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BRICKWOOD'S  
SACKETT  
ON  
INSTRUCTIONS  
TO JURIES

CONTAINING A TREATISE ON  
JURY TRIALS AND APPEALS

WITH  
FORMS OF APPROVED INSTRUCTIONS AND CHARGES  
ANNOTATED  
ALSO ERRONEOUS INSTRUCTIONS WITH COMMENT OF  
THE COURT IN CONDEMNING THEM

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THREE VOLUMES  
VOL. III

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THIRD EDITION

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BY  
ALBERT W. BRICKWOOD, LL. B.  
OF THE CHICAGO BAR

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## PART IV.

### ERRONEOUS INSTRUCTIONS.

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The following instructions have been held erroneous by courts of review. It has been deemed advisable to set forth the instructions in full, and to follow with a brief extract from the opinion of the court setting forth its reasons for holding the instruction erroneous. It will readily be seen that many of these instructions by a slight change of phraseology would have been approved, and that under a different state of facts would not be erroneous.

#### CHAPTER CIV.

##### CREDIBILITY IN GENERAL.

See Approved Instructions, Chapter XVI, Vol. I.

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| <p>§ 3300. Credibility of witnesses—What to consider—Weight of evidence.</p> <p>§ 3301. One credible witness against many — Knowingly false testimony must be to material facts.</p> <p>§ 3302. Duty to reconcile testimony.</p> <p>§ 3303. Affirmative testimony stronger than negative.</p> <p>§ 3304. Interest in the result of the trial.</p> <p>§ 3305. Interest of party in other similar litigation.</p> <p>§ 3306. An interested witness may be as honest as another.</p> <p>§ 3307. Appearance of witness.</p> <p>§ 3308. Opportunity and ability of witness to know.</p> <p>§ 3309. Weight to be given the more intelligent and better informed witnesses.</p> <p>§ 3310. Fear of losing employment.</p> <p>§ 3311. Paying expenses of witnesses.</p> | <p>§ 3312. No presumption that witness is telling truth—Conduct of witness on stand.</p> <p>§ 3313. Believing some witnesses and discarding others.</p> <p>§ 3314. Believing the evidence of plaintiff's side.</p> <p>§ 3315. "Accepting" the evidence of either party.</p> <p>§ 3316. Singling out one witness—Believing theory of either party.</p> <p>§ 3317. Probabilities and speculations not allowed.</p> <p>§ 3318. Commenting on weight of evidence.</p> <p>§ 3319. Jury told that they "should" instead of "might" consider certain facts held erroneous.</p> <p>§ 3320. Witness—Denunciation of by counsel.</p> <p>§ 3321. Argument of counsel—Cautioning the jury against.</p> <p>§ 3322. Statement by counsel.</p> |
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**§ 3300. Credibility of Witnesses—What to Consider—Weight of Evidence.** (a) In weighing the evidence and determining the credibility of the witnesses, and each of them, you should look to the manner and demeanor of each witness in testifying; to the readiness and willingness or tardiness and unwillingness, if any, in answering upon the one side or the other; to the interest, or want of interest, if any, upon the one side or the other; to whether the witnesses, or any of them, have any bias or feeling or not; to the witness'

means of knowledge of an opportunity for knowing the facts he testifies to and professes to know and understand; to the reasonableness or unreasonableness and the probability or improbability of the circumstances related by the witnesses, when considered in connection with all the facts and circumstances in evidence before you. And having thus carefully considered all these matters, the jury must fix the weight and the value of the testimony of each and every witness, and the evidence as a whole, and are not compelled to accept as true any statement made by any witness, unless the jury find such statement to be true after considering the same in connection with all the facts and circumstances in evidence before you, except as to any statements made by the plaintiff, either during the trial or elsewhere, which were against his interest; and as to such statements, if any, you are to take and treat them as absolutely true. But statements made by plaintiff in his own interest are to be weighed just as any other evidence in the cause.<sup>1</sup>

(b) In determining the issues in this case, you should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving the several parts of the evidence such weight as you think they are entitled to. And the court instructs you that when witnesses are otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior and also to those who swear affirmatively to a fact rather than to those who swear negatively to a want of knowledge or recollection.<sup>2</sup>

**§ 3301. One Credible Witness Against Many—Knowingly False Testimony, Must Be to Material Facts—Corroboration by Other Credible Witnesses.** The court instructs you that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe, from the evidence and all facts before you,

1—Shepard v. St. Louis Transit Co., 189 Mo. 362, 87 S.W. 1007 (1010).

"In our opinion the terms employed in the above instruction as to statements by plaintiff against his interest are too strong and not in harmony with the correct and proper rules of law applicable to that subject. In this instruction the jury were told that any statements made by the plaintiff, either during the trial or elsewhere, which were against his interests, were to be taken and treated by them as 'absolutely true.' While statements made by a party against his interests are presumably true, our attention has not been directed to any cause where the court has sanctioned an instruction which goes to the extent of telling the jury that they must treat such statements as absolutely true. The true rule is clearly indicated in Cafferatta v. Cafferatta, 23 Mo. 235."

2—Muncie Pulp Co. v. Keesling, 166 Ind. 479, 76 N. E. 1005.

"Appellant's counsel assail this instruction and insist that the giving thereof to the jury constituted reversible error. In this contention

we concur. An instruction identically the same as that portion of the one in question was condemned by this court and held to constitute reversible error in Jones v. Casler, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274. The question relative to the weight of the evidence was one wholly for the determination of the jury. That the trial court in giving the charge in controversy clearly invaded the province of the jury and therefore erred is settled beyond controversy, not only by the holding in Jones v. Casler, supra, but also by the following cases: Blizzard v. Applegate, 61 Ind. 368; Fulwider v. Ingels, 87 Ind. 414; Shorb v. Kinzie, 100 Ind. 429; Cline v. Lindsey, 110 Ind. 337, 11 N. E. 441; Durham v. Smith, 120 Ind. 463, 22 N. E. 333; Newman v. Hazelrigg, 96 Ind. 73; Finch v. Bergin, 89 Ind. 360; Lewis v. Christie, 99 Ind. 377; Billings v. State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; Indianapolis St. Ry. Co. v. Taylor, 164 Ind. 155, 72 N. E. 1045, and cases there cited." See Sec. 3303, and cases there cited.



that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case.<sup>3</sup>

§ 3302. **Duty to Reconcile Testimony.** (a) The court instructs the jury that they should reconcile, as far as possible, any conflict of testimony there may be regarding the contract.<sup>4</sup>

(b) The court instructs the jury that it is your duty to reconcile the testimony of the witnesses, if you can reasonably do so, under the evidence, with the belief that they endeavored to tell the truth, and to attribute any differences, contradictions or omissions, if any exist, to mistake or misrecollection or lack of observation or lack of memory, rather than to a willful intention to swear falsely.<sup>5</sup>

§ 3303. **Affirmative Testimony Stronger than Negative.** (a) The court instructs the jury that when witnesses are otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given those whose means of information were superior, also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or want of recollection.<sup>6</sup>

3—Himrod Coal Co. v. Clingan, 114 Ill. App. 568 (574, 576).

"This instruction tells the jury that the testimony of one credible witness might be entitled to greater weight than the testimony of many others, if they believed from the evidence that such other witnesses had knowingly testified untruthfully. It omits the essential qualifications that to warrant the jury in discrediting witnesses and disregarding their testimony, they must believe that such witnesses have willfully testified falsely or untruthfully as to some material point in the case. 'A witness cannot be discredited simply on the ground of an erroneous statement.' It is only where the statements of a witness are willfully and corruptly false in regard to material facts that the jury are authorized to discredit his entire testimony. Matthews v. Granger, 196 Ill. 164, 63 N. E. 658. The instruction is also erroneous in that it requires the corroboration of a discredited witness by other credible witnesses. We do not understand that it is essential that the discredited witness be corroborated by several witnesses."

In Junction Mining Co. v. Goodwin, 109 Ill. App. 144 (147), the court said in reference to a similar instruction:

"The giving of this instruction was prejudicial error. The instruction told the jury that they had a right to give more weight to the testimony of one credible witness than to the testimony of many others, if as to those others the jury believed they had knowingly and willfully testified untruthfully, without reference to whether such untruthful testimony was as to a material fact in issue in the case. \*

\* \* Such credible corroborating

evidence may consist of the testimony of one witness, but this instruction erroneously told the jury that it should consist of the testimony of a plurality of witnesses."

To the same effect see Weddemann v. Lehman, 111 Ill. App. 231; West Chicago St. R. R. Co. v. Raftery, 85 Ill. App. 319; LaBonty v. Lundgren, 31 Neb. 419, 48 N. W. 65; Henderson v. Miller, 36 Ill. App. 232.

4—Williamson v. D. M. Smith & Co., — Tex. Civ. App. —, 79 S. W. 51 (52).

"A like instruction has been condemned by the Supreme Court. Houston, E. & W. T. Railway v. Runnels, 92 Tex. 35, 47 S. W. 971."

5—Bleich v. People, 227 Ill. 80 (85).

"The law raises no presumption that a witness has testified to the truth (Hauser v. People, 210 Ill. 253), but it never presumes willful and corrupt perjury. The objection made to this instruction is, that the jury would be induced by it to conclude that there was a mistake or faulty recollection, rather than perjury, in the case of some witnesses who, it is claimed, testified falsely. The court can scarcely commit error in refusing instructions designed to influence the jury in passing upon the credibility of witnesses, but this instruction did not direct the jury to give credit to any witness, and only advised them to attribute misstatements to other causes than an intention to commit perjury. We do not see that it could have harmed the defendant."

6—Himrod Coal Co. v. Clingan, 114 Ill. App. 568 (573, 576).

"The instruction tells the jury that when witnesses are otherwise equally credible, greater weight should be given to those whose means of information were su-

(b) The court charges the jury that if one witness testifies that certain things were said in a conversation, and if another witness testifies that he does not remember what was said in the conversation, but denies that the things stated by the first witness were said, and if the witnesses are equally interested, equally credible, and had equal means of knowing the truth, then greater weight is to be given to the testimony of the witness who testifies affirmatively than to the one who testifies negatively.<sup>7</sup>

(c) You are instructed that the statement by a witness that had a certain contract been made at an interview at which he was present (but who swears he does not recollect what was said at that interview) that he would recollect the same, and that he does not recollect that any such contract was made, is but an expression of an opinion by such witness concerning his memory and should be given only such weight by you as you think it justly entitled to as an opinion.<sup>8</sup>

perior, and to those who swore affirmatively to a fact rather than to those who swore negatively. This instruction should have been refused. 'It is the peculiar province of the jury, where the evidence is conflicting, to properly weigh all the evidence and determine for themselves what the weight of evidence may be. We do not understand that it is the province of the court to tell the jury which is the strongest, or which is of greater force.' *L. N. A. & C. Ry. Co. v. Shires*, 108 Ill. 617. 'It is obvious error for the court to announce to the jury what is the better evidence in a case, or what the jury may so regard. It is the province of the jury to say to what evidence they will attach the greater weight in case of a conflict, and with this right or privilege the court should not interfere.' *C. & A. R. R. Co. v. Robinson*, 106 Ill. 142."

7—*Hooper v. Whitaker*, 130 Ala. 324, 30 So. 355 (356).

"This charge was so manifestly improper it is unnecessary to comment upon it."

In *Winklebeck v. Winklebeck*, 160 Ind. 570, 67 N. E. 451, the court said of a like instruction:

"It was the exclusive right of the jury to determine this conflict of evidence for themselves, and in the doing of it to give the testimony of each witness the weight and credit they believed him to be entitled to as tested by their individual experiences in human conduct. It is the duty of the court to aid the jury by calling their attention to such facts and circumstances as may reasonably and naturally be expected to throw light upon the truthfulness or falsity of statements of witnesses, and also to caution the jury against the consideration of such things as the law forbids; but within the limits of their proper range, the jury must be left free to decide each for himself what witness or class of witnesses is entitled to the greatest consideration. This

has always been the law in this state, and an instruction in the precise language of that under consideration has been held erroneous. *Jones v. Caslar*, 139 Ind. 382, 395, 38 N. E. 812, 47 Am. St. Rep. 274."

In *C. & A. R. R. Co. v. Pelligreen*, 65 Ill. App. 333, a similar instruction was held erroneous. The court said:

"There were abundant opportunities for the jury to misuse this instruction to appellant's prejudice, both as to the manner in which the alleged injury was received and as to the nature and extent of the injury. With this instruction before the jury there arose a necessity for another instruction clearly defining affirmative and negative testimony. The uninstructed mind would probably conclude that a sentence which contains the word not is negative, and that every other is affirmative. This being true the testimony of appellee would be accorded more weight than would be given to the testimony of any who might deny her assertions. And yet the use of the word not is not the invariable test of negative testimony. Where one man swears that A struck B and another swears that A did not strike B, and both had equal opportunity to see and know the facts, the testimony of each of the witnesses is affirmative in the legal signification of the term. So the testimony of the brakeman in this case that he did not, on this occasion, push appellee, or any other woman, violently up the steps in helping her on the train, is not to be regarded as having less weight than appellee's testimony on that point simply because it is couched in negative terms. *C. B. & Q. R. R. Co. v. Cauffman*, 38 Ill. 424; *R. I. & St. L. R. R. Co. v. Hillmer*, 72 Id. 235; *C. B. & Q. R. R. Co. v. Lee*, 87 Id. 454."

8—*Preston & Co. v. Moline Wagon Co.*, 44 Ill. App. 342 (343). "The practice of procuring arguments to the jury upon the evidence, by in-



(d) The jury are instructed by the court, as a matter of law, that the affirmative testimony of witnesses that the bell was rung and whistle sounded at a given time and place is of greater force and weight than the negative testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung or the whistle sounded, or that they did not hear them.<sup>9</sup>

§ 3304. **Interest in the Result of the Trial.** (a) One of the tests for determining the credibility of a witness is his interest in the result of the suit. As a general rule, a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not so interested, but the degree of credit to be given to each and all of the witnesses is a question for the jury alone.<sup>10</sup>

(b) The court instructs the jury that they are the sole and exclusive judges of the weight of the testimony and the credibility of the witnesses, and they may take into consideration the manner of the witnesses on the stand, the relationship of any witness to the de-

structions from the court is perilous. Many a verdict which would have been the same without as with the instructions has been lost by it. The fourth instruction was pointed at W. and was an argument against his testimony, as effectual, in intimating that it was of little or no weight as if it had said so expressly. It clearly indicates to the jury the views of the court as to the presumption arising from the facts stated. *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. 932, citing *Elston and Wheeling Gravel Road Co. v. People*, 96 Ill. 584; *Graves v. Colwell*, 90 Ill. 612.

"In deference to the repeated decisions of the Supreme Court in which instructions to the jury as to (supposed) legal principles relating to the credibility of witnesses have been sanctioned this court in *C. & N. W. Ry. v. Dunleavy*, 27 Ill. App. 438, gave a somewhat ambiguous assent to such instructions; but in many cases since, it has questioned the propriety of all instructions not relating 'to the law of the case.' The word 'case' is used by the law in a great variety of senses, as may be seen by the dictionaries, but never as indicating the processes by which the facts are to be ascertained. See *C. & N. W. Ry. v. Traves*, 33 Ill. App. 307; *Trott v. Wolfe*, 35 Ill. App. 163; *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449; *Johnson v. People*, 40 Ill. App. 382, *aff'd* 140 Ill. 350, 29 N. E. 895; *Central Warehouse Co. v. Sargeant*, 40 Ill. App. 438. But see review of *Penn Co. v. Verston* No. 4063 in same case, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798."

<sup>9</sup>—*A. T. & S. F. R. Co. v. Feehan*, 149 Ill. 202 (212), 36 N. E. 1036. "The force and weight to be given to the testimony of the respective witnesses is a matter to

be determined by the jury and with which the court should not ordinarily interfere. As said in *Martin v. People*, 54 Ill. 225, 'A court can hardly err in refusing to give any instruction which seems designed to influence a jury as to the credit to be given to particular witnesses.' It must be admitted that the rule that positive evidence of the character of that referred to in the instruction is entitled to greater weight than negative, is supported by repeated decisions of this court, and we are not disposed to hold that it would have been error if the court had given to the jury an instruction applying that rule to the testimony before them. But while this may be so, it does not follow that the refusal of such instruction was erroneous. Again it will be noticed that the instruction as asked is a mere abstract proposition, and as has been frequently held by this court, the refusal of such instructions is not error, citing *Devlin v. People*, 104 Ill. 504. We are of the opinion then that the instruction was properly refused."

<sup>10</sup>—*Williams v. John Davis Co.*, 54 App. 198 (200). "This instruction should not have been given. We are not aware of any such rule as is announced for determining the 'credit' to be given to the testimony of a witness. Nor do we think that the interest of a witness in the result of a suit is one of the tests for determining his credibility. His interest is a matter that may be and is to be taken into consideration. Nor can it be said as a matter of law that as a general rule a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not so interested."

fendant, the interest of any witness in the result of the trial, the reasonableness of the testimony of any witness, in connection with all the facts and circumstances in testimony, in determining how far, if at all, they will believe such witness or credit such testimony; and if you believe from the evidence that any witness has willfully sworn falsely to any material matter, or that any witness has told an unreasonable story, or is related to the defendant, or is interested in the result of this trial, then you may disregard such testimony altogether, if in your judgment it is right to do so.<sup>11</sup>

(c) The court instructs you that in passing upon the testimony of the witnesses for the defendant, you have a right to take into consideration any interest which such witness, or any of them, have or feel in the result of this suit, if any is proven, growing out of their relation to the defendant, or otherwise, and to give to the testimony of such witness only such weight as you think it entitled to, under all the circumstances proven on the trial.<sup>12</sup>

(d) With regard to the testimony of Mrs. M., I charge you that she may have testified to the truth as she understood it, or she may have been guided by the mother instinct, seeking to protect E., who is now under arrest, and to attract attention to her other son F., who is now at large, and may not be regarded by her as in much danger of arrest. She may have reason to believe that both sons are guilty, and seek to protect the one who has been arrested. You have a duty to perform as jurors. It is to search for the truth in this case, and then to declare it, whatever it may be. If through sympathy for the accused, or for his family, or friendship for his counsel, or any other cause, you fail to declare your honest convictions, you disgrace the position you have been selected to fill, and are unworthy of the respect and confidence of your neighbors and all honest persons. Do not misunderstand me. I do not tell you to find the defendant guilty; I do not tell you to acquit the defendant. I tell you to discharge your duty as jurors. If you should find the defendant guilty without sufficient evidence, you would commit an unpardonable wrong that can never be remedied.

(e) Should you turn him loose in the face of testimony to justify his conviction, you encourage murder and crime, and invite the lawlessness of the mob, which executes its victims without trial. That is because jurors refuse to do their duty by declaring their honest convictions, that the law is often disregarded, that courts are often looked upon as objects of contempt, and the citizen rights his wrongs

11—Rucker v. State, — Miss. —, 18 So. 121 (122). "This is the second appeal in this cause, and there must be another reversal on reason of the manifest error in the instructions asked and given for the state. The defendant testified in his own behalf, and by the first instruction given for the state, the jury was instructed that it was the judge of the credibility of the witnesses, and among other things was instructed that if it appeared that

any witness 'is interested in the result of this trial, then you may disregard such testimony altogether if in their judgment it is right to do so.' This instruction is directly opposed to the decision of this court in Buckley v. State, 6<sup>o</sup> Miss. 705."

12—Zapel v. Ennis, 104 Ill. App. 175 (177). "Instructions of this kind singling out the witnesses of one party are improper."

with the rough remedy of a rope in the hands of a mob. While the court requests you to declare your honest convictions, it would also impress upon you with equal earnestness that you must not find the defendant guilty unless the evidence satisfies you of his guilt beyond a reasonable doubt.<sup>13</sup>

(f) The jury are instructed that the credit and weight that should be attached to the testimony of a witness depends upon his disinterestedness in the result of the suit, and his freedom from bias or prejudice. Whenever a witness is lacking in any of these respects, it tends to a greater or less degree to weaken the force of his testimony.<sup>14</sup>

(g) When the witnesses appear to be equally credible in every other respect, the one who appears to have the greatest interest in the result of the case is to have the less weight of the two.<sup>15</sup>

**§ 3305. Interest of Party in Other Similar Litigation.** You are instructed that witnesses who are disinterested are entitled to more weight than those who for any reason are shown to have an interest in the determination of the case. A witness who has a lawsuit of a similar character to this, against the same defendant, is not entitled to the same consideration, and his opinion is not entitled to have the same weight as that of a witness who is disinterested, and who has equally as good knowledge of what he testifies to.<sup>16</sup>

13—Long v. State, 23 Neb. 33, 36 N. W. 311 (318). "These instructions contain a mixture of law and argument which should not be encouraged. It was for the jury to ascertain that truth or falsity of the testimony of Mrs. M., giving to it such weight as they might think it entitled to. It was entirely proper that they should be admonished of the importance of the case confided to them, but unnecessary to inform them of the possible results of the failure of juries to discharge their duties; not necessary to tell them that if they should 'turn the plaintiff loose, in the face of testimony sufficient to justify his conviction, they would encourage murder, and invite the lawlessness of the mob.'"

14—Hess v. Lowery, 122 Ind. 225, 23 N. E. 156 (158), 17 Am. St. Rep. 355, 7 L. R. A. 90. "Instructions such as the one in question have so often been the subject of animadversion that courts should not put their judgments in jeopardy by putting such charges in the record, citing Insurance Co. v. Buchanan, 100 Ind. 63-82, Dodd v. Moore, 91 Ind. 522; Woolen v. Whitacre, Id. 502; Cline v. Lindsey, 110 Ind. 337, 11 N. E. 441, 59 Am. Rep. 211, and cases cited."

15—Lee v. State, 74 Wis. 45, 41 N. W. 960.

The court said: "This rule leaves out any consideration of surrounding circumstances, or of the effect of other testimony corroborative of the testimony of one or the other

witness. The jury may well have understood the instruction to mean that if the apparent personal credibility of the prosecutrix was equal to that of the accused, where their testimony conflicted, the prosecutrix must be believed. This trenches too closely, we fear, upon the legitimate functions of the jury."

16—Omaha Belt Ry. Co. v. McDermott, 25 Neb. 714, 41 N. W. 648 (650). "This instruction was bad, for the reason that it assumes to direct the jury in the consideration of the testimony of witnesses, and in the weight to which they are entitled, by reason of their supposed interest in the result of the trial. It is no doubt true that the interest of a witness in the result of a suit is a proper thing for the jury to consider in weighing his testimony, but we know of no rule of law which goes to the extent of supporting a direction to a jury that a witness who has another lawsuit against the same defendant 'is not entitled to have the same weight as that of a witness who is disinterested, and who has equally as good knowledge of what he testifies to.' It may, and perhaps does, often occur that a witness, even though interested, may tell the truth, and be unbiased in his judgment. If so, and the jury are convinced of these facts, they can believe him, and it is not for the court to say they shall not, even if contradicted by another witness who is disinterested, and has equal knowledge of the facts."



§ 3306. **An Interested Witness May Be as Honest as Another.** (a) As a general rule, a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not so interested.<sup>17</sup>

(b) A wise rule which jurors may adopt for their guidance when there is a conflict of testimony between the witnesses is to give credence to the testimony of that witness or those witnesses who have the least inducement, through interest, or other motives, to testify falsely.<sup>18</sup>

§ 3307. **Appearance of Witness.** In this case you are the judges of the weight and credibility of the testimony that has been introduced before you, and you are to judge of that by the appearance of the witnesses who have appeared on the witness stand and their interest as it may appear in the case.<sup>19</sup>

17—*Boyce v. Palmer*, 55 Neb. 389, 75 N. W. 849 (851).

"What the learned district court says may be true, but we are persuaded that a court should never give such an instruction as this. The law does not raise against a witness the presumption of dishonesty, because of his interest in the result of a suit in which he testifies. True, the jury have a right to take into consideration the witness' interest in the result of the suit on trial, in determining what credit shall be given the witness' testimony. But the credibility of witnesses, and the weight to be given their testimony, are solely for the jury; and a trial court should not instruct the jury that the law is that a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not interested. *Van Sickle v. Buffalo Co.* 13 Neb. 103, 13 N. W. 19, 42 Am. Rep. 753; *Preuit v. People*, 5 Neb. 377; *Oliver v. State*, 11 Neb. 34, 7 N. W. 144; *Lumber Co. v. Campbell*, 38 Neb. 567, 57 N. W. 383; *Murphy v. Virgin*, 47 Neb. 692, 66 N. W. 652; *Dixon v. State*, 46 Neb. 298, 64 N. W. 961; *Argabright v. State*, 49 Neb. 760, 69 N. W. 102."

18—*Schutz v. State*, 125 Wis. 452, 104 N. W. 90 (94).

"We can hardly conceive a statement more in contradiction of the true rule in philosophy or in law. It eliminates all but one of those considerations which men usually do, and jurors always should, give weight in passing upon the credibility of conflicting witnesses. It subordinates accurate knowledge of the facts to ignorance or imperfect information. It promotes a proved liar over the man of sternest veracity. It excludes recognition of intelligence and understanding on the one hand, as against stupidity and lack of comprehension on the other. It directs the jury to give no weight to obvious fairness of one witness, as against a disposition to prevaricate

and suppress the truth apparent in another in his demeanor on the stand. All this constitutes an invasion of the jury's essential province of passing on the credibility of witnesses as is most improper in a trial court. *Hill v. State*, 17 Wis. 675 (680), 86 Am. Dec. 736; *Lee v. State*, 74 Wis. 45, 41 N. W. 960; *Roberts v. State*, 84 Wis. 361, 54 N. W. 580; *Thomas v. Paul*, 87 Wis. 607 (614), 58 N. W. 1031; *Omaha Ry. v. McDermott*, 25 Neb. 714 (720), 41 N. W. 648; *Nelson v. Vorce*, 55 Ind. 455; *Dodd v. Moore*, 91 Ind. 522 (525). Especially harmful is such a charge where one accused of crime is one of the witnesses, for his interest in the result is so obviously greater than that of any other that the jury must understand that they are to discard all of his testimony which conflicts with the statement of another witness."

19—*Fries v. Am. L. P. Co.*, 141 Cal. 610, 75 Pac. 164 (165).

"This is a departure from the plain and explicit language of the law. The Code of Procedure says (section 1847): 'A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, and the jury are the exclusive judges of his credibility.' If, to meet the needs of a case, amplification of this rule is desirable, that also will be found in section 2061 of the same Code. Here the jury was told that the weight and credibility of the testimony given by a witness was to be measured by the appearance of the witness as he was presented to them. Such is not only not the law, but it is in hostility to the law. The law says that the presumption of truth-telling may be repelled by the manner in which the witness testifies, together with the character of his testimony. The appearance of the

§ 3308. **Opportunity and Ability of Witness to Know.** (a) The court instructs the jury that the credit of a witness depends upon two things: His ability to know what occurred, and his disposition for telling the truth as to the occurrence. The statement of a witness having superior opportunities for knowing what took place and superior intelligence and memory, other things being equal, is entitled to the greater weight before the jury.<sup>20</sup>

(b) If two witnesses testify about a transaction, and one of the said witnesses was immediately at the scene of the transaction, and the other witness was some distance off, then the jury may look to this in determining which witness they will believe.<sup>21</sup>

(c) If there was a conflict between the witnesses in what they have sworn before you, it is your duty to reconcile that conflict, if you can do so; but, if you cannot do so, then you should believe that witness or those witnesses who have the best opportunity of knowing the facts about which they testify, and the least inducement to swear falsely.<sup>22</sup>

(d) If a witness says he did not see a thing, in determining how much weight should be given to such statement the jury should consider how much opportunity the witness had to see, in connection with all the evidence in the case.<sup>23</sup>

witness upon the stand is but one of the elements going to make up the manner in which he testifies, and to limit the jury in weighing the evidence to the appearance alone, and to charge them, as here they were charged, that the appearance of the witness alone is to govern them, is an error as injurious as it is unnecessary."

20—Himrod Coal Co. v. Clingen, 114 Ill. App. 568 (576).

"This instruction told the jury that the credit of a witness depended upon his ability to know what occurred and his disposition to tell the truth and that the statement of a witness having superior opportunities for knowing what took place and superior intelligence and memory, other things being equal, was entitled to greater weight before the jury. This instruction should have been refused. It is the peculiar province of the jury, where the evidence is conflicting, to properly weigh all the evidence and determine for themselves what the weight of evidence may be."

21—Jones v. Ala. M. R. Co., 107 Ala. 400, 18 So. 30 (33).

"We think plaintiff's above charge comes within the influence of many adjudications of this court defining argumentative instructions and was properly refused."

22—Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434, 38 S. E. 964 (967).

"That this charge is error, is, in principle, decided in the case of Hudson v. Best, 104 Ga. 131, 30 S. E. 988."

23—Norwood v. State, 118 Ala. 134, 24 So. 53.

"The above charge refused by the court is an exact copy of a charge held by this court to be good in the case of Newell v. State, 109 Ala. 5, 19 So. 511. Charges however, must be construed with reference to the facts in the case. In the case of Newell, supra, the carrying of the pistol was admitted. The controverted question was whether it was concealed. State witnesses testified that they saw defendant and did not observe the pistol until the defendant came from behind a tree; authorizing the inference that prior to that time the pistol must have been concealed. The defendant's contention was that the cylinder and handle of the pistol all the time were above the waistband of his pants, and open to ordinary observation; that he merely went behind the tree to disengage it from his suspenders, and that the reason the pistol was not seen by the state's witnesses was on account of their relative position to his body and the pistol. On this state of facts the defendant requested the court to instruct the jury that if a witness says he did not see a thing in determining how much weight should be given to such a statement, the jury should consider how much opportunity the witness had to see, in connection with all the evidence in the case. In the case at bar the state's witness testified that the defendant was standing at the door of the room talking to him, and as the defendant turned to walk away he saw the pistol in the hip pocket of defendant under his coat. The defendant testified that he did not have a pistol on his per-

§ 3309. **Weight to be Given the More Intelligent and Better Informed Witnesses.** (a) The jury are at liberty to decide that the preponderance of the evidence is on the side which, in their judgment, is sustained by the more intelligent and better informed, and the more credible, and the more disinterested witnesses, whether these are the greater or the smaller number.<sup>24</sup>

(b) The jury are instructed that the fact that the number of witnesses on one side is larger than the number testifying on the other side does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testified. In order to determine that question, the jury must be governed by and take into consideration the appearance and conduct of the witnesses while testifying; the apparent truthfulness of their testimony, or the lack of it; their apparent intelligence, or lack of it; their opportunity of knowing or seeing the facts or subjects concerning which they have testified, or the absence of such opportunity; their interest or absence of interest in the result of the case; and from all these facts as shown by the evidence, and from all the proof, the jury must decide on which side is the preponderance. After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty, and it is their duty, to decide that the preponderance of evidence is on the side which, in their better judgment, is sustained by the more intelligent and better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number.<sup>25</sup>

son. To have applied the rule of evidence in the case at bar declared to be correct in the Newell Case, the charge should have been framed so as to assert that when 'a witness says he saw a thing, in determining how much weight,' etc. Under the facts of the case at bar, the charge technically construed was abstract, as no witness testified that he did not see the pistol."

24—*Stubbings Co. v. World's Col. Ex. Co.* 110 Ill. App. 210 (222), citing *C. C. Ry. v. Keenan*, 85 Ill. App. 367; *L. N. A. & C. Ry. v. Shires*, 108 Ill. 617-632.

The court said:

"This is an invasion of the jury's province to determine for themselves what the weight of the evidence may be and where it preponderates."

25—*Eastman v. W. C. St. R. R. Co.*, 79 Ill. App. 585.

"The instruction is equivalent to a peremptory instruction to the jury to find that the preponderance of the evidence is on the side sustained by a certain class of witnesses, namely the class which, in their judgment, is the more intelligent and the better informed, the more credible and the more disinterested. The instruction is also by necessary implication equivalent to a statement that in the opinion of the court the preponderance is on the side which is sustained by the more intelligent and better informed, the more credible and dis-

interested witnesses, whether these are the greater or the smaller number, and is in this respect an invasion of the province of the jury. It is equivalent to saying to the jury: find from the evidence which side is sustained by the more intelligent and better informed, the more credible and the more disinterested witnesses, whether these are the greater or smaller number, and when you have so found, decide that the preponderance of evidence is on that side.

In *Rockwood v. Poundstone*, 38 Ill. 199, the court say:

"We do not understand it is the province of the court to tell the jury in a case where there is much and conflicting testimony, or indeed in any case, which evidence is the strongest," etc. In *Louisville, N. A. & C. Ry. Co. v. Shires*, 108 Ill. 617, this instruction was asked:

"The jury are further instructed that the affirmative testimony of witnesses that the bell of a locomotive engine was rung at a given time and place is of greater force and is entitled to more weight than the testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung, or that they did not hear it ring; and, under such circumstances, the jury should give greater weight to such affirmative testimony than to the negative."

The court says of this instruction:



§ 3310. **Fear of Losing Employment.** (a) If you believe, from the evidence, that any witness has testified under a fear of losing his employment or a desire to avoid censure, or a fear of offending, or a desire to please his employer, then such fact may be taken into account by you in determining the degree of weight which ought to be given to the testimony of such witness; and in such case you have a right to judge of the effect, if any, likely to be produced upon

'A similar instruction was condemned by this court in *Rockwood v. Poundstone*, 38 Ill. 290. It is the peculiar province of the jury, where the evidence is conflicting, to properly weigh all the evidence, and determine for themselves what the weight of evidence may be. We do not understand that it was a province of the court to tell the jury which evidence was the strongest, or which is of greater force. The instruction was wrong, and properly refused.' See also *Toledo, W. & W. Ry. Co. v. Brooks*, 81 Ill. 245.

The instruction in the present case tells the jury in substance that the evidence of the more intelligent and better informed, the more credible and disinterested witnesses is the strongest. The instruction does not announce a correct rule of law. It assumes that the testimony of the more intelligent and better informed witnesses is the more trustworthy, without limiting their intelligence and information to the matters involved in the suit.

In *Chicago W. Div. Ry. Co. v. Bert*, 69 Ill. 388, the jury were instructed:

'A witness may be just as effectually impeached by his manner of testifying, his feelings toward the parties, inconsistency in his statements, if any, his want of intelligence, or the want of means of knowing the facts of which he testifies, as by the direct testimony of other witnesses.'

The court says:

'We think this instruction should not have been given. It might well give the jury to understand that a witness might be just as effectually impeached by lack of intelligence as by the positive testimony of other witnesses. As a general proposition, the trustworthiness of a witness is not to be graduated according to his intelligence.'

Considering this instruction in the most favorable view, it is at least doubtful whether the general intelligence and information of the witnesses is referred to, or their intelligence and information in respect to the matters testified to by them; and being thus doubtful, and calculated to impress the jury that their general intelligence and information was referred to, it is misleading. A doubtful and misleading instruction is erroneous. *Adams v. Smith*, 58 Ill. 417; *Free-*

*port v. Isbell*, 83 Ill. 440; *Frantz v. Rose*, 89 Ill. 590.

The instruction is objectionable in two other particulars. It assumes that the testimony of a disinterested witness is necessarily more credible than that of an interested one, and directs the jury to ignore the comparative numbers of witnesses testifying on the different sides of the case. There is no rule of law which requires a jury, as between two witnesses, the one interested and the other not, to give credit to the latter over the former, merely on the ground of non-interest, nor would such rule be reasonable. . . . If the rule were that his testimony is not to be believed as against that of a disinterested witness, the statute permitting parties to testify in their own behalf would be practically a nullity. It is not the law that the jury should ignore the number of witnesses testifying on each side of the case."

In *Barron v. Burke*, 82 Ill. App. 116 (118), the court said in reference to a similar instruction:

"For the reasons stated in *Eastman v. W. C. S. Ry. Co.*, 79 Ill. App. 585, the majority of the court is of the opinion that this instruction is erroneous, and that the giving of it is cause for reversal, because the giving of it invades the province of the jury by telling it what evidence is the strongest, to wit the evidence of the more intelligent and the better informed witnesses. The weight of the evidence is a matter to be determined solely by the jury."

In *C. C. Ry. Co. v. Keenan*, 85 Ill. App. 367, the court said:

"Similar instructions condemned in *Eastman v. W. C. St. Ry. Co.*, 79 Ill. App. 585 and *Barron v. Burke*, 82 Ill. App. 116, where the giving of them was held to be substantial error. The chief vice of the instruction, in our opinion, consists in a virtual declaration by the court to the jury that the preponderance of evidence lies on the side on which the most intelligent and best informed witnesses have testified.

The law does not as a general proposition graduate intelligence and information into degrees, and it was a clear invasion of the province of the jury to instruct them where the weight of evidence was to be found in a case where the evidence was voluminous and

the human mind by such feelings or motives, and how far such feelings or motives on the part of the witness may tend to warp his judgment or pervert the truth; and after applying your own knowledge of human nature and of the philosophy of the human mind to the investigation of the subject, you are to judge of the weight which ought to be given to the testimony of such witness, taking the same in connection with all the other evidence in the case.<sup>26</sup>

in sharp conflict. It is the peculiar province of the jury to properly weigh all the evidence, and determine for themselves where it preponderates."

In *Hope v. W. C. St. R. R. Co.*, 82 Ill. App. 311 (315), the court held the following instruction erroneous:

After fairly and impartially considering and weighing all the evidence in this case as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent, the better informed, the more credible, and the more disinterested witnesses, whether these are the greater or smaller number.

The court said:

"We held a similar instruction erroneous in two cases decided at the October term, 1898. *Eastman v. W. C. St. R. R. Co.*, 79 Ill. App. 585, and *Barron v. Burke*, 82 Ill. App. 116, for reasons fully stated in the opinion in the former case."

26—*Chicago City Ry. Co. v. Rohe*, 118 Ill. App. 322 (326).

"There is no evidence in the record tending to show any such state of affairs concerning any of the witnesses for the defendant as is suggested in the instruction. Under such circumstances the giving of such an instruction has been more than once condemned by this court and by the other Appellate Courts of the State, but never in more apt terms than by Mr. Justice McAllister in the earliest case in which a discussion of it appears in the reports: 'Such an instruction,' said truly that eminent Judge, 'affords the means for the unlimited sway of both passion and prejudice. If the means of discrediting witnesses there prescribed should be sanctioned, we are unable to perceive how we could ever determine from the record in such case, that the clear weight and preponderance of the evidence was against the plaintiff. We must condemn it not only for that reason, but for its inherently mischievous tendency to thwart the due administration of justice.' *Ch. & N. W. Ry. Co. v. Stube*, 15 Ill. App. 41.

Counsel for appellee say that this instruction has been approved as well as condemned by this court. It has never been approved where, as in the case at bar, there was nothing in the evidence justifying it. In *Central Warehouse Co. v.*

*Sargeant*, 40 Ill. App. 438, this court held that a similar instruction was not erroneous, because 'there was in evidence ground for an argument against the witness toward whom that instruction pointed.'

This court has never sanctioned, and it may confidently be predicted never will sanction, an instruction like this under discussion when the only ground for it in evidence is that certain of the witnesses are in the employ of one of the parties to the controversy. Giving it was error which was not corrected by the other instructions pointed out by appellee's counsel, which treated of the credibility of witnesses. The essential vice of the instruction condemned is that it practically makes one test for the credibility of one set of witnesses and a different one for another, and that it advises the jury that they may 'arbitrarily reject' the testimony of employees, or treat the defendant corporation differently from a defendant individual."

In *I. C. R. R. Co. v. Leggett*, 69 Ill. App. 347 (348, 349), the court said of a similar instruction:

"The main objection to the above instruction is the entire lack of evidence that any employe did testify under any of the fears or desires indicated in it. The fact that they were employes was not, of itself, such evidence. *C. R. I. & P. R. R. Co. v. Givens*, 18 Ill. App. 408. The fact was not stated hypothetically, but assumed, and properly so, because it was admitted. The court did not say or mean 'if you believe' that fact you may consider it as tending to prove they so testified, for there was no 'if' about it; but 'if you believe from the evidence' as though there was some such 'evidence,' which the jury might or might not 'believe.' There was none. The instruction was, therefore erroneous, and affecting alike, as it did, nearly all of appellant's witnesses, materially harmful. See *C. & N. W. Ry. Co. v. Stube*, 15 Ill. App. 39; *St. L. A. & T. H. Ry. Co. v. Huggins*, 20 Id. 639. For that error the judgment will be reversed and the cause remanded."

In *W. C. St. R. R. Co. v. Raftery*, 85 Ill. App. 319 (320), the court said of a similar instruction:

"The mere fact that a witness is an employe of a party to a suit is not sufficient to sustain such an instruction. It cannot be assumed from that fact alone that either one

(b) If you believe that any of the witnesses testified under a fear of losing his employment, or a desire to avoid censure or fear of offending, or a desire to please his employer, then such fact may be taken into consideration in determining the degree of weight which ought to be given to the testimony of such witnesses.<sup>27</sup>

(c) While the jury are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant, simply because such witness was or is an employee of the defendant, but it is the duty of the jury to receive the testimony of such witness in the light of all the evidence the same as they would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which they determined the credibility of any other witness.<sup>28</sup>

§ 3311. **Paying Expenses of Witness.** The fact that the defendant paid the actual expenses of its witnesses while attending this trial has nothing to do with the issues in this case; such payment by defendant was right and proper.<sup>29</sup>

§ 3312. **No Presumption that Witness is Telling Truth—Conduct of Witness on Stand.** (a) When you come to the consideration of the evidence, what does that mean? What is the best legal yardstick to measure that evidence by? There is a presumption that attends every witness that goes upon the stand. Every witness that goes upon the stand is clothed with the presumption that he is telling the truth.

of the four conditions named in this instruction exists or would influence the witness to be otherwise than truthful. . . .

A great majority of the men of this country are employees. Such men are just as truthful as their employers. It would be in isolated cases only if at all that such a man would commit perjury, or that his judgment would be so warped as to cause him to testify to that which is not absolutely true, simply because he is an employee."

See also *St. L. A. & T. H. R. R. Co. v. Walker*, 39 Ill. App. 388; *I. C. R. R. Co. v. Burke*, 112 Ill. App. 415.

27—*Gregory v. Detroit United Ry. Co.*, 138 Mich. 368, 101 N. W. 546 (547).

"This charge could have been applicable to none other than the witnesses for the defendant. We find nothing in this record to justify this instruction. The language is identical in substance with that which was condemned by this court in *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453. In that case the court instructed the jury that, if they found it necessary to consider the testimony given by the agents and employees of the railroad company they should bear in mind the interest they have in protecting their company and shielding themselves from blame. The reason for condemning such instructions is

found in the *Kirkwood* case, *supra*, and we need not restate it here."

28—*Chicago U. T. Co. v. Giese*, 130 Ill. App. 608 (611).

The Appellate Court said that in reading this charge in connection with the following two charges given in that case, the court did not think that the jury would receive the impression that they were absolved from all duty to consider other instructions given to them on the subject of the credibility of the witnesses, and further stated that they could not condemn the instruction as erroneous.

29—*Moore v. Nashville C. & St. L. Ry.*, 137 Ala. 495, 34 So. 617 (618).

"This charge given at the request of defendant was improper. It invaded the province of the jury, and asserted an incorrect proposition of law. While it may be true, as asserted in it, that it was right and proper for the defendant to pay the expenses of its witnesses, yet the fact that its witnesses were transported by it to the place of the trial free of charge and their hotel bills paid is a circumstance tending to show bias, and was proper matter for the consideration of the jury. *Great So. R. Co. v. Johnston*, 128 Ala. 283, 21 So. 771.

This being true, it was clearly error to instruct the jury that, as matter of law, the fact that defendant paid the expenses of its witnesses 'has nothing to do with the issues in the case.'"



Not that every witness tells the truth, but he is clothed with that presumption. It is not infrequent that two witnesses go upon the stand and testify to two states of fact. It does not always mean that either is telling what is not so, but one may be more nervous than the other, and cannot tell his story in that straightforward way, although he is honest in what he says. It does not mean that it is always a falsehood where they do not agree, but where they disagree on the main, salient features of a case,—on facts that everybody would have noticed, if they were there. If you cannot reconcile their statements it is for you to say who is telling the truth and who is not telling the truth. Where they do not agree on the salient features of a case, and their statements cannot be reconciled on the common ground of the common honesty of the witnesses—if you cannot reconcile their statements you may say “I believe the statement of this” or that witness, because you are the sole judges of the facts. I have nothing to do with the facts of the case. You are the sole judges of the facts in a case. The law presumes that everybody is honest, not that everybody is honest; and when a witness takes that stand he is clothed with that presumption, and until the contrary appears he is still clothed with that presumption.

(b) Just like a man is presumed to be innocent until the state proves that he is guilty beyond a reasonable doubt. It does not mean that you must believe everything that a witness says. Not at all. Not any more than you are to consider that a prisoner is innocent. But he is presumed to be innocent until the state shows that the defendant is guilty beyond a reasonable doubt. When that is done the presumption is taken away and the defendant stands naked.<sup>30</sup>

§ 3313. **Believing Some Witnesses and Discarding Others.** I charge you, gentlemen of the jury, you have the right to believe any one of the witnesses and discard all of the others.<sup>31</sup>

30—State v. Taylor, 57 S. C. 483, 35 S. E. 729 (730), 76 Am. St. Rep. 575.

“It is excepted that the first above charge was erroneous, in that there is no presumption that a witness is telling the truth, and in that the charge invaded the province of the jury, whose duty it was to weigh the testimony, without regard to any such presumption. This exception, we think, is well founded. There is a presumption that the character or reputation of witness is good until it is impeached by testimony, but we are not aware of any law which authorizes a statement that there is a presumption that what such witness tells is the truth. The jury may infer from the unimpeached character of a witness that the witness intends to tell the truth, but whether what he tells is in fact true depends upon the conclusions of the jury in view of the whole evidence before them, unaffected by any presumption as to whether it is true or not. Otherwise, the presumption of the defendant's innocence which follows through the trial to the verdict, would be met by a counter-presumption of his guilt if a state's

witness narrated circumstances from which the jury might infer guilt. The rule announced by the circuit court would fill a case with warring presumptions as to facts. It is manifest that the charge is incorrect as matter of law, and was in fact instructing the jury as to the force and weight of testimony submitted to them. This error is further emphasized in the charge in placing such alleged presumption on a level with the presumption in favor of the defendant's innocence.”

31—Shepherd v. State, 135 Ala. 9, 33 So. 266 (267).

“This charge was subject to the vice of being argumentative and misleading. While the jury are the only ones to determine questions of fact, and in a measure are uncontrolled therein, yet they have no legal or moral right to arbitrarily and capriciously believe one set of witnesses and not another. It is their business to weigh the evidence of witnesses in connection with all the evidence and decide according to their belief from its weight. *Hussey v. State*, 86 Ala. 34, 5 So. 484.”

§ 3314. **Believing the Evidence of Plaintiff's Side.** If you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case.<sup>32</sup>

§ 3315. **"Accepting" the Evidence of Either Party.** If the jury accept the evidence on the part of the plaintiff, your verdict should be for the plaintiff; if you accept the evidence on behalf of the defendant, your verdict should be for the defendant; the burden is upon the plaintiff to show by a preponderance of evidence that his injury was caused by the negligence of defendant, and there must be an absence of any evidence showing that the plaintiff himself was guilty of an act of negligence which contributed to his injury.<sup>33</sup>

§ 3316. **Singling Out One Witness—Believing Theory of Either Party.** (a) If you believe the testimony of the witness M. I will not particularize, and call any witness by name, and plant the case on his testimony. You will either believe for the plaintiff or the defendant in this case. I am not going to hold up any one witness—possibly might hold up the plaintiff, he being the one that could describe his injuries. But I am not going to plant this case upon the testimony of any one witness. You will either believe the theory of the plaintiff and the evidence on his side right through, or the theory and the evidence of the railway right through. I will not plant it upon any one man of their picking out. That is for you to take up.

(b) I have known of cases where two witnesses would outswear ten if they had better knowledge of the facts, circumstances and surroundings.

(c) I am not going to hold up any one witness—possibly might hold up the plaintiff, he being the one that could describe his injuries.

(d) Without any anger or malice clearly proven on the part of the company against him B. went off with M., had his two ribs broken and his wrist, or was thrown off. The case has been tried twice before. Some unfortunate remark or ruling has given the judge the idea that it should be tried again. You will either believe the theory of the plaintiff and the evidence on his side right through, or the theory and evidence of the defendant right through.<sup>34</sup>

32—Henderson v. Det. Cit. St. Ry. Co., 116 Mich. 368, 74 N. W. 525 (527).

"This method of submitting a case, always dangerous, was obviously damaging to the defendant in this case, for, in my view of the case, many of the facts testified to by plaintiff's witnesses might be true and yet no liability exist."

33—Christensen v. Lambert, 67 N. J. 341, 51 Atl. 702.

"One of the two exceptions to the charge is to the instruction that, if the jury accepted the evidence on the part of the plaintiff to be true, their verdict should be for the plaintiff. This criticism is not without force. The plaintiff's case rested on his own testimony, which was meager; and the jury might have believed every syllable of it, and yet have thought that he had time, if he had exercised ordinary care, and prudence, to withdraw his

foot without injury after the machine had begun to move."

34—Butler v. Detroit Y. & A. A. Ry., 138 Mich. 206, 101 N. W. 232.

"The language in relation to the value of the testimony of two witnesses as against ten, was, perhaps, in the main, unobjectionable, when, taken in connection with all said upon the subject; but it would have been better had he omitted the intimation that 'the plaintiff could best describe his injuries.'"

It was not proper to say that the jury must believe the theory and evidence of one side or the other 'right through.' The jury might have found with the plaintiff upon the incidents of the fight, and yet disbelieve his testimony as to the extent of his injury, in the light of circumstances shown. This would have had a material bearing on the amount of damages to be awarded."

**§ 3317. Probabilities and Speculations Not Allowed.** You are further instructed that it is claimed by the defense in this case that whatever services were performed by the claimant for the deceased were settled for in the lifetime of the deceased; and while it is true that the burden of proof is on the defense to establish the fact, still that does not mean that they are required to specifically prove the items or amounts of any or all such payments. It is sufficient if, from all the evidence, you believe it is more probable that such payments were made than that they were not made.<sup>35</sup>

**§ 3318. Commenting on Weight of Evidence.** (a) The state has introduced testimony tending to show that the witness X. had made statements contradictory of his evidence on the stand. I charge you that you cannot consider this testimony indiscriminately with all the other evidence in this case, nor for the purpose of establishing the guilt of defendant, but you can only consider such testimony for the purpose for which it was introduced; that is, as affecting the credibility of the witness X.<sup>36</sup>

(b) The court instructs the jury the verdict of the coroner's inquest over the said B. is not such evidence as is conclusive but only that it is competent to be considered together with the other testimony in the case.<sup>37</sup>

**§ 3319. Jury Told that They "Should" Instead of "Might" Consider Certain Facts, held Erroneous.** You are not bound to believe what a witness has said merely because he has sworn to it. . . . In determining the credibility of a witness, you should consider . . . his interest, if any, in the event of the suit; . . . the relation any witness may sustain to the transaction about which he has testified. . . . That the greater number of witnesses testifying to the same effect upon any controverted question does not necessarily create a preponderance of evidence.<sup>38</sup>

35—Boon v. Bliss' estate, 98 Ill. App. 341 (343).

"The particular vice of the above instruction is in the last sentence. In reference to an instruction containing a similar statement as to the law, our Supreme Court said in the case of Warner v. Crandel, 65 Ill. 195: 'The last clause of the third instruction given for the plaintiff, to wit, 'And if the jury consider it more probable from all the facts and circumstances as shown by the evidence that the contract was that such work was to be paid for by Warner & Edwards, then the jury should so find,' was also objectionable. The jury should not have been left at liberty to speculate on probabilities, but should have been satisfied by the greater weight of the evidence that Warner & Edwards and not Edwards & Woods were to pay for the work in question.' The burden of proving payment for the services mentioned by the claimant was upon the defense in this case, and to establish that fact the defense should have been required to prove such payment by the preponderance of the evidence, and the jury should not have been author-

ized to speculate in regard to the probability as to whether such payment had or had not been made."

36—Cavaness v. State, 45 Tex. Cr. App. 209, 74 S. W. 908 (909).

"We have often held that it is erroneous for the court to tell the jury that testimony has been introduced 'tending to show,' etc., since such language is an indication from the court that in his opinion the testimony does show that the witness has been contradicted. The court erred in giving this charge."

37—Sup. Ct. of H. v. Barker, 96 Ill. App. 490 (498).

"While the instruction was in the exact language of the Supreme Court in U. S. Life Ins. Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, yet we think it should not have been given the jury in that form. It is never proper to tell the jury how much weight should be given to the testimony. The instruction might properly have told the jury the inquest was not necessarily conclusive, etc., but it should not have gone further."

38—Wabash R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 284 (286), 60 N. E. 12.

"The instruction must, under



§ 3320. **Witness—Denunciation of by Counsel.** The court instructs the jury that the denunciation of witnesses by counsel, if any such was indulged in, should not influence the jury to disregard the testimony of any unimpeached witness. Witnesses, like all other citizens, are presumed by the law to be law-abiding citizens, and the law supplies a proper method of impeaching their evidence in cases where it can be impeached.<sup>39</sup>

numerous decisions of our court, be held to be bad. In directing the jury as to the manner of determining the credibility of the witnesses, they were told that they 'should' instead of 'might' consider certain facts as shown in the parts of instruction set out. *Fulwider v. Ingels*, 87 Ind. 414; *Woolen v. Whitacre*, 91 Ind. 502; *Schorb v. Kinzie*, 100 Ind. 429; *Kline v. Lindsay*, 110 Ind. 337, 11 N. E. 441; *Jones v. Casler*, 139 Ind. 382, 38 N. E. 312; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333; *Dowd v. Moore*, 91 Ind. 522; *Duvall v. Kenton*, 127 Ind. 178, 26 N. E. 688; *Newman v. Hazelrigg*, 96 Ind. 73; *Hartford v. State*, 96 Ind. 461, 49 Am. Rep. 185; *Finch v. Bergins*, 89 Ind. 360; *Bird v. State*, 107 Ind. 154, 8 N. E. 14; *Penn Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071, and authorities there cited."

39—*Chicago U. T. Co. v. O'Brien*, 219 Ill. (303, 307, 308, 309), 76 N. E. 341.

"The instruction," said the court, "in effect, advised the jury that there was a rule of law that they must not be influenced by the argument of counsel to disregard or disbelieve the testimony of any witness unless such witness had been impeached. The jury are to decide questions of fact, and the purpose of argument by counsel is to induce them to decide such questions in accordance with the claims and theories of counsel. Where witnesses contradict each other, the object of argument is to influence the jury to believe the testimony of one and to disregard or disbelieve the testimony of the other. To that end counsel have a right to present to the jury, in argument, the inconsistencies and contradictions of witnesses, to comment on their manner of testifying, their appearance upon the stand, the improbability of their statements, and anything else which will show that they are mistaken or unworthy of belief, and to denounce a witness as unreliable or untruthful when subjected to any of the tests for determining his credibility. It is the right of counsel to draw any and all proper inferences arising from the evidence in the case, tending to show that the testimony of witnesses is untrue. (*East St. L. C. R. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917.) The instruction was erroneous in telling the jury that the credibility

of a witness cannot be affected by the argument of counsel unless the witness is impeached, and in practically destroying the effect of argument on the credibility of witnesses or the weight to be given to their testimony.

"But counsel for appellee say that the record does not show that there had been any argument, and for that reason the instruction was not harmful. The case of *No. Chi. R. R. Co. v. Wellner*, 206 Ill. 272, 69 N. E. 6, is cited to support that claim. In that case the instruction related to statements of counsel, not based upon the evidence, made either in putting in evidence in the case or in argument, and it would have had some relation to the case although there had been no argument. But in this case, the first part of the instruction related to nothing else, and had neither place nor purpose in the case unless there had been argument to the jury. Counsel on each side asked, and the court gave, instructions relating to argument of counsel and which could apply to nothing else. But if we ought to or can presume that counsel on each side asked the court to give, and the court gave, purposeless and useless instructions concerning something which never happened, and that the only effect, so far as argument is concerned, was to misinform the jury as to the law applicable to a case where there is argument, the objections to the instruction are not thereby removed.

"The part of the instruction which states that witnesses, like all other citizens, are presumed by the law to be law-abiding citizens and the law supplies a proper method of impeaching their evidence in cases where it can be impeached, is equally vicious with the other part. The question of the credibility of witnesses is exclusively within the province of the jury, and it is not the right of the court to take that question from them. Whether a witness has been impeached is a question of fact and not of law, and when not impeached is for the jury to determine whether he shall be believed and to what extent. The court may give to the jury general rules for their guidance, but where witnesses contradict each other as to matters of fact and there is no impeachment of any witness, as was the case here, the law indulges no presump-

§ 3321. **Argument of Counsel—Cautioning the Jury Against.** I will say that it is doubtful whether some of the speeches to which you have listened during the progress of this trial may be surpassed in eloquence by any one speaking the English tongue, but you are to remember that these speeches are of value to you only as they call your attention to the facts proven in the case, and enable you to ascertain the truth; and you will dismiss from your minds, so soon as you can, the music, the literature, the rhetoric and the emotion of these speeches, and dwell only upon the evidence and the case. You will proceed as dispassionately to measure it, and to declare whether it is sufficient to convict the accused, as you would proceed to measure and declare the number of bushels in a bin of wheat, or the number of yards in a box of prints; and while you are making your measurement, you will give the accused the benefit of all reasonable doubts, and when you have made it, you are to declare the result honestly and fearlessly, and regardless of consequences.<sup>40</sup>

§ 3322. **Statement by Counsel.** The court instructs the jury that any questions or statements of counsel that they may have heard during the trial of the case, as to what the conductor of the car in question said to the motorman, after the alleged injury, and while the plaintiff was being placed upon the car, is irrelevant and immaterial, and the jury should entirely disregard the same.<sup>41</sup>

tion that they are all telling the truth. When a witness testifies in a case, the inherent improbability of his statements may induce the jury to disbelieve him although he is not contradicted. How much weight is to be given to his testimony depends largely upon his appearance, his manner of testifying, and all the other evidence and circumstances from which the jury may credit or discredit him. Where witnesses contradict each other and the result of the case depends upon their credibility, it is for the jury to determine which one they will believe. (*Stampofski v. Steffens*, 79 Ill. 303.) The law has no rule which the court may lay down in instructions to the jury that there is a presumption that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses and the weight and value of their testimony. *Hause v. People*, 210 Ill. 253, 71 N. E. 416, 30 Am. & Eng. Ency. of Law, (2d ed.) 1068, 11 Ency. of Pl. & Pr. 312." 40—*Long v. State*, 23 Neb. 33, 36 N. W. 310.

"The reference to the arguments of counsel, in the manner here presented, was unnecessary; neither did there seem to be any occasion for

inviting the jury to dismiss from their minds 'the music, the oratory, the rhetoric, and the emotion of these speeches; and dwelling upon the evidence in the case' as if they were proceeding to dispassionately measure it, and declare whether it was sufficient to convict the accused, as they would proceed to determine the number of bushels in a bin of wheat, or the amount of goods in a box of prints."

41—*Chicago Consolidated Traction Co. v. Gervens*, 113 Ill App. 279.

"It was not error, at least not reversible error, to refuse this instruction when an objection had been sustained to the question to which it relates, and that question, in effect, had been withdrawn. Each of the refused instructions numbered 3 and 4 singles out and renders prominent certain parts of the evidence, and does not take certain other evidence into consideration, and is in effect covered by instructions No. 9 as given to the jury. Further, as each of these refused instructions is based upon the alleged negligence of appellee, and the jury by the special finding declared that no such negligence existed, appellant was not injured by its refusal. *East St. Louis Con. Ry. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917."

## CHAPTER CV.

### CREDIBILITY—SWEARING FALSELY.

See Approved Instructions, Chapter XVII, Vol. I.

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| <p>§ 3323. Entire testimony disregarded when willfully false—Must be willful and knowing.</p> <p>§ 3324. Same subject—Must also be corroborated.</p> <p>§ 3325. Corroboration required may be any other credible evidence.</p> <p>§ 3326. Palpably false testimony.</p> <p>§ 3327. Falsus in uno, falsus in omnibus.</p> <p>§ 3328. Doctrine of "Falsum in uno, falsum in omnibus," only</p> | <p>invoked when the testimony is not only false but willfully and corruptly false.</p> <p>§ 3329. False swearing should be to a material matter in issue.</p> <p>§ 3330. Willful and knowing exaggeration not sufficient to warrant rejection of testimony.</p> <p>§ 3331. Willfully sworn falsely—Singling out a particular witness for comment.</p> |
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§ 3323. **Entire Testimony Disregarded When Willfully False—Must Be Willful and Knowing.** (a) You are instructed that the jury are the sole judges of the credibility of the several witnesses that have appeared before you, and of the weight or importance to be given to their respective statements of testimony; and if you believe, from all that you have seen and heard at the trial, that any witness has willfully sworn falsely as to any of the facts mentioned in the instruction herein, as bearing on the plaintiff's alleged claim, or defendant's alleged defenses thereto, then you are at liberty to disregard entirely the testimony of said witness.<sup>1</sup>

(b) If you find that any witness testified falsely as to any material point, you may disregard all he testified to, unless corroborated by other competent proof.<sup>2</sup>

(c) The court instructs the jury that, if you believe, from the evi-

1—Eikenberry v. St. L. Transit Co., — Mo. App. —, 80 S. W. 360 (362, 363).

"In Hansberger v. Railways Co., 82 Mo. App. 577, the Court of Appeals said of an instruction on the credibility of witnesses, containing the same objectionable phrases as the one in hand, that it was open to the criticism made by appellant's counsel—that it was too broad. The judgment, however, was not reversed on account of the objectionable instruction, but for other errors that intervened at the trial. In Kirchner v. Collins, 152 Mo. 394, 53 S. W. 1081, the Supreme Court passed an instruction containing the identical phrase without condemnation. We agree with the Court of Appeals that the instruction is open to criticism, and is too broad. But we do not think the

judgment should be reversed on account of this objectionable instruction, for it cannot be thought that the jury, when it came to pass on the credibility of any of the witnesses in the case, felt itself authorized by the instruction to put aside the oath that had been administered to it, and take into consideration things heard and seen at the trial outside of the evidence and independent of the witnesses."

2—Donney v. Stout, 59 Neb. 731, 82 N. W. 19.

"This instruction omitted an important element, and was therefore properly refused. The rule is that the jury are authorized to disregard the entire evidence of an uncorroborated witness where his testimony upon a material point is willfully and corruptly false."



dence, that any witness in this case has sworn falsely to any material fact in issue, then you are at liberty to disregard the whole of such witness' testimony, except wherein it is corroborated by other credible evidence in the case.<sup>3</sup>

(d) If you conclude that a witness has testified falsely as to any material fact in the case, you are permitted to disregard all of that witness' testimony, unless it is supported by other evidence.<sup>4</sup>

(e) The jury are instructed that, if they believe any witness has testified falsely, then the jury may disregard such witness' testimony, except in so far as it may have been corroborated by other credible evidence in the case, which you believe to be true.<sup>5</sup>

(f) The jury are the judges of the credibility of the witnesses from the manner of testifying, their means of observation, and their general conduct or demeanor on the stand; and if they should believe that any of the witnesses have sworn falsely to any material fact in the case they are at liberty to disregard the whole statement of the witness so testifying.<sup>6</sup>

(g) The court instructs the jury that if they believe from the evidence that any witness who has testified in the case has been successfully impeached, then the jury are at liberty to disregard all the evidence of such witness, except in so far as it is corroborated by other

3—*Littlejohn v. Arbogast*, 95 Ill. App. 605 (608).

"The vice of this instruction is that it omits the essential element that the witness had knowingly and willfully sworn falsely. A witness may be honestly mistaken as to some material fact, and innocently swear falsely concerning it, and his testimony on other points be worthy of belief. The knowledge or willfulness of the untruth is the test for his impeachment. *Brennan v. People*, 15 Ill. 511; *Chittenden v. Evans*, 41 Ill. 251; *Paxton v. People*, 114 Ill. 505."

4—*Little v. Sup. R. T. Ry. Co.*, 88 Wis. 402, 60 N. W. 705 (706).

"This instruction authorized the jury to disregard all the uncorroborated testimony of any witness if they reached the conclusion that he had, even through inadvertence or mistake, sworn falsely as to any material facts. This was error. As a general rule the question of the credibility of witnesses is for the jury. If they find that a witness has testified falsely as to a material fact, they are, of course, at liberty to disregard such false testimony. But before they should apply the maxim 'False in one thing, false in all things,' they should find that the witness knowingly or intentionally or corruptly swore false as to a material fact. *Mercer v. Wright*, 3 Wis. 645; *Morely v. Dunbar*, 24 Wis. 185 (189); *Louchaine v. Strouse*, 49 Wis. 624, 6 N. W. 360; *Black v. State*, 59 Wis. 471, 18 N. W. 457; *People v. Evans*, 40 N. Y. 5; *Pease v. Smith*, 61 N. Y. 483; *People v. Chapeau*, 121 N. Y. 276, 24 N. E. 469.

"The maxim was apparently

founded on the old rule which rendered a witness convicted of willful perjury incompetent to testify at all. That rule has in this state been abolished by statute, although the fact may be shown to affect his credibility. Rev. St. para. 4073. In view of this change in the rule, it would seem that the court should in no case take the question as to the credibility of a witness from the jury. *Mack v. State*, 48 Wis. 286, 4 N. W. 449."

5—*Overtoon v. C. & I. R. R. Co.*, 181 Ill. 323 (330), Rev. 80 Ill. App. 515, 54 N. E. 898.

"A witness may have testified falsely upon some matter enquired about from forgetfulness, or honest mistake, and in such case the jury would not be authorized to disregard his entire testimony, whether corroborated or not. It is the corrupt motive, or the giving of false testimony knowing it to be false, that authorizes a jury to disregard the testimony of a witness, and the court should so instruct them. *Follard v. People*, 69 Ill. 148; *Penn. Co. v. Conlan*, 101 id. 93. Standing alone, this instruction has other patent defects, not necessary here to mention."

6—*Lee v. State*, 72 Ark. 436, 81 S. W. 385.

"The court said in the case of *Bloom v. State*, 68 Ark. 336, 58 S. W. 41, this court said of a similar instruction: 'The instruction is erroneous and prejudicial, according to the decision in *Frazier v. State*, 56 Ark. 244, 19 S. W. 939, which holds that, before you can disregard the testimony of a witness for false swearing, the false swearing must be willfully done.'

credible evidence or by facts and circumstances as shown by the credible evidence in the case.<sup>7</sup>

(h) The court instructs the jury that one of the methods of impeaching a witness is to show by competent evidence that such witness has made a statement or statements out of court, or in court at another time, contrary to, or different from his testimony in the case in which he testifies as a witness in some matter material to the issue in the case on trial; and in this case, if you believe from the evidence that any witness has been successfully impeached, you have a right to disregard the entire testimony of such witness, except in so far as his testimony may be corroborated by other and credible evidence in the case.<sup>8</sup>

(i) The court instructs the jury that if they believe from the evidence that any witness, in testifying in this case at any time before this present trial of the case, testified to material facts therein directly different from the statements made in regard thereto by such witness on this trial, and no good and sufficient reason has been shown why

7—*Kornanzsewski v. W. C. S. R. Co.*, 76 Ill. App. 366 (368).

"The above instruction was erroneous in that it tells the jury that if the witness has been successfully impeached, they are at liberty to disregard all his evidence except in so far as it is corroborated, etc. If a witness has been impeached, whether by incredible statements, contradictions in his evidence, by witnesses as to his reputation for truth, or in any other way, such impeachment goes to the weight or credit to be given his evidence, of which the jury must be the judges; but we do not think it has ever been held that a jury will be justified in disregarding all the evidence of a witness unless they believe he has willfully sworn falsely to some material matter in issue, and then all his evidence should not be disregarded if corroborated by other credible evidence. The jury should carefully consider and weigh all the evidence of each and every witness, and disregard no item of evidence of a witness because they may believe from the evidence that the witness has been impeached, or successfully impeached, to use the language of the instruction, if that means any more. The credibility of the witnesses is a matter exclusively for the jury, and no instruction should intimate, as this one does, that the jury may disregard the evidence of any witness because they may believe he has been impeached. In *Otmer v. People*, 76 Ill. 152, it is said: 'The court should leave the jury perfectly free and untrammelled to pass upon the credibility of each witness, and to determine for themselves the weight to be given to his evidence.' In *Pope v. Dodson*, 58 Ill. 365, in which the court instructed if a witness 'has sworn falsely in any material statement',

the jury might disregard his entire material statement except so far as it was corroborated, the Supreme Court said: 'A witness can not be discredited simply on the ground of an erroneous statement it is only where the statements of a witness are willfully and corruptly false in regard to material facts that the jury are authorized to discredit the entire testimony. The most candid witness may innocently make an incorrect statement, and it would be monstrous to hold that his entire testimony, for that reason, should be disregarded.

"In *Gullihier v. People*, 82 Ill. 146, the court said, speaking of an instruction which stated that if the jury believed a witness had been contradicted on a material point, then the jury had a right to disregard his whole testimony, unless corroborated by other testimony: 'The mere fact, however, that he is contradicted as to some material matter is not enough to warrant the rejection of his evidence altogether, unless the jury believe that, as to the matter in which he has been thus contradicted, he has sworn falsely and knew his evidence was false.' *Swan v. People*, 98 Ill. 612, and *Hoge v. People*, 117 Ill. 45, 6 N. E. 796, are to the same effect."

8—*Kerr v. Hodge*, 39 Ill. App. 546 (550, 552).

"The jury might have been told that contradictory statements should be considered by them in determining the weight and credit to be given to any witness, but they should not have been told that they could rightfully disregard the entire testimony of a witness for that reason, unless such witness makes them willfully, or that the false statements must be knowingly made. *McClure v. Williams*, 65 Ill. 390; *Pollard v. The People*, 69 Ill. 148; *Linck v. Whipple* 31 Ill. App. 155."

there should be such difference in the testimony of such witness, then the jury are justified in disbelieving the whole or any part of such witness' evidence on this trial. And the court further instructs you that which direction the gripman was looking and what he did as M. S. was running from the pavement to the track, and which way he was looking immediately before that, are such material facts.<sup>9</sup>

(j) If you find from the evidence that any witness has sworn falsely as to any material fact or issue in this case, you should receive the testimony of such witness with caution. You have a right to reject the statement of such witnesses, excepting in so far as they may be corroborated by other credible evidence.<sup>10</sup>

(k) When you are satisfied that a witness has unlawfully sworn falsely to a material matter of fact in the case, then you may disregard the entire evidence of such witness, unless the evidence of such witness is corroborated by circumstances proven, or by the testimony of some other credible witness.<sup>11</sup>

§ 3324. Same Subject—Must also be Corroborated. (a) If you find that any witness has testified willfully and deliberately false as to any material fact in this case, you are at liberty to disregard his

9—Schmidt v. St. Louis Ry. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. 380.

"It is, in effect, that if a witness, on different occasions, has given testimony on the same subject, and the statements of the witness on one occasion are different from those made on another, and no satisfactory reason is advanced for the difference, the jury are justified in disregarding the whole of the witness' testimony. The furthest the court can go in that direction, without trenching on the province of the jury, is to instruct them, in effect, that, if they believe from the evidence that any witness has willfully sworn falsely as to any material fact in the case, they may if they see fit, for that reason disregard the whole of that witness' testimony. But, even in the giving of that instruction, the court should act with caution. It is not to be given in every case, and should never be given unless the trial judge strongly suspects that willful false swearing has been done in the case. The giving of that instruction in this case was error."

10—State v. Johnson, 14 N. D. 288, 103 N. W. 565.

"This instruction authorized the jury to reject the testimony of any witness because of the falsity of some of it. The fact that a witness gives testimony that is false is not ground for entirely disregarding his testimony. A witness' testimony should not be wholly disregarded because he has innocently made a mistake as to a material fact. The testimony must be willfully and intentionally false, before the jury may disregard it, unless corroborated. A similar instruction has been twice condemned by this

court, and the giving of it held prejudicial error. *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935. The correctness of these prior decisions cannot be successfully assailed, and they are decisive of this appeal."

11—*Gantling v. State*, 40 Fla. 237, 23 So. 857.

"The court erred in giving the first portion of the above charge. Under the legal maxim, 'Falsus in uno, falsus in omnibus,' a jury may disregard the entire testimony of a witness where such witness has willfully and knowingly or corruptly sworn falsely to a material fact in the case (*Thomp. Trials*, pars. 2423, 2424, 29 Am. & Eng. Enc. Law, p. 780 et seq.); but they are not required to do so. Neither does the law attach any such condition or qualification to the rules as prevents its operation in cases where the false witness is corroborated by some circumstances proven, or by the testimony of some other credible witness in the case. The court may properly advise the jury that they may disregard the entire evidence of such a witness, and that in determining whether they will disregard it, or what weight they shall give it, they may take into consideration the fact that such witness is or is not corroborated by other credible evidence in the case. The instruction under consideration was calculated to impress the jury with the idea that the law would not permit them to discard the entire testimony of such a witness, where he was corroborated by some circumstances or another credible witness in the case; and it was, therefore, erroneous. *Newberry v. State*, 26 Fla. 334, 8



entire testimony. And in this case, if the jury believe from the evidence that any witness has sworn willfully false to any material fact to the issue, they are at liberty to disregard the entire testimony of such witness, in so far as the same has not been corroborated by other credible evidence.<sup>12</sup>

(b) If the jury are satisfied from the evidence that any witness has willfully sworn falsely as to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness.<sup>13</sup>

(c) The court instructs the jury that if the jury believe from the evidence that the plaintiff has willfully sworn falsely, on the trial of this case, as to any fact or circumstance material to the issues in this case, then the jury should find the issues for the defendant.<sup>14</sup>

§ 3325. **Corroboration Required May be Any Other Credible Witnesses.** (a) If you come to the conclusion that any witness has knowingly and willfully testified in your hearing to that which is false upon any material point, you are at liberty to reject all the testimony of that witness, unless he is corroborated by the statements of other credible witnesses.<sup>15</sup>

(b) If the jury believe from the evidence that any witness has willfully and deliberately testified falsely to any material fact in this case, then the jury may entirely disregard all the testimony of such witness, except in so far as it may be corroborated by other credible

12—*State v. Fuller*, — Mont. —, 85 Pac. 369 (375).

The court said:

"The first sentence of the language quoted, standing alone, is erroneous, under the ruling laid down in *State v. DeWolfe*, 29 Mont. 415, 74 Pac. 1084, 101 Am. St. Rep. 579, and in *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648. The language quoted, taken together, seems to have been an attempt on the part of the court to state, first, an abstract proposition of law, followed by a concrete application of it to the facts of the case. Under the circumstances, we think the jury were not misled by the erroneous statement in the first part of the paragraph quoted. It is a familiar principle that an instruction, even if it be erroneous, will not be sufficient to set aside a verdict, if it is apparent that the jury were not misled thereby."

13—*Bratt v. Swift et al.*, 99 Wis. 579, 75 N. W. 411 (412).

In comment the court said:

"The above instruction was erroneous, the court failing to add to it the qualifying clause, 'unless such testimony was corroborated by other credible evidence.' *Mercer v. Wright*, 3 Wis. 645; *Morley v. Dunbar*, 24 Wis. 185; *Allen v. Murray*, 87 Wis. 46, 57 N. W. 979. The rule on this point, as stated in *Morley v. Dunbar*, supra, has for many years been established, and is an absolute rule of evidence in this state."

14—*Szymkus v. Eureka F. & M. Ins. Co.*, 114 Ill. App. 401 (408).

"We know of no precedent for this instruction, and think it clearly erroneous. The usual instruction, in case of willful false swearing was given by the court, defendants' instruction 4 which instructed the jury that in case of willful false swearing by any witness they were 'at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proven on the trial, if any part of his testimony has been so corroborated.' By instruction above the jury were informed, not merely that they were at liberty to disregard appellant's testimony, but that it was their duty to disregard it, if they found, etc., without reference to whether it was or not corroborated."

15—*Dolman Co. v. Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69 (73).

"Such is not the law. To avoid the liability of the entire testimony of a witness being rejected in such a case, it is not requisite that he should be corroborated by a witness, much less by witnesses. The corroboration may be any credible evidence, or facts and circumstances that may be fairly inferred therefrom. *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979; *Hillman v. Schwenk*, 68 Mich. 293, 36 N. W. 77; *Bowers v. People*, 74 Ill. 418; *Blotcky v. Caplan*, 91 Iowa 352, 59 N. W. 204."

witnesses, or by all the circumstances and facts as shown by the evidence in this case.<sup>16</sup>

§ 3326. **Palpably False Testimony.** It is the duty of the jury in passing upon the credibility of the testimony of the several witnesses to reconcile all the different parts of the testimony, if possible. It is only in cases where it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other credible evidence, that a jury is warranted in disregarding his or her entire testimony. Although a witness may be mistaken as to some part of his or her evidence, it does not follow as a matter of law that he or she willfully told an untruth or that the jury would have the right to reject his or her entire testimony. It is the duty of the jury to consider carefully all the testimony in the case bearing upon the issues of fact submitted to them, and, if possible, reconcile any and all apparently conflicting statements of the witnesses.<sup>17</sup>

§ 3327. **Falsus in Uno, Falsus in Omnibus.** (a) You are the sole judges of the evidence and the weight of the evidence and the credibility of the witnesses, and, if you believe any witness has sworn

16—*Stewart v. West* Ch. St. R. R. Co., 67 Ill. App. 496.

"The action was for a personal injury, the appellant alleging that he received it by the negligence of the appellee. He so testified, and was corroborated by one witness—one only. They were contradicted by witnesses for the appellee. Before the jury the question was upon the veracity of the witnesses. If the jury believed from the evidence that the appellant and his witness had each 'willfully and deliberately testified to any material fact in the case', though the facts were different and disconnected, and of minor importance, then the whole testimony of each might be by the jury entirely disregarded, although the jury might believe that in the main the testimony was true. The appellant and his witness corroborated each other, but neither of them was corroborated by witnesses in the plural. And in no case of any variety of circumstances can any witness be corroborated by all the circumstances and facts as shown by the evidence.' For various faults in instructions as to credibility, many judgments have been reversed. *Hoge v. People*, 117 Ill. 35, 6 N. E. 796. But in no case which we can recall was the credibility of the witness hinged upon an impossible corroboration."

17—*W. C. St. Ry. v. Moras*, 111 Ill. App. 531.

"We think the giving of this instruction was error, and it may have resulted in the verdict in appellee's favor, for the reason that it, in effect, by the use of the word 'palpable' in the second sentence to the jury that they should not

disregard the testimony of a witness because they believed that he deliberately and intentionally testified falsely as to some material matter and was not corroborated by other credible evidence, unless it was clear, glaring, unmistakable or indubitable, that he had so testified. This we think lays down a far more stringent rule than has been applied to civil cases. It is true that the Supreme Court, as well as this court, considered this instruction, which was given, omitting the word 'credible' in the second sentence, in case of *N. C. S. R. R. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483, and 79 Ill. App. 632, and affirmed a judgment in that case. The criticism here made upon the instruction was not made in that case, and the court then confined its holding to the criticism then being considered, viz.: that the word credible was omitted. The Supreme Court say, however, the instruction 'was not drawn with entire accuracy.' The rule laid down in numerous cases by the Supreme Court in civil cases, is that it is sufficient that a party prove his case by a preponderance of the evidence, and it is not necessary that it should be established by a clear preponderance or even evidence to the satisfaction of the jury except where a case or act is based on a criminal act. *Crabtree v. Reed*, 50 Ill. 206; *McDeed v. McDeed*, 67 Ill. 545; *Herrick v. Gary*, 83 Ill. 85-9; *Bitter v. Saatloff*, 98 Ill. 266; *Mitchell v. Hindman*, 150 Ill. 538, 37 N. E. 916. But see *N. C. St. R. R. Co. v. Fitzgibbons*, 180 Ill. 461, 54 N. E. 483 (468), affirming 79 Ill. App. 633 (636), where this instruction was approved."

falsely as to any material fact in the case, you may disregard the whole of such witness's testimony.<sup>18</sup>

(b) You are instructed that the principle of law to be applied to the testimony of witnesses is that, if you find them false in one thing the presumption is they are false in everything testified. That is a matter the court has no right to give you positive instructions on, as applied to the testimony of any witness, but I give you that principle of law to apply to the testimony of any witness that may have testified in this case.<sup>19</sup>

(c) If you should believe that the testimony of any witness whose evidence has been attacked, is not consistent, or if you should believe that the witness has made inconsistent and irreconcilable statements, either under oath or otherwise, which have not been accounted for or explained, then it is the duty of the jury to disregard said witness' testimony entirely. If the jury shall believe that any witness' testimony has been impeached in any one part which is material in the case, then in such event they have a right to believe that it is false in other parts, and have a right, and it is their duty to reject the whole. That if the jury should believe that there is any doubt as to the credibility of any witness, then in such cases it is their duty to give the prisoners the benefit of the doubt, and to reject such evidence entirely.<sup>20</sup>

18—*Jackson v. Powell*, 110 Mo. App. 249, 84 S. W. 1132 (1133).

"It is the willful or intentional false statement of a material fact that impeaches the credibility of the witness. In view of the sharp conflict in the testimony, we do not in this case condemn the giving of an instruction based upon the maxim, 'Falsus in uno, falsus in omnibus'; but under such instruction the jury should not be told in effect to brand as a false witness one who, mistaken about a single material fact, may have been innocent of an intentional untruth. *Smith v. Ry. Co.*, 19 Mo. App. 125; *Blitt v. Heinrich*, 33 Mo. App. 245; *State v. Elkins*, 63 Mo. 166."

19—*Glenn v. Augusta Ry. & Electric Co.*, 121 Ga. 80, 48 S. E. 684.

"This charge is unquestionably open to the objection that it fails to take into consideration the possibility of an honest mistake on the part of the witness. Had the judge preceded the word 'false' by the words 'knowingly and willfully', there could have been no fault to find with the entire accuracy of the charge."

Note: This instruction could hardly be recommended as a safe model even with the use of the words suggested by the learned judge.

20—*State v. Watkins*, 106 La. 380, 31 So. 10 (12).

"The court said that the appellants complain of the refusal of the court to charge the jury upon the subject of the credibility of witnesses. The charges on that subject were grouped together, and

it has been repeatedly held that, if any one of the instructions in the group is wrong, the judge is warranted in refusing the whole of the group. The application of this rule to the charges requested by the appellants evidently caused their complaint to fail. In reference to the matters covered by the bill on this subject the following extract from 3 Rice Cr. Ev. p. 293 is pertinent: He declares that the force of a witness' testimony depends upon the credit the jury think it entitled to, and no court has a right to lay down for a jury rules whereby they shall determine the force of evidence irrespective of the credence they actually give it in their own minds; citing *People v. Jenness*, 5 Mich. 310; *People v. Wallin*, 55 Mich. 497, 22 N. W. 15. They are the sole judges of the credibility of the witnesses. With that the court has nothing to do; and if they find from the evidence that any witness or witnesses have willfully testified falsely, they are at liberty to disregard the whole or any portion of such witness or witnesses' testimony. The author refers to *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470, in which Mr. Justice Ramsey says: 'An ancient maxim of the laws of evidence, "Falsus in uno" would seem to import such exclusion (exclusion of the entire testimony of the witness) by raising a presumption of law, *juris et de jure*, that a witness who was certainly shown to have committed perjury upon one material point in the case should be deemed wholly unworthy of credit upon any other, and his tes-



(d) The jury are instructed that it is a rule of common sense and sound logic that a party who testifies falsely upon any material question shall not be believed upon any other question, unless his evidence is fully and strongly corroborated.<sup>21</sup>

§ 3328. Doctrine of "Falsum in Uno, Falsum in Omnibus" Only Invoked When the Testimony is not Only False but Willfully and Corruptly False. (a) The court instructs the jury for defendant, that they are the sole judges of the credibility of any witness who testified in this case, and that if they believe from the evidence that any witness has testified falsely herein they are at liberty to disbelieve his testimony in whole or in part; and the jury are further instructed that in passing on the credibility of every witness they are at liberty to consider any conviction of any witness for any crime, together with all evidence in the case.<sup>22</sup>

timony be wholly rejected. In most of the cases brought to our attention in the argument where this maxim has been referred to no attempt has been made to define its limits and proper application, while in many it has been very inaccurately used as applicable to witnesses who have been merely contradicted upon some material point, without raising any just imputation of perjury against them.' The justice quotes from Starkie on Evidence to the effect that the doctrine of 'falsus in omnibus' did not extend to the total rejection of a witness where misrepresentation has resulted from mistake or infirmity and not from design; but though his honesty remains unimpeached, this is a consideration which necessarily affects his accuracy. Rice declares that 'the tendency of modern authority is to relax the application of the maxim; that the jury are not bound to wholly discredit a witness if his testimony as to material facts is corroborated by other credible and unimpeached witness.' In Grimes v. State, 63 Ala. 166, the court said: 'We are prepared to follow the line of authorities which hold the maxim is not a rule of law operating a disqualification of the witnesses to be given in charge to the jury as imperatively binding them; that it is to be applied by the jury, according to this same judgment, for the ascertainment, and not for the exclusion of truth. The charge given by the judge is in accordance with this rule. It does not instruct the jury that they are bound to disregard the testimony of unimpeached witnesses, but left it to their sound discretion and judgment.' The maxim, 'Falsus in uno, falsus in omnibus' is not a rule of law, and should not be charged to the jury as such. Juries in this state are in criminal cases judges of the law and the evidence, and they should not be tied down by peremptory instructions from the court as to what their duty is in respect to any particular testimony, nor what their course in re-

spect to the same should be as a matter of law. The right of the court to inform a jury what it might be authorized to do, is something different from telling it what it must do. We think the judge went as far as he could legally be obliged to go in the instructions he gave to the jury on this subject.'

21—*Lamphere v. State*, 114 Wis. 193, 89 N. W. 128 (131).

"In comment the court said: No time need be spent to demonstrate that to be erroneous to a very high degree. It is not the law that a person who testifies falsely as to one material matter in the trial of a cause cannot properly be believed as to any other such matter. A jury may properly believe a witness who has testified upon several matters as to some of them though they may believe the testimony false upon others. They have not a right to reject all of a witness' testimony merely because they conclude that he testified falsely as to some material matter. Much less are they bound to do so. If a witness willfully testifies falsely as to any material matter in the trial of a cause, the jury may properly reject all of his evidence which is not corroborated by some other credible evidence. *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411; *Miller v. State*, 106 Wis. 156, 81 N. W. 1020. They are not, under such circumstances, even bound to disregard all the witness' testimony. They are merely permitted to do so if, in their judgment, such discredit is, by the willfully false evidence, cast upon all of his testimony that no credence can, in their judgment, be safely given to any part of it. It is not necessary to prevent the rejection of all of a witness' testimony where some part of it is willfully false on that ground alone, that the other part be fully and strongly corroborated, as the court put it; it is sufficient if it is corroborated by some credible evidence."

22—*People v. State*, — Miss. —, 33 So. 289 (291).

The court held that this "was

(b) The court instructs the jury that if you believe from the evidence that any witness, before testifying in this case, has made any statement out of court, concerning any of the material matters, materially different and at variance with what he or she stated on the witness stand, then this jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of such witness; and the jury should consider these facts, in estimating the weight which ought to be given to his or her testimony.

(c) The jury are further instructed that if you believe from the evidence that any witness, before testifying in this case at this trial, had heretofore been a witness in this case at a former trial, or at the coroner's inquest, and, while under oath, testified to any matters material to this case materially different and at variance with what he or she stated on the witness stand at this trial, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of such witness, and the jury should consider these facts in estimating the weight which ought to be given to such witness' testimony.<sup>23</sup>

**§ 3329. False Swearing Should be to a Material Matter in Issue.**

(a) You are further instructed that if you believe any witness or witnesses testifying in this case have knowingly and willfully testified falsely as to any matter in controversy in this case, then you have the right to disregard the entire testimony of such witness or witnesses, except in so far as the testimony of such witness or witnesses may be, if it is, corroborated by other credible testimony or by facts or circumstances appearing in proof upon the trial of this case.<sup>24</sup>

(b) I charge you, gentlemen, that you will be slow to believe that any witness has willfully testified falsely; but, if you believe that any witness in this case has willfully testified falsely to any matter, then you are at liberty to disregard his testimony entirely, except in so far as the same may be corroborated by other credible testimony in the case.<sup>25</sup>

properly refused because the defendant had the benefit of all he was entitled to on the doctrine of the credibility of witnesses in the eighth charge given for him; and because it is not the law that the doctrine 'Falsus in uno, falsus in omnibus' can be invoked except upon the basis of the jury's belief that the testimony was not only false but willfully and corruptly false; and finally because the last clause of it, authorizing the jury to consider the conviction of the witness of any crime in passing on his credibility is based on no evidence."

<sup>23</sup>—Davis v. State, 57 Neb. 301, 70 N. W. 984 (1898).

"The maxim 'Falsus in uno, falsus in omnibus', is applicable alone where a witness has willfully testified falsely to a material fact. Buffalo Co. v. Van Sickle, 16 Neb. 365, 20 N. W. 261; Kay v. Noll, 20 Neb. 380, 30 N. W. 269. The foregoing requests were faulty, and rightly refused, because they omitted the sicerter that the witness willfully made a statement out of

court, or testified on a former trial, of a material matter, substantially different from his testimony on the last trial."

In State v. Burns, 27 Nev. 289, 74 Pac. 983 (1884), it was held error to omit the element of willfulness in the falsity of the witness.

<sup>24</sup>—Rautert v. Carlson, 116 Ill. App. 260.

It is insisted that this instruction is erroneous because it is not limited to false testimony as to a matter material to the issue. For appellee it is insisted that the phrase "matter in controversy" as used in the instruction means and is limited to a matter material to the issue. If the intention of counsel in preparing the instruction was to limit it to false swearing as to a matter material to the issue it would have been better to say so in plain and direct words, in place of attempting to convey such meaning by the use of words which may possibly be given that meaning by construction.

<sup>25</sup>—State v. Carter, 15 Wash. 121, 45 Pac. 745 (1896).

(c) If you have reason to believe that any one of the witnesses who have testified here have testified falsely, you have a right to discredit his testimony entirely; and if you believe a part of his testimony is true, and a part is false, you have a right to credit that portion you believe is true and discredit that portion you believe is false.<sup>26</sup>

§ 3330. **Willful and Knowing Exaggeration not Sufficient to Warrant Rejection of Testimony.** The jury are instructed that it is a principle of law that, if you believe, from the evidence, any witness has willfully and knowingly sworn falsely to any material element in the case, or any witness has willfully or knowingly exaggerated any facts or circumstances for the purpose of deceiving, misleading or imposing upon the jury, either as to the origin of the plaintiff's ailments so far as from the evidence you believe they exist, or as to the nature or extent of the injury, then the jury have a right to reject the entire testimony of such witness unless corroborated by other evidence which they believe, or by facts and circumstances that appear in the case.<sup>27</sup>

§ 3331. **Willfully Sworn Falsely—Singling Out a Particular Witness for Comment.** (a) If the jury believe, from the evidence, that the witnesses M. S. and W. have willfully sworn falsely on the trial as to any matter or thing material to the issue in the case, then the jury are at liberty to disregard their entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial.<sup>28</sup>

"This instruction was technically incorrect, in that it omits the word 'material,' but we do not think that the error is of sufficient gravity to warrant a reversal of the judgment."

26—State v. Henderson, 72 Minn. 74, 74 N. W. 1014.

"This instruction was error. The maxim 'Falsus in uno, falsus in omnibus,' applies only to cases where the false testimony relates to a material matter and is knowingly and willfully given. It does not apply to testimony given by mistake or inadvertence, or to immaterial testimony, or to such testimony as may have been corroborated by other creditable evidence. 2 Thomp. Trials, paras. 2423-2425. The instruction as given did not so limit the application of the maxim. The true rule is that, if the jury believe from the evidence that any witness has knowingly and willfully testified falsely to any material fact in the case, they may disregard his entire testimony, except so far as it is corroborated by other credible evidence. The credibility of such a witness is a matter for the jury. They may believe or disbelieve his testimony as to other facts according as they deem it worthy or unworthy of belief. Scheuk v. Hagar, 24 Minn. 339."

27—C. C. Ry. Co. v. Allan, 169 Ill. 287 (291), 48 N. E. 414.

"In holding that the above in-

struction was properly refused, the court said: 'Without deciding the instruction as asked is not open to other objections, we may dispose of the point by observing it is not the law that the entire testimony of a witness may be rejected from consideration by a jury upon the ground the witness has knowingly and willfully exaggerated any fact or circumstance, but only when he has knowingly and willfully sworn falsely to some matter or thing material in its character.' 29 Am. & Eng. Ency. of Law, p. 780, and citation in note 1."

28—Argabright v. State, 49 Neb. 760, 69 N. W. 102.

"One of the governing principles of the question involved is that it is for the jury, and not the court, to pass upon the credibility of witnesses, and to determine the weight to be accorded their testimony. Hedman v. Anderson, 6 Neb. 392; Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835; State v. Cushing, 29 Mo. 215; Shellabarger v. Nafus, 15 Kan. 547; State v. Stout, 31 Mo. 406; and extending this doctrine, and applying it to an instruction on the maxim, 'Falsus in uno, falsus in omnibus,' 'The credibility of a witness who knowingly testifies falsely as to one or more material facts is wholly a matter for the jury.' Scheuk v. Hagar, 24 Minn. 399. 'It is error to single out a particular witness, and to direct such a cautionary in-



(b) The court instructs the jury that if you believe from the evidence that the alleged statements of defendant in reference to the plaintiff, S., as detailed by the witness, were spoken of and concerning certain hogs of defendant that at one time got out of defendant's enclosure and over into the cornfield of the plaintiff, S., and were taken and impounded by the plaintiff, and which hogs defendant got back, and (said statements) were so understood by the witness P. R. as applying to said hogs that got out and trespassed upon plaintiff's premises, and were not understood by her as being in the sense of charging that plaintiff had feloniously taken, stolen and carried away the hogs of defendant, and converted them to his own use, with intent

struction, although couched in proper terms, against his testimony. The reason is that such a course tends to convey to the minds of the jury an impression that the testimony of the particular witness is disbelieved by the judge, and is to be disregarded—a question which it is their province to determine, and not his.' 2 Thomp. Trials, p. 1772 para. 2423. 'It is not unusual for a court to point out a particular witness, and tell the jury to disregard his testimony, if they think he has testified falsely in any material particular; and, when this is done, and all instructions upon the defense which this witness' testimony tends to establish are refused, the jury must understand the court to be of opinion that no case of self-defense is made out—in other words, that the testimony of the suspected witness is entirely unworthy of credit. This conclusion may be correct, but it is the province of the jury, and not the court, to pass upon the credibility of witnesses.' State v. Stout, 31 Mo. 406. 'It is improper for the court to instruct the jury as to the weight they should give to a particular testimony, or to the testimony of a particular witness, or to put a particular witness into undue prominence by charging the jury to find according to their belief in his evidence, if such charge tends to ignore other testimony, citing Chase v. Iron Works, 55 Mich. 139, 20 N. W. 827; Springett v. Colerick, 67 Mich. 362, 34 N. W. 683. On the other hand, a trial judge has no right so to instruct the jury as manifestly to reflect upon a particular witness, citing Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667, 672, 3 N. W. 173, 175; Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33, 37.' An instruction that, if the jury find that any witness has testified falsely as to any material fact in the case, they are at liberty to reject and disbelieve all of his testimony, clearly and sufficiently states the law on the subject; and it is not error for the court to refuse to give a request applying such rule to a particular witness, and challenging the attention of the jury to particular portions of his testimony which the request

assumes as false.' Fraser v. Haggerty, 86 Mich. 521, 49 N. W. 616. 'It is not proper for the court in a criminal case to designate the evidence of a witness who is not an acknowledged accomplice, and caution the jury against giving credence to it. Casting the influence of the court against the testimony of a particular witness, or the character of the evidence he gives, is not the usual way of either affecting the credibility of witnesses or the weight of testimony.' Rafferty v. People, 72 Ill. 37. In the case of State v. Kellerman, 14 Kan. 135, it was said: 'Where an instruction is asked, that if a particular witness, naming him, has willfully testified falsely, etc., the justice should disregard his entire testimony, it is not error for the court to refuse such instruction, and substitute one that, if any witness has willfully testified falsely, etc.' And it was further observed on the same subject: 'With reference to the first, we have little difficulty. The rulings of the court were unquestionably correct. For instance, the appellant asked the court to instruct the jury that, if one witness, naming him, testified willfully, falsely, etc., they must disregard his entire testimony. Instead of this, the court charged that if any witness testified willfully, falsely, etc. The latter is the proper way. To single out a witness, and by name give such an instruction in reference to him, suggests a suspicion, if it does not imply a belief, on the part of the court, of the witness' perjury.' See, also, Cline v. Lindsey, 110 Ind. 337, 11 N. E. 441. It is error to single out and instruct upon the evidence of a particular witness. Muelly v. State, 31 Tex. Cr. App. 155, 19 S. W. 915. In the opinion in Housh v. State, 43 Neb. 163, 61 N. W. 573, in considering an objection alleged against an instruction, it was stated by Post, J.: 'Exception was taken to the following paragraph of the instructions: "Under the law of this state, the accused is a competent witness in his own behalf, and you are bound to consider his testimony but, in determining what weight to give to his testimony, you may weigh it as you would the

to deprive the defendant of them, then no action can be predicated upon said alleged statements to or in the presence of the witness, P., and in such state of the proofs, if such state of the proofs exist herein, your verdict should be for the defendant, and you should find him not guilty as to the alleged statements testified to by the witness.<sup>29</sup>

(c) The court instructs the jury that if you believe, from the evidence, beyond a reasonable doubt, that any witness for the defense has willfully and knowingly sworn falsely to any material fact in issue, then you have a right to disregard his entire testimony except wherein it is corroborated by other credible evidence in the case.<sup>30</sup>

testimony of any other witness, and you may take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to his testimony such weight as, under all the circumstances, you think it entitled to.' Were the question an open one at this time, the writer would with reluctance sanction a practice which permits any reference by the court to the subject of the prisoner's credibility as a witness. There is, on principle, no more reason to call the attention of the jury to him, and to caution them to consider his interest as affecting his credibility, than for like caution with respect to any other witness but that question has been fully settled in this court by decisions in conformity with the practice in this case, which we are constrained to follow. See *St. Louis v. State*, 8 Neb. 405; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489. In the opinion in the case of *Watson v. Roode*, 30 Neb. 264, 46 N. W. 493, one of the matters under consideration was the refusal of the trial court to give an instruction to the jury worded as follows: 'The court instructs the jury that, if they believe from the evidence that the plaintiff, R., is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, this fact tends to discredit his testimony, and the jury may entirely disregard it, except in so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial.' And of this

action it was said: 'The defendant, introduced several witnesses, who testified that the plaintiff's reputation for truth and veracity in the neighborhood where he lived was bad. In view of this testimony, the jury should have been told what weight should be given to the plaintiff's testimony. The request contained a correct statement of law, and, as it was not covered by the instructions given, it was error to refuse it.' And in the syllabus of the opinion it was stated: 'When the general reputation of a witness for truth and veracity in the neighborhood where he resides is proven bad, the jury may entirely disregard the testimony of such witness, except in so far as he is corroborated by other credible testimony.'

29—*Scott v. Snyder*, 116 Ill. App. 393 (395).

"The objection urged to this instruction is that it singles out and gives undue prominence to certain facts, ignoring other facts proved, of equal importance in a proper determination of the case."

30—*Waters v. People*, 172 Ill. 367 (372), 50 N. E. 148.

"This instruction calls the attention of the jury alone to the testimony of the witnesses for the defense. It was the duty of the jury to consider the testimony of all the witnesses, and if any witness had willfully and knowingly testified falsely whether for the prosecution or for the defense, then the jury had a right to reject his testimony, unless it was sustained by other credible evidence."

## CHAPTER CVI.

### PREPONDERANCE OF EVIDENCE AND BURDEN OF PROOF.

See Approved Instructions, Chapter XVIII, Vol. I.

§ 3332. Preponderance defined—Illustration given.	§ 3342. "Quality" of evidence an erroneous term.
§ 3333. Degree of preponderance required—"Although but slightly."	§ 3343. Burden of proof on the plaintiff.
§ 3334. "Convinced by a preponderance of the evidence," held error.	§ 3344. Not required to prove every material allegation in declaration—Jury not to determine what is material.
§ 3335. Clear preponderance not required.	§ 3345. Proving the case as alleged in the declaration.
§ 3336. Reasonable certainty not required.	§ 3346. Burden of proof not on defendant.
§ 3337. Evidence sufficient to satisfy.	§ 3347. Burden of proof—Justification must be proved by defendant—Contributory negligence.
§ 3338. If evidence weighs more.	§ 3348. Burden of proof on objectors.
§ 3339. Evidence equally balanced.	
§ 3340. Number of witnesses.	
§ 3341. Reasonable doubt not required in civil cases.	

§ 3332. **Preponderance Defined—Illustration Given.** (a) You will decide all issues submitted to you by this charge by a preponderance of the evidence. By the term "preponderance of the evidence" is meant not necessarily the greater number of witnesses, but only the facts shall appear by the greater weight of testimony, as may seem to you most worthy of credit, under all the facts and circumstances of the case.<sup>1</sup>

(b) Look at the probabilities; search for inconsistencies; find the contradictions. The preponderance of the evidence may aid you, but it is not always the best guide. In this case you have the plaintiff's sworn testimony as to a large number of alleged facts. Against it you have the sworn testimony of some five or six witnesses, and minutes and resolutions of the bourse made concurrently with the alleged happenings. Well, this may mean much, it may mean little, and you may conclude that it means nothing. It may or it may not be conclusive. Let us take an illustration, not of the conditions met with in this case, but the reliability of preponderance of evidence in some cases. Suppose that a small child should tell you that he saw a large wolf run away with an unusually small lamb. As against this ten adults testified that this was not the case at all, but that the real

1—St. Louis S. W. Ry. Co. of Texas v. Smith. — Tex Civ. App. —, 63 S. W. 1064 (1065).

"The practice of undertaking to define to the jury words used in their ordinary sense, and the meaning of which is generally and well

understood, has been frequently criticised and condemned. Martin v. St. L. S. W. Railway Co., — Tex. Civ. App. —, 56 S. W. 1011. The term 'preponderance' was used in its ordinary sense, and the court should not have undertaken to define it."



fact was that this very small lamb was actually running away with the large wolf. It would not take a jury very long to determine where the truth lies, notwithstanding ten against one. Of course, as I have told you, this is not intended to illustrate the condition of the evidence in this case as you have it before you, but simply to call your attention to the error that a jury might fall into by deciding questions of fact upon preponderance of evidence alone. It is simply one of the elements to be properly taken into consideration in an effort to ascertain where the real truth lies.<sup>2</sup>

(c) By a preponderance of the evidence is meant that which is more satisfactory to your minds and consciences of a given proposition. If, after duly considering all the evidence, a verdict for plaintiff would be more satisfactory to your minds than would a verdict for the defendants, then plaintiff would have a preponderance, and it would be your duty to find for the plaintiff. On the other hand, if a verdict for the defendants would be equally or more satisfactory, then plaintiff would not have the preponderance, and in that event it would be your duty to find for the defendants.<sup>3</sup>

§ 3333. **Degree of Preponderance Required**—"Although but Slightly." The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor.<sup>4</sup>

§ 3334. **"Convinced by a Preponderance of the Evidence," Held Error.** The court instructs the jury that before you can find for the plaintiff, you must be convinced by a preponderance of the evidence that the injury complained of was the direct and immediate result of the intoxication as alleged in the declaration; and unless the proof shows by a preponderance of the evidence that said ——— fell into

2—*Evans v. Philadelphia Bourse*, 215 Pa. St. 652, 64 Atl. 463.

"What the judge said about the preponderance of the evidence was inaccurate, but it is perfectly clear that by preponderance of evidence he meant preponderance in the number of witnesses, and the illustration he gave the jury, though by no means happy, must have made his meaning clear enough to prevent their being misled by the previous inaccurate phrase."

3—*Nickey et al. v. Steuder*, 164 Ind. 189, 73 N. E. 119.

The court said that "by preponderance of evidence is meant the greater weight of the evidence; that it outweighs the evidence of the adverse party. Said instruction did not clearly hold the jury to this definition, but gave one which was indefinite and uncertain, and which was calculated to mislead them as to their duty. In an action to recover damages for personal injury caused by the negligence of the defendant, it is the duty of the jury to find for the plaintiff if he has established his cause of action by a

preponderance of the evidence, unless it is shown by a preponderance of the evidence that the plaintiff was guilty of negligence which approximately contributed to his injury, in which case it is the duty of the jury to find for the defendant. If such cause of action is not established by a preponderance of the evidence, the jury should find for the defendant. This is the duty of the jury whether such a verdict would be satisfactory to their minds or not."

4—*O'Donnell v. Armour Curled Hair Works*, 111 Ill. App. 516 (523).

"The use of the words 'although but slightly' were calculated to impress the jury that the court inclines in favor of the plaintiff." But see *Mitchell v. Hindman*, 150 Ill. 538, 37 N. E. 916; *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Donlevy v. Dougherty*, 75 Ill. App. 379 (380), aff'd 174 Ill. 582, 51 N. E. 714; *W. C. St. R. Co. v. Marzal Kierwiecz*, 75 Ill. App. 240; *Same v. Loftus*, 83 Ill. App. 194, where the above was approved.

the ditch and was injured as a direct or immediate result of said intoxication, you should find the defendants not guilty.<sup>5</sup>

§ 3335. **Clear Preponderance not Required.** (a) It is your duty to be satisfied, by proof and evidence that satisfies you, that the conversion of this property was within six years previous to the 8th day of February, —. If he has not done it, if there is not a clear preponderance of evidence that satisfies you to that effect, if there is not that weight of evidence that preponderates in favor of it, gentlemen of the jury, the case is ended, and it is your duty to say, "No cause of action." . . . This is not a case of equity, or a chancery case. It is a law case. He says he is entitled to so many hundred dollars from X. by law. He is entitled to it, he says. He doesn't ask your sympathy, but he says he is entitled to it as a legal question upon the evidence. Now, gentlemen of the jury, the defendant says that, if he is entitled to it, it is his duty, by law, to prove it; that he must produce evidence that establishes the fact that he is entitled to it, so that it preponderates, so that you know it, that your minds are not left balanced. It is his duty to prove it, and the defendant has a right to insist that he does it. And the defendant not only insists that he must prove that there was timber cut, and that he owned the lands, and that he owned the timber, but that it devolves upon him to prove that he has not rested upon his rights, but that he has brought this action within six years from the time his cause of action accrued. . . . I have given you now what I believe to be the law. Now, apply it, and find the facts as you believe it. Don't guess at anything. It is your duty to sit there and demand that the plaintiff establish his case, so that you are not left balanced, so that you have to guess; but he must outweigh the evidence brought against him, so that your minds are not balanced, so that you are satisfied that what he claims is so, before you have the right to grant it.<sup>6</sup>

5—Brady v. Mangle, 109 Ill. App. 172 (175).

"It requires no extended argument nor citation of authorities to determine this instruction is erroneous. An instruction that calls for a stronger degree of proof than the preponderance of the evidence, such as that the jury be 'convinced' or 'satisfied' imposes a greater burden on the plaintiff than the law demands."

6—Hoffman v. Loud, 111 Mich. 156, 69 N. W. 231.

"In civil cases, a preponderance of evidence is all that is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests. Proof to a demonstration is not required, and it is usually unfortunate to employ qualifying words when defining the necessity for a preponderance of evidence, when it is possible that the terms employed may lead the jury to draw the inference that something more than a mere preponderance is required. See Watkins v. Wallace,

19 Mich. 77; Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Gumberg v. Treusch, 103 Mich. 543, 61 N. W. 872. There is respectable authority for holding that the use of the term 'clear preponderance' is in itself sufficient to mislead the jury, and that it is error to employ such term in an instruction. McDeed v. McDeed, 67 Ill. 546; Butter v. Saathoff, 98 Ill. 266; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Marx v. Kilpatrick, 25 Neb. 118, 41 N. W. 111. Whether we would be prepared to adopt this view of all cases, without regard to other portions of the charge, it is not now important to determine. But we think this instruction, taken as a whole, was calculated to impress the jury with a view that something more than a preponderance was requisite before they were authorized to find for the plaintiff. In addition to the expression 'clear preponderance,' the jury were repeatedly told that they had no right to guess that they must be satisfied. While it is strictly accurate to say that the jury should not be permitted to guess, it is true that they have a right to weigh probabilities, and to decide in favor of

(b) The court instructs the jury that the burden of proof is on the defendant herein as to all the material facts necessary to sustain his contention that he has satisfied and paid the same and it is incumbent upon the defendant to establish these allegations by clear and satisfactory evidence.<sup>7</sup>

§ 3336. **Reasonable Certainty not Required.** (a) A witness is only valuable to the extent that his evidence establishes some material fact or circumstance which aids in making clear and plain to your minds some question involved in this litigation.<sup>8</sup>

(b) The court instructs the jury, as a matter of law, that the jury must find that there is a certain amount due to X. from Y., and that they must not guess at the same.

(c) The court instructs the jury, as a matter of law, that the plaintiff can not recover for an account that is five years old prior to the commencement of this suit, except upon a new promise made thereafter.<sup>9</sup>

the greater; and the use of this expression in the connection in which it was used was calculated to convey the idea that the jury must be able to feel absolutely certain as to the fact, before acting upon the testimony. In one place it is said that 'he (plaintiff) must produce evidence that establishes the fact that he is entitled to it, so that it preponderates, so that you know it, that your minds are not left balanced'; that 'it is his duty to prove it, and the defendant has a right to insist that he does it.' We think, take the charge as a whole, it is open to the criticism made by plaintiff's counsel, and the judgment should be reversed."

7—*Meyer v. Hafemeister*, 119 Wis. 539, 97 N. W. Rep. 165 (166), 100 Am. St. Rep. 900.

The court said: "The instruction informed the jury that the fact of payment must be shown by evidence establishing it to a higher degree of certainty than its mere preponderance. It is argued, though this rule be erroneous, it should not be held prejudicial, because the court also instructed the jury correctly upon the subject. But what rule did the jury follow? It is fully as probable they followed the one rule as the other in their determination of the issues. They found payment was not established as alleged by defendant. This may have resulted because they believed the proof failed to show payment to that degree of certainty as defined and required by the last instruction, though believing that the weight of the evidence adduced preponderated in defendant's favor. Since the instructions may have prejudiced the defendant upon this issue, it must be held to constitute reversible error."

8—*E. Rank of O. of K. P. v. Steele*, 107 Tenn. 1, 63 S. W. 1126 (1127).

"In the case of *Gage v. Railroad*

Co., 88 Tenn. 724, 14 S. W. 73, it was said, criticising and correcting the charge of the court below: 'It is sufficient in civil cases if, after weighing the evidence on both sides, a preponderance is the one way or the other. The burden is on the plaintiff to make out his case, and he is only required to do so by a preponderance, but when he has done so he is entitled to recover.' In *McBee v. Bowman*, 89 Tenn. 132, 14 S. W. 481, there was a contest over a will, the defense being that the will was a forgery. The court below, in speaking as to this defense, said, among other things: 'It should appear with reasonable certainty that such is the case.' This court, in commenting on that expression, said: 'To our minds, the whole instruction means, and was intended to mean, that, to establish a charge of forgery, it was incumbent on McBee to show the fact by that degree of preponderance or weight of evidence necessary to produce conviction of its existence with reasonable certainty. The instruction is manifestly erroneous. Reasonable certainty implies the absence of reasonable doubt. Telling a jury that they must be convinced of a fact with reasonable certainty is almost, if not quite, the same as telling them they must be convinced of it beyond a reasonable doubt. In civil cases, preponderance is all that is required.'"

9—*Gager v. Dobson*, 51 Ill. App. 542.

"The first of these instructions might have greatly misled the jury. Jurors have many times to form an opinion as to amounts from contradictory and imperfect evidence. An instruction that they must be certain and could not guess, might have been by them understood as forbidding them to use their judgment in reaching a conclusion. Absolute certainty is seldom required in law suits."



§ 3337. **Evidence Sufficient to Satisfy.** (a) It is for him to satisfy you, by such evidence as convinces your mind, that no value was paid for that note.<sup>10</sup>

(b) The burden of proof is upon the plaintiff to establish each and every particular fact necessary to prove his cause of action by a preponderance of evidence. By the term "preponderance of the evidence" is meant that greater and superior weight of the testimony as reasonably satisfies your minds. Preponderance is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It may occur that the statement or the superior knowledge of the subject-matter testified to of one or a few witnesses, may be of more importance, and be relied upon with a greater degree of assurance, than that of a greater number and the testimony of the witnesses is oftentimes strengthened or weakened by other facts and circumstances disclosed by the evidence.<sup>11</sup>

(c) The court instructs the jury for the interpleader that when fraud is set up the party alleging fraud must prove it by a preponderance of the evidence, so clear and cogent that it leaves the mind well satisfied that the charge is true. And in this case, if you believe from the evidence that the plaintiff in attachment has not so proved the fraud alleged in this case, you should find for the interpleader, if you believe from the evidence the property is his.<sup>12</sup>

§ 3338. **If Evidence Weighs More.** You cannot find for the plaintiff unless his evidence weighs more than that of the defendant. If the defendant's evidence weighs as much as that of the plaintiff, and, of course, if defendant's outweighs that of plaintiff, you must find a verdict for defendant. If the plaintiff has proven his case by a fair preponderance of evidence,—if plaintiff's evidence weighs enough

10—Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866 (867), 54 Am. St. 365.

"In a civil case it is error to tell the jury that there must be evidence sufficient to convince their minds of any fact necessary to be shown by either party. The weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case."

11—Ball v. Marquis, 122 Ia. 665, 98 N. W. 496 (497).

"The instruction is said to be erroneous because of the use of the words 'reasonably satisfies.' It is conceded, of course, that plaintiff was not required to prove his case beyond a reasonable doubt, and that all that was required of him was the production of the greater weight or preponderance of the evidence. Such is undoubtedly the law of this state. Coit v. Churchill, 61 Iowa 296, 16 N. W. 147; Bryan v. Railway, 63 Ia. 464, 19 N. W. 295; Callan v. Hanson, 86 Ia. 420, 53 N. W. 282; Rosenbaum v. Leavitt, 109 Ia. 295, 80 N. W. 393. The contention of appellant is that the instruction given in this case in view of the language used, required of plaintiff not merely that he establish the facts of his case by a preponderance of the evidence, but

that the evidence on his behalf must be such as to fairly set at rest the truth of every material fact necessary to a recovery. The contention centers upon the expression 'reasonably satisfies' and it is the argument of counsel that such expression fairly considered, could convey to the jury no other meaning than that the verdict must be for the defendant, even though the weight of the evidence was with plaintiff, if the jury was not reasonably satisfied of the inherent truth of the matters alleged. We have made the question thus raised the subject of full and mature consideration, and we reach the conclusion that while the use of the expression is not to be commended, the jury could not fairly or in reason have been misled by the instruction as given. It will be observed that the expression criticised is used in defining the term 'preponderance of the evidence,' and we think it must have been understood by the jury that a preponderance was established if upon consideration of the evidence the result was to reasonably satisfy the minds of the jury that the greater weight thereof was with the plaintiff."

12—Hutchinson Nat. Bk. v. Crow, 56 Ill. App. 558 (567).

more than that of the defendant to turn the scale on the plaintiff's side, even if it be but little, if that little be perceptible, sufficient to turn the scale on his side,—your verdict will then be for the plaintiff, and against the defendant.<sup>13</sup>

§ 3339. **Evidence Equally Balanced.** (a) The jury are instructed that if you believe from the evidence that the plaintiff has sworn positively that the defendant promised to pay him for the time he spent at the jewelry factory while it was in the hands of the sheriff, and that the defendant has sworn just as positively that he did not promise to pay the plaintiff, and if you further find from the consideration of all the evidence in the case that the testimony of the defendant is entitled to as much credit as that of the plaintiff and corroborated to the same extent, then you should find for the defendant.<sup>14</sup>

(b) The court instructs the jury that the burden of proof in this case is upon the plaintiff, and any matter asserted by one party and denied by the other can only be proved in law by preponderance of the evidence, and in this case, if the jury find, from the evidence, that the plaintiff has proved the alleged contract by only one witness, and that the contract has been denied by one witness of equal credibility and means of knowledge, then as a matter of law such contract has been proved, unless in the minds of the jury there have been facts or circumstances proved corroborating the plaintiff's witness sufficient to outweigh the testimony on the part of the defendant.<sup>15</sup>

(c) The court instructs the jury that the plaintiff, in order to re-

"The law does not require such a degree of proof in a civil suit. It is sufficient if the jury believe a material fact in issue from the evidence, even if the proofs do not generate a belief which entirely satisfies their minds. *Mitchell v. Hindman*, 47 Ill. App. 431, aff'd 150 Ill. 538, 37 N. E. 916; *Connelly v. Sullivan*, 50 Ill. App. 629; *Herrick v. Gary*, 83 Ill. 85; *Stratton v. Central Ry., etc.*, 95 Ill. 25."

13—*Guinard v. Knapp, Stout & Co.*, 95 Wis. 482, 70 N. W. 671 (672).

"This instruction seems well calculated to mislead the jury as to the amount of evidence necessary to justify a verdict for the plaintiff; for, while it is stated that the plaintiff's case must be proved by a fair preponderance of evidence, the instructions seems to say that by a fair preponderance is meant only a little more evidence in weight than the defendant's evidence can fairly claim, and leaves out of sight or minimize the important consideration that the plaintiff's evidence must be sufficient in convincing power to satisfy the jury of the existence of the facts, which, in law, justify the plaintiff's recovery, before he can be entitled to a verdict. On the idea of this instruction, a case too weak to stand alone when unopposed by a defense may become invigorated and helped out by a still weaker defense. Similar instructions have been criticised by this court. *Gores v. Graff*, 77 Wis. 174,

46 N. W. 48; *Heath v. Paul*, 81 Wis. 532, 51 N. W. 876; *Pelletier v. Railway Co.*, 88 Wis. 521, 60 N. W. 250. The instruction should, in effect, be that, if the jury are satisfied by a preponderance of the evidence of the existence of all the facts essential to the plaintiff's right of recovery, then they should find for the plaintiff. *Gores v. Graff*, supra. If the mind of the jury is convinced and satisfied, it is quite safe to assume that the preponderance of the evidence is on the side of such conviction."

14—*Stern v. Tuch*, 55 Ill. App. 445 (447).

"This instruction has been expressly condemned by the Supreme Court in *Johnson v. People*, 140 Ill. 350, 29 N. E. 895, where a former decision sustaining the instruction was overruled. Same case, 40 Ill. App. 382."

15—*Lasher v. Colton*, 80 Ill. App. 75 (77).

"The legal truth asserted in the foregoing that unimpeached witnesses are of equal credibility, and when equally opposed to one another the affirmative side of the case must fall, would be correct if *McFarland v. People*, 72 Ill. 368, where it was held, had not been overruled. After that decision, a former judge of this court—Mr. Justice Waterman—when sitting in the criminal court, declined to follow it. Thereupon the question arose once more in the Supreme Court (*Johnson v. People*, 140 Ill.

cover, must prove his case by a preponderance of evidence. And in case they, the jury, should find the evidence in this case so nearly balanced as to make it impossible to tell where the preponderance of the evidence lies, then, and in such case, they should find the issues in favor of the defendant.<sup>16</sup>

(d) The jury are instructed that the burden of proof in this class of cases is always upon the party holding the affirmative; and any material matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence, and in this case if the jury find from the evidence that the plaintiff has proved that he loaned the defendant the sum of \$2,000.00 by only one witness, and that he is contradicted in that respect by a witness of equal credibility and means of knowledge, then, as a matter of law, the plaintiff has failed to prove that he made such a loan to the defendant by a preponderance of the evidence, unless in the minds of the jury there have been facts or circumstances proved corroborating the plaintiff's testimony sufficient to outweigh the testimony on the part of the defendant.<sup>17</sup>

(e) Now if these two witnesses were the only witnesses in the case, the plaintiff would fail to make out his case, because the rule of law is that the plaintiff has the affirmative of the issue, and must make out his case by what is called a preponderance of the testimony; that is, the greater weight, of the testimony. So that when the two parties directly contradict each other in regard to the main facts in the case the evidence is balanced, unless there is some other witness or some other circumstance shown by the evidence which will enable you to judge upon which side the real truth of the matter is.<sup>18</sup>

350, 29 N. E. 895), where Mr. Justice Schofield, who wrote the opinion in the McFarland case, again wrote upon the question, and, with a frankness and fairness characteristic of a great mind, condemned his earlier opinion, and the court overruled the McFarland case. Subsequently this court in *Hanke v. Cobiskey*, 57 Ill. App. 267, following the Johnson case, held 'It is not true as a matter of law that unimpeached witnesses are of equal credibility, but the credibility of witnesses is always a question of fact.'

16—*Schanzenbach v. Brough*, 58 Ill. App. 526 (528).

"Above instruction is wholly wrong. That the appellee worked for the appellant was undisputed. The burden of proving payment was upon the latter."

17—*Holmes v. Horn*, 120 Ill. App. 359 (362).

"The instruction is clearly erroneous for more than one reason; in the first place, it undertakes to lay down a rule that if two witnesses of equal credibility testify directly opposite to each other on a question of fact, that the party holding the affirmative of the proposition would not have a preponderance of the evidence. There are some expressions in *McFarland v.*

*People*, 72 Ill. 368, which seem to sustain the rule of law announced in the above instruction, but that case has long since been overruled by *Johnson v. The People*, 140 Ill. 350, where it is held that the competency of the witnesses to testify is a question of law for the court, but their credibility is a question of fact for the jury. Second, this instruction deprives plaintiffs in error of the prima facie case, which the note itself makes; and lastly, the instruction places the burden of proof as to what the consideration of the note was upon plaintiff's error, when, under the law, the burden of impeaching the consideration is upon the defendant in error."

18—*Sickle v. Wolf*, 91 Wis. 396, 64 N. W. 1028.

"Outside of the testimony of these two witnesses, there was no testimony save that of the plaintiff's bookkeeper, who testified to some implied admissions of the defendant. When the circuit judge said to the jury in substance that when two witnesses directly contradict each other, the evidence is balanced, unless there is some other witness or circumstance in evidence corroborating one side or the other, he was plainly in error. *Mariner v. Pettibone*, 14 Wis. 195. This instruction took no account of the



§ 3340. **Number of Witnesses.** (a) The court instructs the jury that by a preponderance of the evidence is meant the greater weight and value of the evidence, and not the greater number of witnesses.<sup>19</sup>

(b) The burden rests upon the plaintiff to prove that there was a sudden starting of the car. Upon this point you have the testimony of five witnesses for the defendant,—two of them the trainmen, and three not employes of the company. If these witnesses had an equal opportunity to know whether there was or was not a sudden jerking of the car, and if entitled to equal credit, then the plaintiff has failed to produce a preponderance of testimony on this point.<sup>20</sup>

(c) The burden of proof is on the plaintiff, and before you will be warranted in finding a verdict (in his favor) he must satisfy you by a fair preponderance of the evidence, etc. By a preponderance of the evidence is meant the greater weight of value of the same, and necessarily the greater number of witnesses.<sup>21</sup>

(d) Preponderance of evidence does not mean that there shall be a greater number of witnesses on one side than on the other.<sup>22</sup>

(e) In determining where the preponderance or the greater weight of the evidence lies, that is not to be determined by the number of witnesses on either side, or by the number of witnesses on any particular material point.

(f) But that evidence is said to preponderate or outweigh on any given question which is the most satisfying or the most convincing to your minds after you have thoroughly and carefully considered it. It is for you to determine the credit and weight to be given to each witness in the case.<sup>23</sup>

manner of the witness, his interest, intelligence, knowledge of facts, apparent bias or prejudice, or the reasonableness or probability of his story, all of which facts are entitled to be considered in judging where the truth lies when two witnesses directly contradict each other. This instruction in this case was certainly well calculated to mislead the jury, because there was no witness who was present when the contract of service was made, except the parties themselves, and they directly contradict each other. This was without doubt the view of the circuit judge when he granted a new trial, and he certainly was in a better position than we can hope to be to determine the question."

19—*Lamb v. City of Cedar Rapids*, 108 Ia., 629, 79 N. W. 366.

"That statement is in a sense correct, but it is not to be commended, for the reason that in some cases it might be misleading, or at least confusing. A preponderance of the evidence may or may not be given by the greater number of witnesses."

20—*Omaha St. Ry. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209 (211).

"The giving of such an instruction as this," said the court, "is of doubtful propriety, and it does not follow that because five persons had an equal opportunity to observe an occurrence which one person says happened and the other five

say they did not observe, therefore the occurrence did not happen. The jury may have been of the opinion that it was more probable that X. fell from the platform of the car, as she says she did, and that the other witnesses, by reason of their situation at the time did not notice the accelerated speed of the car, than that X. deliberately committed perjury."

21—*Heald v. Western U. Tel. Co.*, 129 Ia. 326, 105 N. W. 588.

"The italics are ours. That this instruction was erroneous cannot be doubted. It is probable that some word or words were omitted by accident or oversight, but, however this may be, we cannot say that the jury were not misled, especially as six witnesses testified in favor of plaintiff and but three in favor of defendant. *Kinyon v. Railway Co.*, 118 Ia. 349, 92 N. W. 40, 96 Am. St. 382."

22—*Dallas Cotton Mills v. Ashley*, — Tex. Civ. App. —, 63 S. W. 160 (161).

"The effect of this instruction was to inform the jury that they need not consider the number of witnesses that testify upon each side, respectively in determining the credibility and the weight that should be given to the testimony. For the error pointed out, the judgment will be reversed."

23—*Karske v. Ridgeville*, 123 Mo. 503, 102 N. W. 22 (23).

(g) The requirement of the law that the plaintiff must establish his cause of action by a preponderance of the evidence before he is entitled to a verdict in his favor does not mean that he is required to have more witnesses than the defendant; it simply means that he must sustain his cause of action by the greater weight of the evidence. The testimony of one witness may have greater weight than the testimony of many. The weight of the testimony of a witness or person depends upon many circumstances; his opportunities to see and know the facts about which he testifies, his apparent candor, his intelligence and conduct upon the stand are all circumstances to be considered by the jury in determining the weight to be attached to the evidence of the several witnesses.<sup>24</sup>

(h) By a preponderance of evidence is not necessarily meant the side which has the most witnesses. It is the evidence which satisfies and convinces your minds and judgments.<sup>25</sup>

(i) Where witnesses of equal candor, fairness, and intelligence testify, with equal knowledge, opportunity of knowledge, and memory, and their testimony is in all respects of equal weight and credibility, and there is nevertheless a conflict which you cannot reconcile, then numbers of witnesses would constitute a preponderance, and your verdict should be according to and in harmony with the testimony of the greater number of witnesses.<sup>26</sup>

"From this statement the jury may have inferred that the number of witnesses upon any given question was of no consequence, and not to be considered, and hence subject to the criticism which this court has frequently made. *McCoy v. Mil. St. R. Co.*, 82 Wis. 215 (217-218), 52 N. W. 93, and cases there cited. *Hardy v. Mil. St. R. Co.*, 89 Wis. 183 (185), 61 N. W. 771. The error in the charge in that case was quite similar to the one in the case at bar, but it was there held not to be misleading because it was followed by a further and correct charge to the jury in the same connection, as above in this case."

24—*Wabash R. R. Co. v. Jensen*, 99 Ill. App. 312.

"Inasmuch as appellee testified in his own behalf and his testimony on vital questions of fact was flatly contradicted by disinterested witnesses, we think it was prejudicial error for the court to omit from the instruction that the jury, in considering the weight which ought to be given to the testimony of the witnesses, should consider the interest of the witnesses in the result of the litigation."

25—*Gortjan v. Rice*, 124 Wis. 253, 102 N. W. 551 (553).

"We agree with counsel for appellant that the learned court's definition is novel. The nearest approach thereto which we are aware of is *Thomas v. Paul*, 87 Wis. 607, 613, 58 N. W. 1031, where the idea thus conveyed was unqualifiedly condemned as incorrect. In the orderly way of determining the truth from evidence, the jury first consider the same and determine on which side of the dispute there is the greater weight thereof, the

more convincing indications as to where the truth lies. They next determine whether such greater indications are sufficiently convincing to satisfy them of the truth of the matter, not beyond a reasonable doubt, for no such degree of certainty in civil cases is required, nor merely as to what the preponderance of the evidence tends to prove, for that degree of certainty leaves the truth of the matter possibly not more than suggested—the mind being far from satisfied as to the real truth. *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48, but satisfied of the truth to a reasonable certainty. That doctrine has frequently been announced in this court. *Pelletier v. The Chicago St. P. M. & O. Ry. Co.*, 88 Wis. 521, 60 N. W. 250; *Curran v. Stange Co.*, 98 Wis. 609; 74 N. W. 377; *Ward v. C. M. & St. P. Ry. Co.*, 102 Wis. 215 (219), 78 N. W. 442. True it is said in *Guinard v. Knapp-Stout & Co.*, 95 Wis. 482, 70 N. W. 671: 'If the mind of the jury is convinced and satisfied, it is quite safe to assume that the preponderance of the evidence is on the side of such conviction.' The learned justice of this court who used that language, arguendo, when presiding at the circuit used the language in *Thomas v. Paul*, supra, which this court was constrained to hold 'was obviously incorrect.' It was not intended here to suggest the use of the expression so made in *Guinard v. The Knapp-Stout & Co. Company* as a correct definition of 'preponderance of evidence' or to sanction such use as permissible."

26—*Indianapolis & E. Ry. Co. v. Bennett*, — Ind. App. —, 79 N. E. 389.

(j) The jury should take into consideration (then follows an enumeration of the matters proper to be considered by the jury, omitting, however, any reference to the number of witnesses testifying pro and con and then concluded), and from all these circumstances determine upon which side is the weight or preponderance of the evidence.<sup>27</sup>

(k) The court instructs the jury that the preponderance of the evidence is not to be determined alone by the number of witnesses testifying on either side of a given proposition; if everything is equal, the testimony of the greater number of witnesses will outweigh the testimony of the smaller number; but you should weigh the testimony of the several witnesses under the rule hereinafter given for determining the credibility of the witnesses, and determine on which side is the preponderance or greater weight of the evidence.<sup>28</sup>

§ 3341. **Reasonable Doubt Not Required in Civil Cases.** You are instructed that the law presumes every one to be honest and upright in all their transactions, until the contrary be proven, and so in every case you should endeavor to reconcile the facts with such theory, if it can be reasonably done; and in considering evidence, if upon any reasonable hypothesis a fact can be accounted for upon any other theory than a dishonest one, you should so find.<sup>29</sup>

"The instruction takes from the consideration of the jury all the corroborating circumstances, which, if considered by the jury, might convince them of the truthfulness of the testimony of one witness and of the falsity of another, although the two witnesses might be of equal candor, fairness, and intelligence. The jury must not only determine the credibility of each witness, but must also determine the weight that shall be given the testimony of each witness. The instruction as requested tended to give the jury to understand that the preponderance of evidence is to be determined by the number of witnesses testifying on each side. See *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313; *Fritzinger v. State*, 31 Ind. App. 350, 67 N. E. 1006; *Bierbach v. Goodyear*, 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; *Amis v. Cameron*, 55 Ga. 449."

27—*Chicago Union T. Co. v. Hampe*, 228 Ill. 346.

"The instruction directed to the jury to determine the matter of preponderance from the elements mentioned in the instruction. It omitted one very important consideration, and for that reason should have been refused. It is doubtful whether an instruction of this character should, in any case, limit the jury to the consideration of matter particularly and specifically mentioned and pointed out in the instruction. It is proper to enumerate elements which they may consider, but they should always be left to consider all the evidence introduced and all the facts and circumstances shown upon the trial, in determining the crucial question as to where lies the greater weight of the proof."

28—*Dale v. Colfax Cons. Coal Co.*, 131 Ia. 67, 107 N. W. 1096.

"What is said as to the testimony of the greater number of witnesses outweighing the testimony of the smaller number, would be objectionable if not qualified, and we are inclined to think that it would be better not to introduce such language in any form into the instructions. But, in the connection in which the language is used, we cannot think that the jury could have been in any way misled. It is, no doubt, abstractly true, that everything else being equal, preponderance should be given to the testimony of the greater number of witnesses, and the whole instruction taken together is not open to any reasonable objection on the ground that the jury would be likely to ignore the quality of the evidence, and consider only its quantity."

29—*Neb. Merc. Mutual Ins. Co. v. Myers*, — Neb. —, 107 N. W. 747 (748).

"To the giving of this instruction the defendant excepted and now insists that it was prejudicial error. We think that the objection to the instruction was well taken. All that the law requires in a civil action is that a disputed fact be established by a preponderance of the evidence. The language employed would be appropriate to an instruction in a criminal case, where the jury is required before conviction to be satisfied to the exclusion of every reasonable doubt; but the doctrine of reasonable doubt does not enter into the trial of a civil action. This instruction was doubtless intended to apply to the charge that the fire was caused by the will-



§ 3342. "Quality" of Evidence an Erroneous Term. (a) You are instructed that in judging of the preponderance of the evidence you should be governed by the quality of the evidence and not simply by the quantity, and in judging the weight to be given to the evidence of the witnesses, you may take into consideration the feeling and bias of any witness or witnesses, their manner on the witness stand, their prejudice, if any, in the opinion of the jury, has been manifested either in favor of one party or the other, and in making your verdict you should take into consideration all the facts and circumstances of the case as detailed before you in the evidence.<sup>30</sup>

(b) You, gentlemen of the jury, are the sole judges of the facts and of the credibility of the witnesses, and of the weight to be given to their respective testimony. You will take into consideration, in passing upon the weight of the testimony, not so much to the number of witnesses that testified to any one given fact, but the quality of the testimony. And in weighing the quality of the testimony you will take into consideration the interest of the witnesses, their appearance on the witness stand, the interest or lack of interest that they, or any of them, may have in the subject-matter of this action and in your verdict; and you may take into consideration all circumstances which appeal to you, as men knowing human nature, which would affect the credibility of the testimony of those witnesses. You are also entitled to take into consideration the age of any witness, if, in your opinion, that age bears upon the reliability of that witness' testimony.<sup>31</sup>

ful, intentional, and wrongful act of the insured, and the jury might well infer that they were justified in finding that the fire was not so caused, if the fire could be explained upon any other reasonable hypothesis. Such is not the law in civil actions."

30—*W. C. St. R. R. Co. v. Raftery*, 85 Ill. App. 319; *Morton v. O'Connor*, 85 Ill. App. 273 (276).

"The first proposition announced by the instruction is that the jury should be governed by the quality of the evidence and not simply by the quantity. We do not know what is meant by 'quality' in the connection here employed, and it is not likely that the jury did. At best, the instruction was in such respect confusing and misleading, and that too in a case where clearness and accuracy were demanded. If it meant that the jury should be controlled by the testimony of the most intelligent, best informed, most credible and least interested witnesses, it was error for the court to invade the province of the jury in thus pointing out to them a class of witnesses whose testimony should be given the greater weight. *C. C. Ry. Co. v. Keenan*, 85 Ill. App. 367.

"We need not speculate as to what other meaning quality has as used, for whatever it may mean the instruction was in effect to single out by the court a class of witnesses whose testimony the jury should attach a controlling weight to; the jury alone shall determine where

the weight of evidence is to be found.

"But the instruction is yet more vicious by its assumption that 'feeling and bias' existed in some witness or witnesses. \* \* \* An employe or a party unimpeached is as credible a witness in the eye of the law as any other, until the contrary appears."

31—*Gilmore v. Seattle & R. R. Co.*, 29 Wash. 150, 69 Pac. 743.

"Doubtless the trial court may properly instruct the jury that, in determining the preponderance of the evidence upon any issue of fact made by the pleadings, they need not be controlled by the mere circumstance that a greater number of witnesses have testified upon one side than upon the other, but that they should take into consideration, along with that circumstance, all the facts and circumstances of the case shown by the evidence, and make up their verdict from the whole thereof as the truth shall appear to them, whether that be with the greater or less number of the witnesses testifying. But it seems to us that the instruction before us does something more than this. It tells the jury that they will not regard the number of witnesses testifying to any given fact, so much as the quality of the testimony. If by the use of the term 'quality' the court meant the better evidence, then the court has invaded the province of the jury, for it is for the jury to say whether they will regard the testimony of the greater

§ 3343. **Burden of Proof on the Plaintiff.** (a) Now, gentlemen, it is the business of the plaintiff to make out his case by the preponderance of the testimony, to satisfy you of the allegations of the complaint by such testimony as you believe; not necessarily by the number of witnesses, but by that testimony which carries conviction to your minds.

(b) It is also the duty of defendant to establish the defense by the preponderance of the testimony, and, if he has established the defense by the preponderance of the testimony—that is to say, “I was not negligent, but this man was injured by reason of his own carelessness and his own negligence”—then you should write your verdict for the defendant.<sup>32</sup>

(c) The burden of proof in this case as to all the material facts necessary to sustain the plaintiff's claim is upon the plaintiff. He must show or prove by competent evidence, so as to satisfy your minds by a preponderance of all the evidence, that such facts exist as alleged by him,—that is, the plaintiff has the burden of proof as to such matters as he alleges—and, in order for you to answer the questions which will be submitted to you, as the plaintiff contends you should answer them, you must be satisfied by a preponderance of all the evidence that his contention is correct.

(d) The defendant has alleged, among other things, that he received the greatest number of votes cast by the duly qualified electors of said village for the office of assessor. The burden of proof in this action as to all the material facts necessary to sustain the defendant's allegations is upon the defendant. He must show or prove by competent evidence, so as to satisfy your minds by a preponderance of all the evidence that such facts exist as alleged by him—that is, the defendant has the burden of proof as to such matters as he alleges—and in order for you to answer the questions which will be submitted to you as the defendant contends you should answer them, you must be satisfied by a preponderance of all the evidence that his contention is correct.

(e) I further charge you, gentlemen of the jury, it is conceded

number of witnesses testifying as more or less controlling than the better testimony of the fewer number. The court cannot, without invading the province of the jury, instruct them which class of evidence is entitled to the greater weight, or instruct them in any manner which will not leave them free to make up their verdict for their own views of the weight of the evidence. Nor is such an instruction rendered harmless by an instruction to the effect that the jury are the sole judges of the credibility of the witnesses and of the weight of the evidence, and it gives them a wrong rule of law for determining that weight and credibility. The instruction is also objectionable for another reason. It is the right of parties to have the jury instructed on the law applicable to the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake as to the meaning of the language

used. The word ‘quality’ is here used in an unusual sense, and the instruction is for that reason liable to confuse and mislead the jury. In *Morton v. O'Connor*, 85 Ill. App. 273, it was held error to instruct the jury that, in judging the preponderance of the evidence, they should be governed by the quality of the evidence, and not simply the quantity. See also the instructive case of *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071.”  
32—*Strickland v. Capital City Mills*, 70 S. C. 211, 49 S. E. 473 (479).

“The whole charge in this connection was manifestly such as to lead the jury to suppose that defendant was required to establish its defense by the preponderance of the evidence. The case of *State v. McDaniel*, 68 S. C. 318, 47 S. E. 384, 102 Am. St. 661, is illustrative of the error of improperly shifting the burden of proof.”

that the defendant received a certificate of election as assessor issued by the proper officers in proper legal form; and the jury is instructed that said certificate is *prima facie* evidence of the defendant's right and title to said office, and his said right and title to said office can only be overcome by some positive testimony that illegal votes sufficient to change the result of the election were cast and counted for the defendant. But when it shows by satisfactory evidence that the certificate does not state the truth as to the result of such election, the presumption in favor of the incumbent, based upon such certificate is rebutted, and then the burden is thrown upon the defendant to establish his right to the office by other competent evidence, to show that he has received an equal number, or a greater number, of legal votes than the plaintiff.<sup>33</sup>

(f) If you believe, from the evidence in this case, that the defendant claims to have paid the plaintiff for the goods in question in this case, or to have paid for them; and if you further believe, from the evidence, that the defendant has failed to prove such payments, by the preponderance of the greater weight of evidence, then you should find in favor of the plaintiff and assess his damages against the defendant, whatever sum the evidence warrants.<sup>34</sup>

(g) The burden of proof as to the second question, and as to every other question of this verdict, except the last question, being the one in regard to damages, is upon the affirmative; that is to say, you will not answer any of these questions by "Yes," unless you are satisfied by the preponderance or greater weight of the evidence in the case, that the fact or facts which you find by such affirmative answer, are true and correct.<sup>35</sup>

**§ 3344. Not Required to Prove Every Material Allegation in Declaration—Jury Not to Determine What is Material.** The court in-

33—State ex rel. Leonard v. Rosenthal, 123 Wis. 442, 102 N. W. 49 (52).

"There is certainly confusion here rather than helpfulness. The first portion of these instructions says in effect, that the burden of proof is upon both parties at the same time. It was proven at the inception of the case that the defendant was declared elected by the board of canvassers of the election, and was holding the office under such determination. This created a presumption in his favor that he had received the number of votes stated in the certificate, and cast upon the relator the burden of showing that the certificate was false, thus rebutting the presumption. When this has been done by competent evidence, it then devolves upon the defendant to establish his right (i. e., the fact that he received the greater number of votes) by other evidence, in order to prevent a judgment of ouster. State ex rel. v. Norton, 46 Wis. 332, 1 N. W. 22. These rules should have been given to the jury."

34—McAmore v. Wiley, 49 Ill. App. 615 (618).

"This instruction required the jury to find against appellant at all events, if he fails to prove payments. The amount, however, is

limited by the instruction to 'what the evidence warrants,' thus casting the burden of proof upon the defendant, making his lack of proof supply the preponderance of the evidence the law requires of the plaintiff, and gives him a verdict, without proof, if the jury obeyed the instruction.

35—Hupfer v. Distilling Co., 127 Wis. 306, 106 N. W. 831.

The court said that it "was equivalent to saying that upon the question of damages the burden of proof was not upon the party seeking to establish the affirmative. Certainly such burden was not on defendant. The portion of the charge quoted left the jury to infer that it was not on the plaintiff. The whole purpose of the action was to recover damages; and in another portion of the charge the jury were told, that under no circumstances could they 'give the plaintiff damages in excess of \$.....' Of course, the question whether damages were sustained was a question of fact to be determined by the jury from the evidence; and the burden of furnishing such evidence was on the plaintiff. We are constrained to hold that the portion of the charge thus quoted was misleading and hence erroneous."



structs you that in this case the burden of proof is upon the plaintiff to prove all material allegations of the declaration by a preponderance of the evidence. If you believe, after considering all the facts in the case, that the evidence is equally balanced on any material allegation of the declaration, or that the evidence preponderates in favor of the defendant on any such material issue made by the declaration, then you should find your verdict in favor of the defendant.<sup>36</sup>

§ 3345. **Proving the Case as Alleged in the Declaration.** The court instructs the jury that if they find from the evidence in this case that the plaintiff has proved his case as alleged in the declaration, by a preponderance of the evidence, then they should find the defendant guilty, and assess the plaintiff's damages, if any, at such sum as you believe from the evidence will fairly and reasonably compensate him for the injuries sustained by him, if any, as the direct result of the accident in question.<sup>37</sup>

§ 3346. **Burden of Proof Not on Defendant.** The burden of proof is not upon the defendant to show how the plaintiff came to fall. If the preponderance of the testimony does not show that she fell by reason of the car being started before the plaintiff had an opportunity to alight therefrom, your verdict should be not guilty.<sup>38</sup>

§ 3347. **Burden of Proof—Justification Must be Proved by Defendant—Contributory Negligence.** (a) In this case, as in all other civil cases, the burden is upon the plaintiff to establish the facts essential to his recovery by a preponderance of the evidence.<sup>39</sup>

36—*Jones v. Hunter*, 99 Ill. App. 413 (415).

"By the instruction the jury were told in effect that they should not find for the plaintiff unless he proved every material allegation contained in all the counts of the declaration, those in the special as well as those in the common counts. To a recovery it was only necessary for the plaintiff to prove the material allegations contained in some one count of his declaration. The instruction is also open to criticism that it leaves to the jury the determination of what are material allegations." See also *C. T. R. R. Co. v. Schmelling*, 197 Ill. 619 (631), 64 N. E. 714, *aff'd* 99 Ill. App. 577.

37—*Chicago City Ry. Co. v. Mauger*, 105 Ill. App. 579 (583).

"The giving of an instruction substantially like the above was held error in *Chicago R. I. & P. Ry. Co. v. Cleveland*, 92 Ill. App. 308." But see *I. C. R. R. Co. v. Harris*, 162 Ill. 200 (201), 44 N. E. 498; *City of LaSalle v. Kastha*, 190 Ill. 130 (133), 60 N. E. 72; *Mt. Olive Coal Co. v. Rademacher*, 190 Ill. 538 (540), 60 N. E. 888; *N. C. St. Ry. Co. v. Hutchinson*, 191 Ill. 104, *aff'd* 92 Ill. App. 567, 60 N. E. 850; *C. & E. I. R. R. Co. v. Filler*, 195 Ill. 9 (17), 62 N. E. 919; *N. C. St. R. R. Co. v. Polkey*, 203 Ill. 225 (231), 67 N. E. 793; *U. S. Br'g Co. v. Stallenberg*, 211 Ill. 531 (533-534), 71 N. E. 108, when similar instructions have been approved.

38—*W. Chicago St. R. R. Co. v. McCafferty*, 220 Ill. 476 (478-479), 77 N. E. 153.

"It is said by appellant that the object of this instruction was to tell the jury what issue was raised by the pleading. The declaration alleged that while the plaintiff was in the act of alighting from the car the defendant started the car before the plaintiff had an opportunity to alight therefrom. We think the reasonable construction of this allegation is, that while plaintiff was in the act of alighting, but before she had an opportunity to complete the act, the car was started, thus limiting the opportunity to alight to the interval between the time she started to alight and the time the car was started. The instruction is misleading, in that it does not confine the opportunity to alight to the interval between the time when she started to alight and the time when the car was started. The jury might have concluded from the instruction that if there was sufficient time between the stopping of the car at the avenue and its starting to afford an opportunity to plaintiff to alight, then their verdict should be for the defendant, although they believed, from the evidence, that the car was started by defendant's servants at a moment when they knew the plaintiff was in the act of alighting therefrom. The instruction failed to definitely state the issue presented by the pleadings and was therefore properly refused."

39—*Monson v. Lewis*, 123 Wis. 583, 101 N. W. 1094 (1095).

"This might well be understood as meaning that the plaintiff, after

(b) The court instructs you that the burden rests upon the plaintiff to prove the material facts averred in the complaint. You may consider what facts have been proved, and to this end you may consider what facts the parties have attempted to prove. Where the plaintiff has offered evidence to prove a point, and the defendant has offered evidence to disprove it, you will then weigh all the evidence on such point, and determine the point in favor of the party whose evidence you find has the greatest weight in affecting such point; and if, upon weighing the whole evidence, you find that the plaintiff has not made her case out by a fair preponderance of the evidence, your verdict should be for the defendant, but, taking the evidence as a whole, you find that the plaintiff has sustained the material allegations of her complaint by a fair preponderance of the evidence, then you should find for the plaintiff, and assess such damages as will adequately and reasonably compensate decedent's next of kin for the loss sustained by his death.<sup>40</sup>

§ 3348. **Burden of Proof on Objectors.** In a case of this kind, where remonstrators appeal from the order of the board of commissioners establishing a drain or ditch, the burden of proof is upon the said remonstrators to establish the allegations in their remonstrances.<sup>41</sup>

proving the blow, was obliged to prove that there was no justification for it. This is not the law. The blow and consequent damage being admitted by the defendant, a prima facie case was made, and the burden lay upon him to prove facts constituting a justification therefor. *Timm v. Baer*, 29 Wis. 254; *Blake v. Damon*, 103 Mass. 199, 2 Greenleaf Ev. (15th Ed.) §§ 95-98."

<sup>40</sup>—*Chicago I. & L. Ry. Co. v. Wicker*, 34 Ind. App. 215, 72 N. E. 615.

"By this instruction the jury were told that, to determine what facts had been proved, they might consider what facts the parties had attempted to prove. The instruction was radically wrong. Juries are apt enough to consider matters outside of the evidence, without being directed to do so by the court. At the time the cause was tried, the burden of proving contributory negligence was upon the defendant. It follows that the instruction was wrong, in that it directed the jury to find for the plaintiff if the material allegations of her complaint had been sustained; ignoring the question of contributory negligence, proof of which, having been made by the defendant, might have been sufficient to defeat the action, although the allegations of the complaint have been proven. The instruction is otherwise defective and, after very mature consideration, we are of the opinion that the error in giving it is one that ought not to be condoned."

<sup>41</sup>—*Trittippo v. Beaver*, 155 Ind. 652, 58 N. E. 1034 (1035).

"Upon appeal the cause stands as

any other adversary proceeding. The petition and the reports of the viewers and reviewers are considered as the plaintiffs' complaint, and the remonstrance as the defendant's answer, and only such facts as are not controverted by the remonstrance stand admitted as true. It follows, therefore, that upon appeal it is incumbent upon the plaintiffs (petitioners) to establish, by evidence, such facts as were necessary to be established before the board, if those facts are controverted by remonstrance. Section 4285, Rev. St. 1881 (section 4285, Horner's Rev. St. 1897; Section 5655 Burns' Rev. St. 1894) empowers the board of commissioners to cause drains to be constructed "when the same shall be conducive to the public health, convenience or welfare, or when the same shall be of public benefit or utility." Section 4294 Rev. St. 1881 (section 2494 Horner's Rev. St. 1897; section 5664 Burns' Rev. St. 1894) provides that if "the board find the proposed drain to be of public utility or conducive to health, or of public benefit or convenience, it shall establish the same." These facts may be controverted by the remonstrants, and tried on appeal in the circuit court, and, if controverted, the burden is upon the plaintiffs (petitioners) to establish these facts by evidence, in order to make a prima facie case. Since the appellants introduced some evidence tending to prove that the drain would not be of public utility nor conducive to health, the giving of the instruction was harmful error."

## CHAPTER CVII.

### TESTIMONY OF PARTIES.

See Approved Instructions, Chapter XIX, Vol I.

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| <p>§ 3349. Credibility of parties to the suit—Interest in the result—Singling out a witness.</p> <p>§ 3350. Testimony of plaintiff consistent with both diligence</p> | <p>and negligence of defendant.</p> <p>§ 3351. Books falsified—Credibility of the partners.</p> <p>§ 3352. Failure of party to testify.</p> |
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§ 3349. **Credibility of Parties to the Suit—Interest in the Result—Singling Out a Witness.** (a) Under the law of this state, the parties to a civil action have a right to be sworn as witnesses and to give evidence in their own behalf, and one of the parties to this action has availed himself of this right, and has been sworn as a witness, and has given evidence in his own behalf; but, while the law makes this competent evidence, its weight is exclusively a question for the jury to determine, and in weighing the evidence of the defendant the jury have a right to take into consideration the great interest which he naturally feels in the result of the suit, and the strong temptation which he naturally feels to give evidence favorable to himself, and to give his evidence such weight, and only such weight as the jury think it ought to receive. You, gentlemen of the jury, are the exclusive judges of all questions of fact, and of the credibility of each and every witness who has testified on the trial.<sup>1</sup>

1—Harriott v. Holmes, 77 Minn. 245, 79 N. W. 1003 (1004).

"In determining whether the giving of this instruction was prejudicial error, its context and the particular facts of this case must be considered. The court correctly charged the jury that they might take into consideration the interest of the witnesses in the result of the action; and then the defendant is singled out, and the jury instructed particularly as to his credibility; but nothing was said as to X, who had covenanted with the plaintiff that the claim against the defendant was justly due, and who was directly interested in maintaining the action, and whose alleged fraud was the principal issue in the case. The plaintiff was not sworn as a witness, as he knew nothing personally as to the issues; and necessarily his right to recover rested upon the testimony of X, the real party in interest, which was contracted by the defendant. The important question for the jury to determine was which of these witnesses was entitled to credit. Such being the case, the court, after calling attention to the fact that

parties have a right to be sworn as witnesses, and that one of the parties to this action had availed himself of this right and given evidence in his own behalf, then instructs the jury that in weighing his testimony they have a right to take into consideration the great interest he naturally feels in the result of the suit, and the strong temptation he naturally feels to give evidence favorable to himself. The instruction assumes as a fact or legal inference that, because there was \$390 involved in the result of the action, the defendant naturally felt a great interest in the result and a strong temptation to give evidence favorable to himself. If such was the fact as to the defendant, what of X, who had not only the same pecuniary interest in the result of the action, but the further interest of vindicating himself from the charge of fraud made against him? The giving of the instruction complained of was prejudicial error as applied to the particular facts of this case, because it singled out the defendant in violation of the rule that the trial court must not charge as to the



(b) While the law makes the plaintiff a competent witness in this case, yet the jury have a right to take into consideration her situation and interest in the result of your verdict, and all the circumstances which surround her, and give to her testimony only such weight as in your judgment it is fairly entitled to.<sup>2</sup>

(c) The jury are instructed that in weighing the plaintiff's evidence, you should take into consideration his interest in this suit, and what effect, if any, such interest is likely to have upon his testimony, and give his testimony such weight and credit as you think, under all the circumstances, it is entitled to.<sup>3</sup>

(d) The court instructs the jury that the preponderance of the evidence does not necessarily depend entirely upon the number of witnesses testifying on either side of the case; that the jury are the sole judges of the credibility of the witnesses, and of the weight to be given to the evidence of each and all of them; and that if after considering all the evidence in the case you believe the testimony of any witness as to certain facts, then you should find accordingly, although such testimony is not corroborated, and is denied by other witnesses.<sup>4</sup>

credibility of particular witnesses of the same class. This instruction did not leave the defendant and the witness X before the jury on equal terms. It also invaded the province of the jury in assuming that the defendant naturally felt a strong temptation to give testimony favorable to himself. The vice in the instruction was not cured by the general charge that the jury were the exclusive judges of all questions of fact and the credibility of the witnesses. We hold that it was prejudicial error to give the instruction."

2—*Steurer v. Reid*, 56 Ill. App. 245 (247).

"This instruction gave prominence to the interest of plaintiff in the result of the suit and ignored the same cause affecting the credibility of defendant, and the decision of the jury hinged on the question of their respective credibility. The rules in that regard applied equally to the parties, and in a statement of the law they should be presented to the jury as so applying."

3—*Arnold v. Pucher*, 83 Ill. App. 182.

"It is bad because it singles out a particular witness and applied to him a rule which should have been made to apply, if at all, to others as well, viz., the defendants who were witnesses in the case. *Phoenix Insurance Co. v. LaPoint*, 118 Ill. 384; 8 N. E. 353; *Penn. Co. v. Verstet*, 140 Ill. 637; 30 N. E. 540, 15 L. R. A. 798; *Parlin et al. v. Finfrouk*, 65 Ill. App. 174. It is true that instructions somewhat similar to the one here in question have been approved in *West Chicago St. R. R. Co. v. Estep*, 162 Ill. 130, 44 N. E. 404, and *West Co. St. R. R. Co. v. Dougherty*, 170 Ill. 379, 48 N. E.

1000. But in neither the *Estep* case, nor the later *Dougherty* case, does the Supreme Court expressly over-rule the doctrine as to the vice of singling out a particular witness in an instruction, announced in the *Versten* case and others cited supra. As applied to the evidence in the *Dougherty* case, and in the *Estep* case, the instruction may have been proper, for, each being a suit against a corporation, it may well have been that no other than the plaintiff was a witness, who could have been said to have been an interested witness. No objection to the instruction because it singled out a particular witness seems to have been raised or considered in either of these cases. But in the case under consideration, there were defendants who testified as well as the plaintiff, and the same statute operated to remove their disability as witnesses, and made their interest a matter for the consideration of the jury. The instruction should have applied the rule to the defendants as well as to the plaintiff, and it being vicious in that it applied it to the plaintiff only thereby improperly singling him out to the jury, the trial court was justified in refusing to give it."

4—*Chicago U. T. Co. v. Shedd*, 110 Ill. App. 400 (401).

"There was only one witness who was not corroborated and was contradicted on the vital questions of fact in the case, and that was the plaintiff. In effect the instruction was the same as if it had read: 'If, after considering all the evidence, you believe the testimony of the plaintiff, you will find accordingly.' One cannot accomplish by indirection what he is forbidden to do directly."

§ 3350. **Testimony of Plaintiff Consistent with Both Diligence and Negligence of Defendant.** If you believe that the testimony of the plaintiff in this case is consistent both with the theory of diligence and negligence on the part of the defendant railway company, then I charge you that you must adopt the theory of diligence, and that the witness for the defendant has sworn truly, and must find for the defendant.<sup>5</sup>

§ 3351. **Books Falsified—Credibility of the Partners.** Various books of plaintiffs have been introduced in evidence, and it is claimed by the defendants that the books have been changed and falsified in their makeup and entries. If the jury are satisfied that such is the fact, then you would be warranted in regarding the testimony of the plaintiffs themselves with suspicion, and their entire case with a want of confidence in its justness, and the legality of the claim here urged by them against the defendants.<sup>6</sup>

§ 3352. **Failure of Party to Testify.** The defendant G. has been represented by counsel, and was present in court the first day of this trial and has since been absent. The defendant S. has been in court during the trial, but has seen fit to decline to take the stand, and I charge you, gentlemen, that the unexplained failure of G. and S. to take the stand and give evidence here may be given by you such weight as you see fit. And it is a legitimate fact for you to consider in determining the merits of this case.<sup>7</sup>

5—Ga. S. & F. Ry. Co. v. Wisenbacker, 120 Ga. 656, 48 S. E. 146.

"This request was properly refused. There was a direct conflict as to a question of fact between the testimony of the plaintiff and that of the engineer, and it was for the jury to determine what credit they would give to the plaintiff. His testimony was not consistent with the theory of diligence on the part of the company, and the request was not adjusted to the issue the jury were called on to determine. To have given it in charge would have been to clearly invade their province. On the argument before us, counsel for the railway company insisted that the request should have been given, as it 'was framed from the decision of this court in the case of G. S. & F. Ry. Company v. Thompson, 111 Ga. 731, 36 S. E. 945. There the company introduced testimony which fully overcame the presumption of negligence on which the plaintiff rested his case. He sought, by offering circumstantial evidence, to discredit the company's witnesses, but this evidence, 'while consistent with the theory that they did not swear truly, was also consistent with the theory that they did.' Accordingly, this court held that in 'such a case the positive testimony must control.'"

6—Gutherless et al. v. Ripley et al., 98 Ia. 290, 67 N. W. 109 (110). The court said:

"The plaintiff is a co-partnership composed of three persons. If there were alterations in their books,

which were introduced in evidence, it is not shown that all of the plaintiffs knew of them. The fraudulent act of one party would not affect the credibility of another, who was guiltless of intentional wrong."

7—McDonald v. Smith, 139 Mich. 211, 102 N. W. 668 (673).

"It was not strictly accurate to tell the jury to give 'such weight as you see fit' to the failure of defendants to take the stand. If this expression stood alone, it might lead the jury to the erroneous belief that they might infer from defendants' silence some essential fact which they could not infer from the testimony. But taking this language in connection with that part of the charge immediately following which placed the burden upon the plaintiff of establishing 'the claim which he asserts by a fair preponderance of the evidence' we think the jury would understand that they could consider defendants' failure to give testimony only in drawing inferences from and in weighing plaintiff's testimony. So understood, the charge was not erroneous. In *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. 425, defendant, though in court during trial saw fit to offer no testimony. It was held that it was not error for the court to charge the jury that defendant's silence 'may be considered by you as to one of the facts in this case as to whether the position of the plaintiff is in accordance with the facts.'"

## CHAPTER CVIII.

### IMPEACHMENT IN GENERAL—GENERAL REPUTATION— CONTRADICTORY STATEMENTS.

See Approved Instructions, Chapter XX, Vol. I.

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| <p>§ 3353. Purpose of impeaching testimony.</p> <p>§ 3354. Giving full faith and credit to an impeached and uncorroborated witness.</p> <p>§ 3355. Testimony of an impeached witness may be believed even when not corroborated.</p> <p>§ 3356. Impeachment must be as to a material matter.</p> | <p>§ 3357. Good reputation.</p> <p>§ 3358. Party vouching for the credibility of his own witnesses.</p> <p>§ 3359. Contradictory statements out of court.</p> <p>§ 3360. Character of witnesses—Based upon law and evidence in case—Mere inference, conjecture and personal experience of jurors.</p> |
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§ 3353. **Purpose of Impeaching Testimony.** Certain character of testimony has been introduced which is in law known as "impeaching testimony," that is, that witnesses who have testified in the case have at other times testified different and contradictory to the testimony of the witnesses testifying before you. This character of testimony is admitted before you for the purpose of enabling you to weigh the testimony of the witness or witnesses thus sought to be impeached, and it is introduced only for this purpose.<sup>1</sup>

§ 3354. **Giving Full Faith and Credit to an Impeached and Uncorroborated Witness.** (a) The court instructs you for the state that although you may believe from the evidence, beyond a reasonable doubt, that the witness for the state may have a bad reputation for truth and veracity, still you may give full faith and credit to his testimony and convict the defendant on the testimony of said witness without corroboration.<sup>2</sup>

(b) If the jury find that what L. has testified to was the fact, your verdict should be for the defendant, and if you find that there is no evidence impeaching or contradicting him, his testimony is entitled to full credit and belief.<sup>3</sup>

1—Dean v. State, 45 Tex. Cr. App. 339, 77 S. W. 803.

"As we understand the rule," said the court, "the jury may entirely discredit, and disbelieve a witness who has been impeached; yet the court told the jury that it was introduced simply and solely for the purpose of enabling the jury to weigh the testimony of the witnesses thus impeached. We are of opinion that the charge was too restrictive. Howard v. State, 25 Tex. App. 693, 8 S. W. 929; Winn v. State, 34 Tex. Cr. App. 37, 28 S. W. 807."

2—Snyder v. State, 78 Miss. 366, 29 So. 78.

The court held this instruction erroneous, "because it practically instructs the jury to 'give full faith and credit' to the testimony of the impeached witness, and to convict on it 'without corroboration.' It does not even require as a prerequisite that they should believe the testimony."

3—Bradley v. Gorham, 77 Conn. 211, 58 Atl. 698.

This instruction was erroneous. There was evidence contradicting him, but, had there not been, al-



**§ 3355. Testimony of an Impeached Witness May be Believed Even When Not Corroborated.** (a) There cannot be a conviction in any criminal case upon the testimony of a witness for the prosecution who has been impeached, unless such testimony has been corroborated by other testimony tending to show the guilt of the defendant; and in no criminal case can there be a lawful conviction, unless the jury be satisfied from the evidence, beyond a reasonable doubt, that the defendant is guilty.<sup>4</sup>

(b) The court charges the jury, if the jury believe from the evidence that G. has been successfully contradicted as to any material fact, the jury may, in connection with all the other evidence, disbelieve him entirely.<sup>5</sup>

**§ 3356. Impeachment Must be as to a Material Matter.** (a) The jury are instructed that in determining the question of fact in this case, they should consider the entire evidence introduced by the respective parties; but the jury are at liberty to disregard the statement of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction or by proof of having made different statements at other times, or by proof of bad reputation for truth and veracity in the neighborhoods where they live—except in so far as such witnesses have not been corroborated by other credible evidence, or by facts or circumstances proved on the trial.<sup>6</sup>

though his veracity were unimpeached, the jury were not, as a matter of law, bound to regard what he had said as entitled to full credit and belief. They were to consider all the evidence in the case. The issue was as to the facts in controversy, and could not properly be narrowed in this manner to a question as to the credibility of a single witness. *White v. Reed*, 15 Conn. 457, 465; *Freeman's Appeal*, 74 Conn. 247, 249, 50 Atl. 748; *Lewis v. Lewis*, 76 Conn. 586, 593, 57 Atl. 735."

4—*Osborn v. State*, 125 Ala. 106, 27 So. 758 (759).

In comment the court said "that the testimony of an impeached witness is sufficient to convict without corroboration by other evidence tending to show guilt, and was held correct in *Cohen v. State*, 50 Ala. 108, and in *Porter v. State*, 55 Ala. 95, but was condemned in *Moore v. State*, 68 Ala. 360, and again in *Horn v. State*, 98 Ala. 23, 13 So. 329.

A similar one was also held bad in *Ray v. State*, 50 Ala. 104, but for the reason given in that case the witnesses had not been impeached. In *Moore's case*, referred to, it was said by the court that, "when the character of a witness is assailed, or he is otherwise impeached as being unworthy of credit, it is entirely within the province of the jury as the exclusive judges of the facts to say what degree of weight or credibility shall be given to his testimony. It does not lie in the mouth of any court to instruct the jury as matter of law that they cannot convict on such testimony unless it is corroborated." We are

of the opinion that the latter case states the law correctly. The statements of an impeached witness may be so disinterested and consonant with reason as to carry with it internal evidence of truth. The general rule applicable alike to witnesses who are and who are not impeached is that an instruction by the court defining the effect to be given their statements is an infringement upon the jury's province. *North v. State*, 87 Ala. 85, 6 So. 371; *Corley v. State*, 28 Ala. 22; *Railroad Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66; *Central R. & Banking Co.*, 1 Greenl. Ev. par. 10, and note; 29 Am. & Eng. Enc. Law, 766-768. On this point the cases of *Cohen v. State* and *Porter v. State*, supra, must be overruled."

5—*Hall v. State*, 130 Ala. 45, 30 Co. 422 (425).

The court held that this instruction "had a tendency to mislead the jury to discard G's testimony upon the mere consideration that he had been successfully contradicted as to a material fact, when they might have concluded that he testified conscientiously as to that fact, and was honestly mistaken as to it."

6—*Geringer v. Novak*, 117 Ill. App. 161.

"The phrase, 'as have been successfully impeached either by direct contradiction,' etc., does not go far enough. The jury should have been told that 'the contradiction must go to the extent that they believe the impeached witness has willfully sworn falsely upon a material matter, before he is impeached in the sense that his evidence can be disregarded, except

(b) If the jury believe from the evidence that any witness has been successfully impeached on this trial, or that he has willfully sworn falsely as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial.<sup>7</sup>

(c) If you believe that in any part of his testimony any witness has sworn falsely or erroneously, you are entitled to disregard all his evidence.<sup>8</sup>

§ 3357. **Good Reputation.** You are instructed that where a person has lived for a considerable length of time in the community and is well known throughout that community, that the absence of anything being said in the community derogatory to his truthfulness, if proven, is competent evidence to be considered by the jury in connection with all the evidence in the case to sustain his reputation as a truthful person.<sup>9</sup>

§ 3358. **Party Vouching for the Credibility of His Own Witnesses.** The court instructs you that the plaintiff vouches for the credibility of his witnesses, and cannot be heard to impeach their testimony, or to question the veracity of any one of them.<sup>10</sup>

there be corroboration.' *Beedle v. People*, 204 Ill. 200. The phrase 'or by proof of having made different statements at other times,' is subject to like criticism. It is also defective in not limiting such statements to matters material to the issues in the case."

7—*Geringer v. Novak*, 117 Ill. App. 161.

"Even where a witness has been successfully impeached, the jury are not justified in disregarding his entire testimony unless they believe from the evidence that such witness has willfully sworn falsely to some matter material to the issues. The witness may have innocently made the incorrect statement.

The remainder of the instruction is unobjectionable, except in this: by being put as an equivalent of or in opposition to the phrase 'successfully impeached,' it leads the jury to believe that under such phrase, in the absence of corroboration, something less than wilful false swearing will justify them in wholly discrediting a witness. *Kornazewka v. W. C. St. Ry. Co.*, 76 Ill. App. 370; *Lieserowitz v. W. C. St. Ry. Co.*, 80 Ill. App. 255; *Baker v. Robinson*, 49 Ill. 301. The instruction is erroneous."

8—*Gerardo v. Brush*, 120 Mich. 405, 79 N. W. 646 (647).

"The above request is faulty in that—First, it leaves out the question of materiality; and second, it would have instructed the jury that they could disregard all his evidence if they found that upon any point he had sworn erroneously. That is not the law. Impeachment by contradictory testimony must be on a material matter, and an error or mistake on the part of a witness does not warrant an instruction

that the jury may entirely disregard the testimony."

9—*Hays v. Johnson*, 92 Ill. App. 80 (91).

"If this instruction is in harmony with the rule laid down in 1 *Thompson on Trials*, secs. 564-5 and 29 *Am. & Eng. Ency. of Law*, 825 'witnesses 5b,' and the authorities there cited, still a different rule has been established in this state. A similar instruction offered under a like state of proof was held properly refused in *Magee v. People*, 139 Ill. 138, 28 N. E. 1077.

It was there held that general reputation is what is generally said of a person by those among whom he dwells or with whom he is chiefly conversant, and that after witnesses have testified that a person's general reputation thus established is bad, the fact that others never heard him spoken of in that regard does not tend to disprove the evidence of impeaching witnesses. *Gifford v. People*, 148 Ill. 173, 35 N. E. 754, does not conflict with the case just cited."

10—*Joyce v. St. L. Tr. Co.*, 111 Mo. App. 565, 86 S. W. 470.

"This instruction says the plaintiff cannot impeach the testimony of his witnesses. Strictly speaking, and using the word 'impeach' in a technical sense, the instruction may be regarded as good law. But without further advice to the jury as to what was meant by impeaching the testimony of a witness, it was likely to be understood as precluding the plaintiff from disputing the truth of the testimony of any witness introduced by him. The tendency of the instruction to mislead the mind not trained in legal phraseology is apparent from the two propositions declared in it: that the plaintiff could not be heard

§ 3359. **Contradictory Statements Out of Court.** (a) The court instructs the jury that the credibility of a witness may be impeached by proof that he or she has made a statement or statements out of court contrary to the testimony given by such witness on the trial. If the jury believe, from the evidence, that any witness who has testified in this case has made a statement or statements upon a material fact in the case out of court contrary to the statements made by such witness upon the trial, then the contradictory statements would tend to impeach such witness, and you would be justified in rejecting the testimony of such witness if, from all the evidence, you believe it to be untrue.<sup>11</sup>

(b) The court charges the jury that if B. made statements out of court in conflict with those in court, and if they believe this fact, then B. is impeached.<sup>12</sup>

(c) The court instructs you that if any witness has made statements out of court different and contradictory from those made in court in this case, then you may disregard the whole testimony of such witness or witnesses if you see proper to do so.<sup>13</sup>

(d) The jury are instructed that the weight of the evidence is not governed by the number of witnesses alone testifying on the one side or the other of the case. You have the right to give the evidence of all witnesses such weight as you believe from all the facts and circumstances on the trial such evidence is entitled to. You may disregard the testimony of any witness if you believe the witness has testified falsely, and is not corroborated by any other credible witnesses in the case. And you may, in weighing the evidence, take into consideration the reasonableness or unreasonableness of the testimony of any witness, his demeanor on the witness stand, his interest in the case, and from all the facts and circumstances in the case give the

to impeach the testimony of his witnesses or question the veracity of any one of them. The instruction did not simply deny plaintiff's right to attack the credibility of his witnesses, but might have been understood to deny his right to attack the truthfulness of the testimony given by any of them. This is not the law. *Meyer Bros. v. McMahan*, 50 Mo. App 18; *Greenleaf, Evidence* (16th Ed.), §§ 442, 443b. The party who puts a witness on the stand may prove, by other evidence, facts inconsistent with the witness' statement, even if the inconsistent evidence tends to show the witness committed perjury. *Brown v. Wood*, 19 Mo. 475."

11—The above instruction was held reversible error by a majority of the court without any reason being given. Mr. Justice Carter, who delivered the opinion of the court, speaking for himself said that he was unable to see any valid objection to the instruction. *Healy v. People*, 163 Ill. 372 (385), 45 N. E. 230.

Note: The instruction omits the material element of corroboration.

12—*Mims v. State*, 141 Ala. 93, 37 So. 354.

The court held the above charge to have been properly refused. "As hypothesized, the jury may have believed that B made statements in conflict with his testimony, and yet not have discredited his testimony. They may have believed that he was swearing the truth notwithstanding their belief that he had made contradictory statements."

13—*McDonald v. State*, 78 Miss. 76, 28 So. 750 (751).

The court in holding this erroneous said "it does not even qualify by requiring the statements out of or in court to be material. It would operate upon the mind of the average juror as an injunction not to believe anything the defendant said if some one testified that he anywhere in his testimony contradicted anything he had said outside. It is dangerous thus to experiment on the exploded doctrine of *falsus in uno*, etc. It is of no use, because jurors will be quick anyway to draw proper conclusions from contradictions, and they should not be urged beyond fair grounds. Such efforts to get some advantage from the old doctrine must lead to numerous reversals."



testimony of each witness such weight as in your opinion it is justly entitled to.<sup>14</sup>

§ 3360. **Character of Witnesses—Based upon Law and Evidence in Case—Mere Inference, Conjecture and Personal Experience of Jurors.** In passing upon the question of the credibility of witnesses, you will always consider, of course, any motives that a witness may have for testifying the way he does. The temptation to perjury,—you should always consider that. You will always consider, of course, the character of the witnesses, so far as you know it, as bearing upon the question whether a witness would be truthful and reliable or not. My observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth.<sup>15</sup>

14—Hughes v. Ferriman, 119 Ill. App. 169 (172).

"The vice in this instruction is in the clause: 'You may disregard the testimony of any witness if you believe the witness has testified falsely, and is not corroborated by other credible witnesses in the case. This has been condemned in this state, almost 'times without number.' It is needless to cite authority. To warrant a jury in disregarding the testimony of a witness they must believe from the evidence that he has willfully and knowingly testified falsely, as to some matter or fact material in the case, and then he may be corroborated by other credible evidence in the case not necessarily by the oral statements of witnesses, for there may be other credible corroborating evidence besides that of 'witnesses.' And further one corroborating witness is sufficient. The plural word 'witnesses' should never be used, alone, in this connection."

15—Johnson v. Superior Rapid Transit Ry. Co., 91 Wis. 223, 64 N. W. 753.

"In determining the credibility of the several witnesses, each jurymen was thus directed to take into consideration his own knowledge of the witness or witnesses and, in addition to that, the judge instructed the jury as to what his own observations had been in regard to the truthfulness of good and bad persons. As this court has repeatedly held: 'Every party to an action at law in this state has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference, conjecture, and personal experience.' Sherman v. Lumber Co., 77 Wis. 22, 45 N. W. 1079; Little v. Railway Co., 88 Wis. 408, 60 N. W. 705.

The error mentioned was not cured by the court's telling the jury, in effect, that nothing was to be found 'by conjecture,' but that their verdict 'must be based upon evidence' and 'facts inferable from the proofs.'"

## CHAPTER CIX.

### ADMISSIONS AS AFFECTING CREDIBILITY.

See Approved Instructions, Chapter XXI, Vol. I.

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| <p>§ 3361. Verbal and written admissions—Weight of.</p> <p>§ 3362. Verbal admissions to be received with great caution.</p> <p>§ 3363. Invasion of the province of the jury—Weight of the evidence.</p> <p>§ 3364. Admissions not subject to mistakes, as a matter of law.</p> <p>§ 3365. Admission by silence when reply is called for.</p> <p>§ 3366. Failure to produce books and papers is not necessarily an admission.</p> | <p>§ 3367. Admission after beginning suit — Argumentative instructions.</p> <p>§ 3368. Admission of matters set out in affidavit for continuance of opposite party.</p> <p>§ 3369. Opening statement of counsel not binding as admission.</p> <p>§ 3370. Admissions of facts are evidence, although made in an effort to compromise.</p> <p>§ 3371. Admission in letters.</p> |
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§ 3361. **Verbal and Written Admissions—Weight of.** The admission of a party to a suit, when made deliberately, and with full understanding of the matter to which such admission relates, often affords satisfactory evidence; but as a general rule the statements of witnesses as to the verbal admission of a party should be received by the jury with great caution, as that kind of evidence is subject to imperfections and mistake. But any statement made by the plaintiff as to the amount of his alleged damages which was at the time stated to be an offer of compromise, cannot be considered as an admission of plaintiff of the amount of his alleged damages.<sup>1</sup>

1—Castner v. Chicago B. & O. Co., 126 Ia. 581, 102 N. W. 499 (500).

"The instruction is plainly erroneous and misleading in referring to the effect to be given to the letter and oral admissions. In the first place it draws no distinction between the oral admissions established only by the testimony of a witness who heard them, and written admissions confessedly made by the party himself that is established by writing over his own signature. As to oral admissions the rule of the instruction is not open to serious criticism, although it tends to deprive them of the weight to which they are entitled when clearly proven. The language of Greenleaf which is to some extent embodied in this instruction is as follows: 'With respect to all verbal admissions, it may be observed they ought to be received with great caution. The evidence consisting as it does in the mere repetition of oral statements is subject to much imperfection and mis-

take; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party actually did say. But where the admission is made and precisely identified, the evidence it affords is often of the most satisfactory nature.' 1 Greenleaf Evidence § 200.

The thought of the last sentence quoted from Greenleaf is not given full force by the instruction which states that as a general rule 'the statements of witnesses as to verbal admissions of a party should be received by the jury with great caution.' And the instruction is especially objectionable under the evidence which is found in this record.

The instruction is, however, wholly inadequate and misleading

§ 3362. **Verbal Admissions to Be Received with Great Caution.** (a) The court instructs the jury that verbal admissions should be received with caution and are sometimes the most unreliable of all evidence, and the jury should carefully consider all the evidence, and the circumstances proved in the case, in determining the weight to be given to such admissions.<sup>2</sup>

(b) The court instructs the jury that although parol proof of the verbal admissions of a party to a suit when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet, as a general rule, the statements of a witness as to the verbal admissions of a party should be received with great caution as the kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence and give it the consideration to which it is entitled, in view of all the other evidence in the case.<sup>3</sup>

§ 3363. **Invasion of the Province of the Jury—Weight of the Evidence.** The court states to the jury that evidence of the admissions

as to the weight to be given to plaintiff's letter containing a deliberate statement over his own signature as to the amount of his loss. Such a written admission is provable not merely as discrediting the testimony of the party as a witness but as substantive evidence against him. 1 Greenleaf Evidence (16th Ed.) § 170a. As stated by Prof. Wigmore in his recent treatise: 'Anything said by the party may be used as against him as an admission, provided it exhibits the quality of inconsistency with the facts asserted by him in pleadings or in testimony.' 2 Wigmore Evidence § 1048. 'Admissions are receivable primarily because of their inconsistency with the party's present claim and irrespective of their credit as assertions.' *Id.* § 1049.

'An admission . . . is nothing but a piece of evidence discrediting the party's present claim, and tending to prove the fact of its incorrectness.' *Id.* § 1056.

It is plain therefore that a written admission shown to have been made by the adverse party and inconsistent with his claim is substantive evidence, and not subject to the rule which is applicable to verbal admissions established only by the testimony of witnesses with reference to statements in general which would otherwise be hearsay, and which are by Greenleaf's language, subject to some discredit, because of the uncertainty of such testimony. The instruction of the court is open to the same objection as the one criticised in *Hawes v.*

*Burlington C. R. & N. R. Co.*, 64 Ia. 315, 20 N. W. 717, on the ground that it contained no direction as to what the rule would be if the admission was deliberately made as understood at the time." 2—*Johnson v. People*, 197 Ill. 48 (50, 51), 64 N. E. 286.

"These instructions were irreconcilable, and the jury were left to take their choice. Regardless of the question whether the instructions would be proper in any case, it was error to give the first one for want of any evidence on which to base it. It was an abstract proposition of law not applied to the case in any way, and it could not be. While it is not error to give an abstract proposition of law to the jury as an instruction if it will not mislead them, it is not error to refuse one. This one was misleading, and of the most hurtful kind. The error was not cured by telling the jury in the other instruction that the evidence of admissions should be received with caution, or that it might be the most unreliable of all evidence. The jury would be as liable to follow one as the other."

3—*Doer v. Breen*, 56 Ill. App. 657 (659).

"The effect of this instruction was to discredit the testimony of the witness —, and of the defendant as to conversation at the plaintiff's place of business shortly after the son had quit work, and the plaintiff had written a letter to the defendant demanding payment and threatening suit if the demand was not complied with."



of the parties to this action has been given to you. Such evidence ought to be received with great caution. Such evidence consisting of mere repetition of oral statements is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly understood his own meaning, or the witness having misunderstood him. It frequently happens also that a witness unintentionally altering a few of the expressions really used gives an effect to a statement completely at variance with what the parties actually did say; but in a case where you find that an admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature.<sup>4</sup>

4—*Lewis v. Christie*, 99 Ind. 377 (381).

"This instruction is taken from section 200 of 1 Greenleaf on Evidence but it is changed; Greenleaf says: 'The party himself either being misinformed or not having clearly expressed his own meaning,' whereas the instruction here given is 'not having clearly understood his own meaning.'

The appellant claims that the above instruction was erroneous. He says 'what the parties had done they knew; they spoke of their own transactions; they could not have been misinformed. . . . But how could a party fail clearly to understand his own meaning? It is easy for anyone to 'not clearly express his own meaning, but not to understand 'his own meaning' is impossible, if he has any meaning.'

We need not determine whether the instruction if otherwise valid would be vitiated by this error, because this court has held that said section 200 of 1 Greenleaf on Evidence ought not in Indiana to be given to the jury as law in an instruction by the court.

In *Finch v. Bergins*, 89 Ind. 360, the judgment was reversed because the court below had given an instruction adopting the very words of Greenleaf in the section above-mentioned, and *Howk, J.*, in delivering the opinion of the court said: 'Of this section of Greenleaf's text in a similar instruction in *Davis v. Hardy*, 76 Ind. 272, this court said: "To give it in a charge as written would in this state be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence. It is a proper matter of argument that such evidence is subject to imperfection and discredit for the reasons suggested, and the court may direct the jury's attention to the subject. But it is not for the court to say as a matter of law in reference to the evidence of this kind given in a particular case that it is subject to too much imperfection; or that 'it frequently happens that the witnesses by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party did say'; or

that where 'the admission is deliberately made and precisely identified, the evidence is often of the most satisfactory nature.' These are matters of fact, experience and argument, but not otherwise the subject of legal cognizance."

So in *Garfield v. State*, 74 Ind. 60, in commenting on an instruction transcribed like the one above quoted from 1 Greenleaf on Evidence, this court said: 'It is not every statement of the law found in a text book or opinion of a judge, however well and accurately put, which can properly be embodied in an instruction. . . . The instruction under consideration does not contain a single proposition of law, but only declarations on supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench. . . . They may well enter into the arguments of attorneys . . . but the jury, not the judge, is the arbiter of such contentions. . . . The most that the judge may do under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions, and leave them in the light of their experience to say what credit should be given to any testimony on account of its alleged doubtful character.'

In the case of *Woollen v. Whitacre*, 91 Ind. 502, this court said, by *Hammond, J.*: 'The decisions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witness's testimony.' And the rule above indicated in *Finch v. Bergins*, supra, is supported by *Nelson v. Vorce*, 55 Ind. 455; *Pratt v. State*, 56 Ind. 179; *Miller v. Eglin*, 64 Ind. 197, 31 Am. Rep. 121; *Jackman v. State*, 71 Ind. 149; *Works v. Stevens*, 76 Ind. 181.

The foregoing authorities clearly show that the court erred in giving to the jury the aforesaid instruction, and for this error of law the motion for a new trial ought to have been sustained."

§ 3364. **Admissions Not Subject to Mistakes, as a Matter of Law.** The court instructs the jury that any admission or confession verbally made by the defendant, and written down by another, is subject to mistakes that may arise from the misunderstanding of the meaning of the words used by the defendant, or by using words not used by the defendant, or by substituting the language of the person so writing down such admission or confession for that of the defendant.<sup>5</sup>

§ 3365. **Admission by Silence When Reply is Called For.** The court instructs the jury that when an accusation is made by one party against another of the existence of a certain fact, and the party called upon for a reply, and, he failing to reply, when men similarly situated under like circumstances should do so, the fact of not doing so is considered by the law as an admission of the correctness of the accusation or existence of the fact.<sup>6</sup>

5—*Hauk v. State*, 148 Ind. 238, 46 N. E. 127 (133).

"To have given this instruction as written would unquestionably, under the decisions of this court, have been an invasion upon the province of the jury. It cannot be said, as a matter of law, that the admissions of the defendant, under the circumstances mentioned, are subject to mistakes. It was proper matter of argument to the jury that the evidence in question, under the facts, might be or was subject to mistake, and the court might have properly called the attention of the jury to this question. The following decisions fully support our conclusion: *Garfield v. State*, 74 Ind. 60; *Davis v. Hardy*, 76 Ind. 272; *Morris v. State*, 101 Ind. 560; *Unruh v. State*, 105 Ind. 117, 4 N. E. 453."

6—*Harman & Crockett v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009 (1010).

"This instruction tells the jury that silence under circumstances calling for a response is considered by the law as an admission of the existence of a fact. Admissions other than judicial admissions and admissions by deed are seldom, if ever, conclusive, unless they have been acted upon by the opposite party to his prejudice, so that they must be made conclusive upon the party making them, to the end that injustice and injury may not result to the party who has acted upon them. 'Verbal admissions which have not been acted upon, and which a party may controvert without any breach of good faith or evasion of public justice, though admissible in evidence, are not held conclusive against him.' 1 Greenl. Ev. § 209. After giving some illustrations, the author further says in this section: 'In these and the like cases no wrong is done to the other party by receiving any legal evidence showing that the admission was erroneous, and leaving the whole evidence, including the admission, to be weighed by the jury.' Such being the character of the ad-

mission, the inquiry is as to what the instruction means, and what effect it may have had upon the jury, and whether it was improper. As the court had admitted the evidence, there was no reason for suggesting to the jury its admissibility. Nor is it easy to conceive any reason for explaining that it was in the nature of an admission. Its nature as such is readily perceived without the aid of legal knowledge. Hence the jury probably assumed that there was some purpose in giving it. It was well calculated to impress upon their minds that, under some legal principle known to the court and unknown to them, it was evidence of a higher nature than other evidence in the case. The language is susceptible of a double meaning. It tells the jury that, tested by the law, the act is an admission. What sort of an admission—a conclusive admission or only a persuasive admission? How is the court to determine what construction the jury gave it? Strictly speaking, the law does not class it as an admission. The law says it is evidence, because reason and common sense teach that it is an admission. Therefore it is admissible as evidence for the consideration of the jury. As the instruction is susceptible of two meanings, and the jury might, and probably did, give it a wrong interpretation, it is such an instruction as was calculated to mislead and confuse them. The giving of such an instruction is erroneous. *Balt. & O. Railroad Co. v. Lafferty*, 2 W. Va. 104; *Bantz v. Basnett*, 12 W. Va. 772. 'Where an instruction asked for is so imperfectly expressed that its true import is not readily discernible, and would tend to mislead the jury, it should be refused.' *Patton v. Navigation Co.*, 13 W. Va. 259. 'It is error to give an instruction which is confused in its language and calculated to mislead the jury.' *State v. Sutfin*, 22 W. Va. 771; *State v. Cain*, 20 W. Va. 679; *Nicholas v. Kershner*, 20 W. Va. 251. Aside from the view that the jury may

**§ 3366. Failure to Produce Books and Papers is not Necessarily an Admission.** If the jury believe, from the evidence, that the defendant has in his possession or under his control so that he might have produced them, books or papers which contain evidence material to this case, which he has not produced in evidence, you have a right to presume that such books and papers if produced in evidence would be injurious to his case, unless you find that such presumption has been refuted by the other credible evidence in the case.<sup>7</sup>

**§ 3367. Admission After Beginning Suit—Argumentative Instructions.** When a plaintiff comes into court and undertakes to sustain his case by oral admissions or statements made by his adversary after the lawsuit has been commenced, such testimony should be received with great caution, because of the improbability that a party to a suit would make statements prejudicial to his own case, and because of the frailty of memory, and the inability of witnesses to remember the precise words used, and their liability to misunderstand what was really said, or to leave out or add something to it unintentionally. This kind of evidence is subject to much imperfection and therefore weak in its character.<sup>8</sup>

**§ 3368. Admission of Matters Set Out in Affidavit for Continuance of Opposite Party.** The court instructs the jury that the plaintiff admits that one K. and B., if present on the witness stand, would swear to certain matters set out in an affidavit made in support of an application for continuance filed in the case by the defendant. You are further instructed that by such admission on the part of the plaintiff he does not admit the truth of such statements, but he may disprove the matters disclosed in said statements, or show any contradictory statements made by such absent witnesses in relation to the matters in issue and on trial. It is for you to say what weight you will attach to any and all testimony introduced in the trial of this cause.<sup>9</sup>

have regarded the instruction as virtually binding upon them to find for the plaintiffs, the instruction may be regarded as one upon the weight of the evidence. That is clearly a matter within the exclusive province of the jury, and with which the court cannot deal without doing violence to the principles of law governing jury trials. It is almost universally held that an instruction upon the weight of the evidence is erroneous. *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274; *Westbrook v. Howell*, 34 Ill. App. 571; *Ephland v. Railroad Co.*, 57 Mo. App. 147."

7—*Cartier v. Troy Lumber Co.*, 138 Ill. 533 (537), 28 N. E. 932, 14 L. R. A. 470.

"It is insisted by appellant that the giving of the above instruction was manifest error calculated to mislead the jury and prejudice his case. It was condemned by the Appellate Court, a majority of its members, however, holding that the

giving of it was not, under the facts of the case, reversible error. We fully concur in the view that the instruction does not correctly state the law of evidence as applicable to facts in proof. It clearly authorized the jury to indulge in presumption not legally arising from the facts on which it is based. It will be observed that, according to its terms, however innocent may have been the omission on the part of the defendant to produce each and every book and paper in his possession or under his control containing evidence material to the case on either side, the damaging presumption might be indulged. It left the jury free to determine for itself what would be material evidence in the case."

8—Above charge "is an argument pure and simple. Its refusal was proper." *Riddle v. Webb*, 110 Ala. 599, 18 So. 323 (324).

9—*Freeman v. Metropolitan St. Ry. Co.*, 95 Mo. App. 94, 68 S. W. 1057 (1059).

"Section 687, Rev. St. 1899, under



**§ 3369. Opening Statement of Counsel Not Binding as Admission.**

The court instructs the jury as a matter of law that any statement made by counsel for plaintiffs in his opening statement to you about what the evidence would show, is as binding upon these plaintiffs as if the plaintiffs themselves had made such statement, and, as such, should be considered by you in making up your verdict.<sup>10</sup>

**§ 3370. Admissions of Facts Are Evidence Although Made in an Effort to Compromise.** The jury are instructed that any evidence in reference to the value of the trunk and its contents, which was the result of any conversation in reference to a settlement or compromise between the plaintiff and the defendant of the matter in controversy, is incompetent, and should not be considered by you in determining the value of the said trunk and its contents.<sup>11</sup>

**§ 3371. Admission in Letters.** The jury are to decide just what the plaintiff intended by the statement in said letter, whether a statement as to what his claim against the defendant was, or a statement as to what he was willing to accept in view of the statement in said letter and all the other evidence in the case, and what seemed natural and probable under the facts as they appear in evidence. The jury

which such evidence is authorized, among other things, provides that 'the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial.' The vice of the said instruction is plain. It tells the jury that the plaintiff may 'disprove the matters disclosed in said statements, or prove any contradictory statements made by such absent witnesses in relation to the matters in issue and on trial.' The court thus, in effect, told the jury that said absent witnesses had made contradictory statements. We are further of the opinion that said instruction is of doubtful propriety in any case, taking it as a whole. The purpose of the statute was to prevent delay, and afford to parties litigant a speedy trial. But we do not think it can be seriously contended that it was the intention of the legislature to place such evidence on a different footing from the evidence of other witnesses. When once admitted, it should be subject to the same rules and considered like the evidence of any other witness,—like the evidence of a witness included in a deposition, or in an agreed statement of the parties, which is sometimes resorted to on account of the unavoidable absence of a witness. The evidence of an absent witness is not very forceful, at best, on account of the absence of the person testifying. This fact is appreciated by the trial judges and the legal profession generally, and it is often felt that great injustice is done by forcing a party

to go to trial under such circumstances for the personality of the witness, if present, might have the effect of turning the scales of justice. And to further weaken the force of the evidence of such absent witness, in permitting the court to specially comment on his evidence, practically destroys its usefulness altogether. We do not think such an instruction should be given."

10—Lusk v. Throop, 189 Ill. 127 (143), 59 N. E. 529.

"This instruction was properly refused. In DeWane v. Hansow, 56 Ill. App. 575, it was said: 'While the office of a jury statement is to enlighten the jury upon the issues involved, so as to prepare their minds for the evidence to be heard, and the attorney making it should confine himself to the proposed proofs, and make it sufficiently full for their understanding of the case, the plaintiff is not confined to the facts recited in the statement.' Thomson in his work on Trials (vol. 1, sec. 267) says: 'Counsel is not confined in the introduction of evidence to the statement which he makes in the opening of his case, since this would subject him at his peril to announce to the jury each item of evidence which he intended to introduce.'"

11—Thom v. Hess, 51 Ill. App. 274.

"Offers of compromise do not bind; but admissions or statements of the facts are evidence, though made in an endeavor to effect a settlement. 1 Greenleaf Ev., Sec. 192."

are the sole judges as to what is the truth of the matter, as shown by the evidence.<sup>12</sup>

12—Dick v. Marble, 51 Ill. App. 351 (352), reversed 155 Ill. 137, 39 N. E. 602.

"When a writing is ambiguous, extrinsic circumstances may be of value in elucidating the true meaning. The court and jury in interpreting what a writer meant, should put themselves as far as possible in the position he was when he wrote. Emery v. Webster, 42 Me. 204, 66 Am. Dec. 274; Knight v. Worsted, 2 Cush. 271; Martin v. Berens, 5 Penn. St. 305; Shore v. Wilson, 2 Cl. & F. 556; Gray v. Sharpe, 1 Myl. & K. 602; Simpson v. Magitson, 11 Q. B. 32; 12 Jur. 155, 7 L. J. Q. B. 81.

"The clear meaning of an instrument as to which no latent ambiguity appears, can not be varied by parol. The letter of appellee is not

a contract, it is in the nature of an admission; the circumstances under which it was made might be shown; the weight to be given to the statements therein contained might be thus affected; the jury are not to decide what the writer meant, but under the circumstances of the writing, what weight, as an admission, is to be given to the letter."

On appeal to the Supreme Court, 155 Ill. 137, that court said: "The instruction takes from the jury the right of determining the effect of the letter by way of impeachment of plaintiff's testimony, and makes it substantive proof, weakening its effect and destroying it for the purpose for which it was offered and admissible."

## CHAPTER CX.

### EXPERT TESTIMONY.

See Approved Instructions, Chapter XXII, Vol. I.

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| <p>§ 3372. Expert testimony — Weight of, for jury.</p> <p>§ 3373. An expert witness is to be judged from same standpoint as other witnesses—Testimony should not be disparaged.</p> <p>§ 3374. Discrediting expert evidence as of a very low order.</p> <p>§ 3375. Expert testimony of a weak and unsatisfactory character.</p> | <p>§ 3376. Value of expert opinion dependent on the hypothetical question.</p> <p>§ 3377. Opinions of experts as to the value of services.</p> <p>§ 3378. Evidence of physicians appointed by the court—Singling out their testimony.</p> <p>§ 3379. View of jury—Expert opinion—Assessing values from the view and disregarding testimony.</p> |
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§ 3372. **Expert Testimony—Weight of, for Jury.** (a) I charge you further that the testimony of expert witnesses is proper evidence to be received and considered by you, and is entitled to such weight with you as in your judgment as fair-minded men it is entitled to, but it is not of as high grade as evidence—is not as good evidence of a fact as the testimony of a credible witness or witnesses who testify to having seen the fact itself occur. In other words, the testimony of an eye witness to an occurrence, whom you find to be a credible witness, is entitled to more weight with you than that of an expert witness who did not see the occurrence, but testifies only to his opinion in the matter.<sup>1</sup>

(b) The court instructs you that when the experience, honesty and impartiality of the experts are undoubted, their testimony is entitled to great weight and consideration.<sup>2</sup>

(c) The court instructs you that the testimony of experts is not

1—Nelson v. McLennan, 31 Wash. 208, 71 Pac. 747 (749), 96 Am. St. 902, 60 L. R. A. 793.

"This court has decided that expert testimony, being competent testimony under the law, must go to the jury as any other testimony in the case goes, and that the jury is the sole judge of the weight of such testimony, and that the court errs when by its instruction to the jury it discriminates in any way against the weight of such testimony. Such was the ruling of this court in *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721, and in *re Blake's Estate*, 136 Cal. 306, 68 Pac. 827."

2—Wall v. State, 112 Ga. 336, 37 S. E. 371.

"There was but one expert witness in this case. That was the physician who examined the wounds of the deceased, and who gave an opinion that one of the wounds he

examined was of a fatal nature. This question has several times been decided by this court. The most recent decision thereon is that of the case of *Merritt v. State*, 107 Ga. 675, 676, 34 S. E. 361, where it was held: 'In charging upon expert testimony of physicians introduced in behalf of the state upon a material question of fact at issue, it is error for the court, after charging the jury that such testimony is dependent upon the degree of the experience and honesty and impartiality of the witnesses who testified to further instruct them that where such elements are undoubted their testimony is entitled to great weight and consideration.' The charge of the court in the case at bar is equally erroneous. This was fully discussed by the writer in the case above cited on pages 679-681, 107 Ga., and pages 361-364, 34 S. E. See authorities therein cited."



given to you as statements of facts, but merely as opinions of the witnesses in the nature of advice, and it should be received and considered with other evidence in the case. You are not bound to accept it as true, and, in determining what weight, if any, you will give it, you should apply it to your own knowledge and judgment in connection with the testimony in regard to the facts in the case, and you should accept only such parts as you may, from all the facts and circumstances in the case, deem reasonable and trustworthy. You are at liberty to reject all of such testimony, if, in your judgment, it is unreasonable or unworthy of belief.<sup>3</sup>

§ 3373. **An Expert Witness is to be Judged from Same Standpoint as Other Witnesses—Testimony Should Not be Disparaged.** The value of expert testimony depends upon the circumstances, and of these circumstances the jury must be the judge. The jury must determine the weight to be credited to it, but in all cases the testimony of experts is to be received and weighed with great caution. The evidence of a witness who is brought upon the stand to support a theory by his opinion is testimony exposed to a reasonable degree of suspicion, which there is great reason to believe is in many instances the result of employment and his bias arising out of it. In many cases, it is to be feared, by giving too much weight to testimony of experts, juries have been induced to render unwarrantable verdicts, discreditable to the administration of justice, as well as exceedingly detrimental to public interests.<sup>4</sup>

§ 3374. **Discrediting Expert Evidence as of a Very Low Order.** (a) The court further instructs the jury that it is your duty to consider the opinion and expert evidence in this case, the same as the evidence of other witnesses. However, the court further instructs you that such opinion and expert evidence is of the very lowest order, and is the least satisfactory, and the jury should not permit such opinion and expert evidence to overthrow positive and creditable evidence of

3—Buckalew v. Quincy, O. & K. C. Ry. Co., 107 Mo. App. 575, 81 S. W. 1176 (1179).

"The propriety of such an instruction may be well questioned. In some jurisdictions, a similar one has been approved. Haight v. Vallet, 89 Cal. 245, 26 Pac. 897, 23 Am. St. 465; Buxly v. Buxton, 92 N. C. 479. But the weight of authority is to the effect that such an instruction is erroneous, and should not be given. Weston v. Brown, 30 Neb. 609, 46 N. W. 826; A. T. & S. F. Ry. Co. v. Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; People v. Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. 326; Kankakee & S. R. Co. v. Horan, 23 Ill. App. 259; Louisville v. Whitehead, 71 Miss. 451, 15 So. 890, 42 Am. St. 472. The competency of an expert witness is a question for the court, and it is the exclusive province of the jury to determine the credibility and weight of such evidence, which it should consider in connection with all the other evidence in the case. Epps v. State, 102 Ind. 539, 1 N. E. 491; Geutlig v. State, 66 Ind. 107,

32 Am. Rep. 99; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. 65; Kilpatrick v. Haley, 6 Colo. App. 407, 41 Pac. 508. In this state it has been declared that it is a question for the court to determine whether a witness offered as an expert possesses the proper qualification, but 'the value of the evidence which the witness may give is a question for the jury.' Thompson v. Ish, 99 Mo. 179, 12 S. W. 510, 17 Am. St. Rep. 552; Hampton v. Massey, 53 Mo. App. 501."  
4—People v. Seaman, 107 Mich. 348, 65 N. W. 203 (208), 61 Am. St. 326.

"This instruction was clearly erroneous. An expert witness is to be judged from the same standpoint as any other witness. Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28. It was for the jury, and not for the court, to determine the weight to be given to the testimony. Maynard v. Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276."

credible witnesses who have testified in this case of their own personal knowledge.<sup>5</sup>

(b) Expert testimony is the opinions of witnesses on special subjects, in which they are presumed to have special or unusual knowledge. In general, testimony is to facts only, but one exception to the general rule is expert testimony, which is as to the opinions of the experts. Such testimony must receive just so much weight and credit as the jury deem it entitled to when viewed in connection with all the evidence, and no more. Upon a jury rests the responsibility of rendering a correct verdict, and if the testimony of experts is opposed to the jury's conviction, it is their duty to disregard it. Such evidence, as all evidence of opinions, ought to be considered with careful scrutiny, and with much caution.<sup>6</sup>

**§ 3375. Expert Testimony of a Weak and Unsatisfactory Character.** (a) You are instructed that the evidence as to the genuineness of the handwriting is generally regarded as of a weak and unsatisfactory character, not only from the exactness with which handwriting may be imitated, but also on account of the dissimilarity to be found in different specimens of the handwriting of the same person, executed at different times and under different circumstances. The evidence as to handwriting should be considered by you in connection with all the other facts and circumstances surrounding the case which are in evidence before you. You should give the evidence of each witness such credit as you deem it entitled to, taking into consideration the sources of his knowledge, and the fact as to how well acquainted he is with the handwriting of the defendant, and the frequency of the times at which he has seen the defendant write, and the different circumstances under which he has observed his writing or his signature.<sup>7</sup>

5—Hayden et al. v. Frederickson, 59 Neb. 141, 80 N. W. 494 (495).

"This instruction was bad, and should not have been given. The defendants had the right to have the jury consider the testimony of their expert witnesses without any admonition from the court that 'expert evidence is of the very lowest order, and is the least satisfactory.' It was for the jury alone to determine the weight to be given such evidence."

6—Weston v. Brown, 30 Neb. 609, 46 N. W. 827.

"The court, after cautioning the jury that the responsibility of rendering a correct verdict rested upon them, follows it with the statement in substance that it was their duty to consider the testimony of these witnesses with much caution. Their testimony was so discredited by the charge of the court that the jury might well have understood that it was their duty to entirely disregard it."

7—Davis v. Lambert, 69 Neb. 242, 95 S. W. 592 (592-3).

"We think the giving of this instruction was error prejudicial to the defendant, who was defeated below, and who prosecutes this proceeding. The instruction does not

differ essentially from the one that suffered unanimous disapproval at the hands of this court in Hayden et al. v. Frederickson, 59 Neb. 141, 80 N. W. 494. The defendant in error seeks a discrimination between the two cases in the respect that, in the case cited, the expert testimony referred to appears to have been introduced in behalf of one party, while in the present instance both parties offered evidence of that character; hence, he says, neither can be supposed to have been regarded by the jury as falling under the greater condemnation. This reasoning seems to us to be fallacious. Counsel for defendant in error will hardly contend that the court, by expressly withdrawing from the jury the consideration of all expert testimony, would not have committed reversible error. The jury had an undoubted right to consider it, and to determine its credibility and preponderance in like manner as, and in connection with, all the other evidence before them. But, if this is so, then a partial withdrawal of this testimony, or, what amounts to the same thing, a partial discrediting of it, would work at least a proportional injustice. It is con-

(b) The court instructs the jury that they are authorized to compare the handwriting of K., the deceased, with any of the checks and other papers which have been introduced and proven as signed by deceased, with the signature to the note here sued on, and to determine for themselves, from comparison, whether the signature to the note here sued on is similar to the signature to the checks and other papers which are proven to be genuine, and judge for themselves whether the signature to the note is genuine or not; and this is true, although an expert has testified that the signature to the note is not exactly like the signature to the checks and other papers.<sup>8</sup>

§ 3376. **Value of Expert Opinion Dependent on the Hypothetical Question.** If the facts stated as a basis for the hypothetical question propounded to the medical experts in this case were not substantially correct, as shown by the evidence introduced on the trial of the case, then the opinion given by the experts based upon such assumed state of facts is entitled to but little or no weight, as may be determined from the evidence. That is to say, the hypothetical facts upon which the question is based must be substantially correct to entitle the conclusion drawn by the expert to have any considerable weight. You will therefore consider the testimony of the medical experts, with all the other testimony, and give it just such weight as you think it deserves. In connection with the medical works introduced and read to you, you should consider this evidence, and give it such weight as you think it deserves.<sup>9</sup>

ceivable that it might do a much more grievous wrong. If, in the absence of such an instruction, the jury would have looked upon the expert testimony as preponderating largely on either side, they might not unreasonably have considered such a criticism of it by the court as an admonition to them to disregard such preponderance, or, at any rate, to treat it as of little or no significance. We are of opinion, therefore, that the fact that there was so much testimony on both sides does not purge the instruction of its vice. But the deprecatory language of the instruction is not confined to expert testimony, but applies equally to all 'the evidence as to the genuineness of handwriting,' and includes within its condemnation the sworn denial of the truthfulness of his reputed signature by the defendant himself. In its literal significance it comes as nearly as possible to telling the jury that the defense is one which is to be considered as discredited in advance, and that something more than a preponderance of the evidence is required to maintain it."

8—*Coleman v. Adair*, 75 Miss. 660, 23 So. 369 (370).

"By its terms the jury may have thought itself authorized to pronounce the disputed signature to the note sued on genuine, if the jury, from a comparison of this signature with other proved genuine signatures of the intestate, thought the disputed signature similar to the proved genuine ones.

That is exactly what the instruction says, as we think, after repeated examinations of it. Moreover, this charge seemingly authorizes the jury to disregard all the expert evidence, if the jury, composed of men presumably not experts in handwriting, thought from their own comparisons that the signature to the note sued on was similar to the admittedly genuine ones, though all the experts thought it not genuine, and gave their reasons for so thinking. It was well calculated to induce in the mind of the jury the belief that they might wholly disregard the expert evidence, if it did not coincide with their own opinion, formed by comparison of the different signatures, though not one of the jury was presumably capable of giving an opinion as an expert as to handwriting."

9—*Hall v. Rankin*, 87 Ia. 261, 54 N. W. 217.

"We think the vice of this instruction consists in the thought that the opinion of the expert might have some weight even though the jury should find that the facts assumed as a basis for the opinion were incorrect. To that extent the instruction is erroneous. The sole value of the opinion must, of necessity, depend upon the correctness of the statement of facts upon which it is based. If that is incorrect, then the opinion can have no weight or value whatever. It was held in *re. Will of Norman*, 72 Ia. 89, 33 N. W. 374, that, if some of



§ 3377. **Opinions of Experts as to the Value of Services.** The opinions of experts as to the value of the services of the plaintiff are not conclusive upon you. Such opinions are advisory only. You must, in the end, use your own judgment in determining the value of the services, guided by the credible evidence in the case, and assisted by opinions of the experts.<sup>10</sup>

the facts on which the opinion was based were not established by the evidence, the opinions of witnesses which were founded on the assumption of the existence of such facts would be of no value whatever. It seems to us it fairly appears from this instruction that the jury were justified in giving some weight and force to evidence of experts, even though they should find that such evidence was bottomed upon facts not proven. As the jury were bound by the law as thus given them, we must assume that they acted in accordance therewith. Viewing the instruction as a whole, it seems to us that the error is not cured by the general directions which follow the erroneous clauses we have referred to."

10—Ladd v. Witte, 116 Wis. 35, 92 N. W. 365 (367).

"This instruction is not without apparent support from certain language contained in the opinion in *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291, but it is in direct contradiction of what was decided in the later case of *Wurdemann v. Barnes*, 92 Wis. 206, 207, 66 N. W. 111, where the court held that, there being no evidence of value of a physician's services except his own, no question thereon for the jury existed. The same proposition was decided in *La Chappelle v. Supply Co.*, 95 Wis. 518, 526, 70 N. W. 589, where an expert having testified to a certain value, and no other evidence having been given, it was held that the trial court rightly instructed the jury to adopt that value. This seeming conflict between our own decisions largely disappears, however, upon a full understanding of the situation to which was applied the language used in *Moore v. Ellis*. There the evidence had taken a wide range, and there was extreme divergence between the opinions of witnesses, and considerable dispute as to the facts constituting the true hypothesis upon which such opinions should be based. It appeared that the plaintiff's professional services were largely in the way of collection of indebtedness and enforcement of mortgages, as to some of which it was claimed that he had made the loans, and received a commission therefor from the borrower. Some of the plaintiff's experts fixed his reasonable compensation at 10 per cent upon all sums collected. Some of defendant's experts

testified to a customary charge of 1 per cent and many of them that no charge at all was customary for collecting in loans on the making of which a commission had already been received by the attorney. Two antithetic decisions of the Supreme Court of Michigan are instructive. The first—*Wood v. Barker*, 49 Mich. 295, 13 N. W. 597, was closely identical in its facts with the case at bar. It was a suit for compensation quantum meruit by a consulting surgeon, the value of whose services was testified to by himself and the general practitioner whom he aided. No evidence of other experts was offered, nor was there any substantial conflict as to the character of his services, or the circumstances under which they were rendered. The court there said, 'There can be no presumption of law concerning the value of a surgeon's services, and there is no presumption that a jury can ascertain it without testimony of some kind from persons knowing something about such value. \* \* \* We can see no sufficient reason for the suggestion that all of this (expert) testimony might be disregarded, and there is no rule which would allow the jury to entirely ignore the testimony, and at the same time to form an independent conclusion without testimony upon a matter which requires proof beyond their conjectures or their opinions. \* \* \* There can be no safety to any one if juries are to use their own unguided views on such matters.' In *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, there was presented an action for attorney's fees for conducting a suit for personal injuries. There it was held error to refuse an instruction quite similar to that given in the present case. The court said: 'Had there been no testimony of the value of plaintiff's services aside from that of the attorneys, the case would undoubtedly have been ruled by *Wood v. Barker*, supra; but there was other evidence bearing upon the value of the services (reciting rendition of bills, agreements, as to per diems, and conflicting proof of details of the work done). Under these circumstances the rule in *Wood v. Barker* was not applicable, and the court should have instructed the jury that the opinions of the attorneys were not conclusive.' In line with this latter case, and with the real decision

**§ 3378. Evidence of Physicians Appointed by the Court—Singling Out Their Testimony.** You are instructed that Dr. J. S. and Dr. C. W. S. are physicians who were appointed by this court as a commission to examine the plaintiff, C. D. S., with reference to the extent and nature of her injuries. They are witnesses neither in behalf of the plaintiffs nor the defendant, and this fact you may take into consideration in determining their credibility, interest or lack of interest in the result of this suit, and the weight to be attached to their testimony.<sup>11</sup>

**§ 3379. View of Jury—Expert Opinion—Assessing Values from the View of Disregarding Testimony.** You are the sole judges of the credibility of the witnesses testifying in this case. You are to consider the evidence of all the witnesses testifying before you, but you are not bound to believe them unless you think them worthy of credit, and if you believe, from your view of the premises, and from all the evidence in the case, that any witness has testified to the value upon said lands and property in question which was not the fair cash

in *Moore v. Ellis*, supra, are the cases of *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028, and *The Conqueror*, 166 U. S. 110, 132, 17 Sup. Ct. 510, 41 L. Ed. 937. In those cases it is pointed out that the testimony of experts was, at the best, not to the fact of value but to the fact of their opinions, and therefore that the fact of value is one to be deduced by the jury from the various evidentiary facts presented before them, inclusive of the fact that certain expert persons have certain opinions thereon. In the absence of such conflicting facts, however, there seems to be no answer to the logic of *Wood v. Barker* that jurymen, as such, have no presumptive knowledge upon the subject of the value of professional services and must be guided by the evidence offered upon the trial, and consequently are not at liberty to disregard the same, and enter the field of their own uninstructed conjecture. That view seems to have been tacitly adopted by this court in the two cases above cited—*Wurdemann v. Barnes* and *LaChappelle v. Supply Co.* Such rule is not in conflict with another doctrine laid down in *Remington v. Railway Co.*, 109 Wis. 154, 162, 84 N. W. 898, 85 N. W. 321, that upon trials to the court the opinions of experts as to the value of professional services of lawyers are never conclusive, for the reason that the judge himself has personal expert knowledge on the subject—a principle recognized and applied in *Speiser v. Bank*, 110 Wis. 506, 523, 86 N. W. 243; *Richardson v. Tyson*, 110 Wis. 572, 588, 86 N. W. 250, 84 Am. St. Rep. 937, and other cases. The present case is clearly within the class of *Wurdemann v. Barnes*, *LaChappelle v. Supply Co.*, and

*Wood v. Barker*, for there was no evidence whatever in conflict with that of the two physicians—one disinterested—that, in their opinion, the customary and reasonable value of the services rendered exceeded \$50. True these witnesses testified that, in their opinion, the value exceeded \$100, but in that respect there may be said to have been conflict, for their previous testimony indicated that at another time they believed it to be less, but never less than the \$50. Following, therefore, the precedents of our own cases, and adopting the reasoning of *Wood v. Barker*, we cannot avoid the conclusion that the instruction given was erroneous, and should not be repeated upon a new trial. Whether appellant's method of presenting his case has been such as to preclude a reversal on this ground need not be decided, since that results in any event for other reasons already stated."

11—*Smith et ux. v. City of Seattle*, 33 Wash. 481, 74 Pac. 674 (676).

"We think the instruction was properly refused. While it is true that the physicians named had been appointed by the court to examine the injured respondent, yet they testified as witnesses called by appellant. To have given the instruction would have been for the court to say, inferentially, at least, that the jury were at liberty to give greater credence to the testimony of these witnesses because they had been selected by the court. This would have been clearly erroneous. Their testimony must be subjected to the same tests as that of other witnesses, and it would have been error for the court to distinguish it as being subject to any different rule."

market value of such lands on (date of filing petition), then you may disregard his testimony in this respect.<sup>12</sup>

<sup>12</sup>—Du Pont v. Sanitary District, 203 Ill. 170 (179), 67 N. E. 815.

"The province of the jury is to weigh and consider the testimony of unimpeached witnesses, but this instruction authorizes them to absolutely disregard the testimony of witnesses not impeached and ex-

pressing an honest opinion on the question of value, and although corroborated. Under this instruction the jury must disregard all the evidence of witnesses for defendant on the subject of values merely as a result of looking at the premises."



## CHAPTER CXI.

### JURY—DUTIES AND POWERS.

See Approved Instructions, Chapter XXIII, Vol. I.

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| <p>§ 3380. Jury sole judges of the facts—Qualified.</p> <p>§ 3381. Right of jury to disregard testimony.</p> <p>§ 3382. Jury has no right to disregard statement of law.</p> <p>§ 3383. Cannot refer questions of law to the jury.</p> <p>§ 3384. Jury cannot be left to determine what allegations in the pleadings are material.</p> <p>§ 3385. Invasion of the province of the jury—Inference, conjecture, and personal experience not proper.</p> <p>§ 3386. Common sense and experience, omitting other elements, not proper rules to govern the jury—Juror's own special knowledge, experience and observation.</p> <p>§ 3387. Jury should not be influenced by newspaper accounts.</p> | <p>§ 3388. Question whether jury believe evidence is true or untrue, not whether it is just and right.</p> <p>§ 3389. Verdict signed by less than twelve—Majority verdict.</p> <p>§ 3390. Advice to jury to agree.</p> <p>§ 3391. Restraint on jury in reaching a verdict.</p> <p>§ 3392. Sending the jury back for further deliberations.</p> <p>§ 3393. Directing method of arriving at verdict.</p> <p style="text-align: center;">MISCELLANEOUS.</p> <p>§ 3394. Referring to onlookers as lobby in favor of one or the other party.</p> <p>§ 3395. Referring to probabilities and circumstances not in the case.</p> <p>§ 3396. Lengthy and argumentative instructions—Limiting the number of instructions.</p> <p>§ 3397. Depositions—Weight of.</p> |
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§ 3380. **Jury Sole Judges of the Facts—Qualified.** (a) The jury are instructed that you, the jury, are the sole judges of the questions of fact in this case, and the court does not by any instruction given the jury in this case, intend to instruct the jury how they should find any question of fact.<sup>1</sup>

(b) The jury are instructed that they, the jury, are the sole judges of the questions of fact in this case, and they should determine the same solely from the evidence which has been admitted as evidence by the court.<sup>2</sup>

<sup>1</sup>—Chicago Union Tr. Co. v. Strand, 114 Ill. App. 479 (483).

"This instruction should not have been given. It has been frequently condemned for its tendency to make the jury feel independent of the court, and find the facts without reference to the proof before them and without reference to the law of the case. C. G. Ry. Co. v. Novacek, 94 Ill. App. 178; C. B. & Q. R. Co. v. Greenfield, 53 Ill. App. 424; C. N. S. Ry. Co. v. Hobson, 93 Ill. App. 98; W. C. St. R. Co. v. Shannon, 106 Ill. App. 120. Nor was the vice of the instruction cured by others."

<sup>2</sup>—W. C. St. Ry. Co. v. Shannon, 106 Ill. App. 120 (128).

"It is true, questions of fact are to be determined by the jury from the evidence, but they are to be decided from the evidence under the guidance of the court in its instructions. The only tendency of this instruction would be to impress upon the jury their supremacy upon questions of fact. It was unnecessary, could serve no good purpose, and was misleading in its character. The jury are not, as they were told in the instruction in the case at bar, the sole judges of questions of fact in the case, but they are bound to apply the law to the facts as instructed by the court, and it is therefore not for the jury to do with the facts which they

§ 3381. **Right of Jury to Disregard Testimony.** (a) The jury are not bound to believe any testimony because any witness or witnesses have given such testimony, although testified to by any number of witnesses. You may and should disregard it and refuse to follow it, if you do not believe it to be true.<sup>3</sup>

(b) You are not at liberty to reject the testimony of any witness who has testified in your hearing in this case because his statements are in conflict with the statements of any other witness who has also testified in your hearing.<sup>4</sup>

§ 3382. **Jury Has No Right to Disregard Statement of Law.** (a) The jury will disregard all statements of the law made by the court which in their judgment, considering the facts, are not predicated upon the evidence. Such statements are intended to be abstract prop-

may find from the evidence as they please, regardless of the instructions of the court as to the law. The court, not the jury, is the judge of the legal effect of the facts found from the evidence by the jury. *Chi. G. Ry. Co. v. Novaeck*, 94 Ill. App. 178; *Chi. B. & Q. Ry. Co. v. Greenfield*, 53 Ill. App. 424. The Supreme Court in *Chi. C. Ry. Co. v. Roach*, 180 Ill. 174, 54 N. E. 212, did not, as contended by counsel for appellee, overrule the last mentioned case, but held that the jury are, in determining questions of fact, bound to observe the rules of law as stated to them in the instructions, and further held that it was not necessary that such rules for the guidance of the jury should be stated in each instruction.<sup>4</sup>

3—*Travers v. Snyder*, 38 Ill. App. 379, 385 and 386.

"In *Evans v. George*, 80 Ill. 51, the Supreme Court, speaking on the subject of the right of a jury to disregard evidence, say: 'The proposition that the jury have the right to disbelieve such witnesses, as, in their judgment, under all the circumstances of the case, are unworthy of belief, is not the law. The jury, although they are the judges of the credibility of witnesses, have no right to arbitrarily disbelieve the testimony, unless where such witnesses have willfully and knowingly sworn falsely to material facts in the case. It is the very plain implication in above instruction, given for defendant, that it might so do, that is objectionable. Where there is a conflict in the evidence it is for the jury, however, to determine which side to believe and which witnesses to believe. *Durant v. Rogers*, 87 Ill. 508; *Peeples v. McKee*, 92 Ill. 397; but testimony can not be willfully disregarded, *Hartford L. In. Co. v. Gray*, 80 Ill. 28. Many more cases might be cited, but this is sufficient."

4—*F. Dohmen Co. v. Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69 (72).

"Respondent contends that by this the learned judge intended to

convey the idea that the jury should not reject the evidence of a witness arbitrarily, without trying to reconcile it with that of others with which it was in conflict, merely because of such conflict. It is probable that such was the intention; but in testing the accuracy of an instruction it cannot be approved because, in the sense intended, it was free from error, if it was liable to be, and may probably have been, understood in a different sense, which was harmful. Instructions to juries should be clear, accurate, harmonious and concise statements of the law applicable to the evidence and the issues to be determined; not argumentative or ambiguous. An instruction which plainly has a tendency to mislead the jury, and may probably have had that effect, even though the instructions, when taken together, embrace correctly the law of the case, is harmful. *Price v. Mahoney*, 24 Ia. 582; *The Pittsburg, C. & St. L. Ry. Co. v. Krouse*, 30 Ohio St. 222; *Murray v. Com.*, 79 Pa. St. 311. Applying the foregoing to the instruction under consideration, it was erroneous and prejudicial. The jury might well have understood that they could not reject the evidence of a witness because in conflict with the evidence of another witness. They might well have understood the language of the court as a direction not to reject the evidence of one witness because contradicted by another. So understood, it was manifestly erroneous, and a clear invasion of the province of the jury. It was undoubtedly their right to reject the evidence of any witness whose testimony they believed to be false, though such belief was founded solely on the ground that such evidence conflicted with that of some other witness of whose truthfulness they were convinced whether by his manner or by any other of the many lights that may properly influence a jury in determining the credibility of witnesses."

On this subject see also *Roberts v. McWatty*, 129 Wis. 598, 102 N. W. 18.

ositions of law, applicable only, and to be applied, to the facts found, and not assuming any fact to be proven, or as in any manner directing your judgment upon the facts. You will consider the instructions of the court together. It is not the province of the court to urge or make prominent any facts of this case, but to state the law applicable to the theory of either party.<sup>5</sup>

(b) That the jury are the sole judges of the law and the facts of this case, and that they have the right to ignore the law given to them by the court should they deem it proper to do so.<sup>6</sup>

§ 3383. **Cannot Refer Questions of Law to the Jury.** (a) It is for the jury to say from the evidence whether the H. Institute engaged in such practice or treatment as to require a certificate from the medical board of examiners, and if the jury believe from the evidence that such treatment did not require such certificate, then the plaintiff would not be required to prove or show that such certificate issued.

(b) If the jury believe from all the evidence that H. Institute treatment of patients was such as did not require a certificate from the board of medical examiners, then there would be no necessity for the plaintiffs to make proof of the issuance of such a certificate.<sup>7</sup>

(c) You know more or less about this class of litigation,—about lumber business and logging contracts, and the way this business is carried on. Use your own common sense, and do what is right between these two parties. That is all I care to say to you, besides these requests to charge.<sup>8</sup>

(d) The court instructs you, that if you believe, from the evidence in this case, the children of lawful school age in the city of Alton were assigned to different schools by the proper authorities, without discrimination as to color, then your verdict should be for the defendant.<sup>9</sup>

5—*Baldwin v. Lincoln County*, 29 Wash. 509, 69 Pac. 1081.

"While the instruction, when construed literally, is subject to this criticism, yet, we think, from the whole context, it was not the intention of the learned trial judge to authorize the jury to disregard any statement of the law which had been made, and which was applicable to the facts found. The instruction cannot fairly be so construed. But it was the intention of the court to tell the jury that when they found the facts they should apply the law applicable thereto, and disregard the law not applicable. The central idea of the court, no doubt, was to impress the jury that the court was not assuming any fact to be proven, or in any manner to direct their judgment upon the facts, but was stating the law applicable to both parties. This must certainly have been the impression upon the jury, and therefore could not have been prejudicial. While we do not desire to be understood as approving the instruction as a model to be followed hereafter, we think it did not constitute reversible error."

6—*State v. Powell*, 109 La. 727, 33 So. 748 (750).

"That this was not a proper charge to ask or to give needs no discussion to demonstrate."

7—*Wellman v. Jones*, 124 Ala. 580, 27 So. 416.

"The question as to whether the H. Institute was required, under the law, to obtain a certificate from the medical board of examiners, under the undisputed evidence in the case being a question of law for the determination of the court, it was error to refer this question to the jury."

8—*Roby L. Co. v. Gray*, 73 Mich. 356, 41 N. W. 420 (422).

"This substantially makes the jury judge of the law as well as the facts, whereas they are required to take the law from the court. We think the errors pointed out sufficient for the disposition which must be made of the case, as presented to us, and we see no occasion for further examination of the numerous exceptions which we find in the record."

9—*People v. Mayor of Alton*, 193 Ill. 309, 61 N. E. 1077.

"This instruction is erroneous as submitting to the jury a question of law. \* \* \* We have repeatedly held it reversible error for the court to give instructions which require



§ 3384. **Jury Cannot be Left to Determine What Allegations in the Pleadings Are Material.** (a) If the jury find from the evidence that the plaintiff has made out his case as laid in his declaration, by a preponderance of the evidence, then the jury must find for the plaintiff.

(b) If the jury believe from the evidence that the deceased, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in the declaration, or either one of the counts thereof, then you can find the defendant guilty.<sup>10</sup>

(c) The jury are instructed that if the plaintiff has proven all the material allegations of his declaration by a preponderance of the evidence in manner and form as he has alleged them in his declaration, he is entitled to recover in this case.<sup>11</sup>

(d) In determining the amount due from the defendant to the plaintiff, if you find from the evidence that there is due the plaintiff any sum whatever, you should confine yourselves in making your estimates to such items as are set forth in the account of the plaintiff attached to his bill of particulars, and concerning which items evidence has been permitted by the court. You will note by an examination of the account of the plaintiff that it contains a number of items concerning which no evidence has been introduced, and for these items plaintiff cannot, of course, recover.<sup>12</sup>

(e) The court instructs the jury that all that portion of the plaintiff's declaration contained on the first page thereof and to the end of the first paragraph of the second page of said declaration are what is

the jury to find and determine legal propositions. *Mitchell v. Fond du Lac*, 61 Ill. 174; *Eyers v. Thompson*, 66 Id. 421; *Henderson v. Henderson*, 88 Id. 248; *Austine v. People*, 110 Id. 248."

10—*Chi. N. S. St. Ry. Co. v. McCarthy*, 66 Ill. App. 667 (668).

"When a jury is instructed 'that if they believe the plaintiff has made out his case as laid in his declaration, then the finding must be for the plaintiff,' a fair presumption is that the jury, as it has a right, take the declaration to its room when it retires to consider as to its verdict. Else how is it to know what is charged in the declaration? In the present case, upon three of the counts of the declaration as filed, there could be no recovery. So far as appears, the jury knew nothing about the sustaining of a demurrer to two counts, or the withdrawal of a third. It was error to instruct the jury as above set forth. *Grand Tower Mfg. Co. v. Ullman*, 89 Ill. 244; *U. S. Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474."

11—"The objection to this instruction is that it leaves it to the jury to determine what allegations of the declaration are material."

*C. T. R. R. Co. v. Schmelling*, 197 Ill. 619 (631), *aff'd* 99 Ill. App. 577, 64 N. E. 714; see also *Jones v. Hunter*, 99 Ill. App. 413 (415).

12—*Stevens v. Maxwell*, 65 Kan. 835, 70 Pac. 873.

"The jury were thus not only re-

manded to the pleadings for the matters in controversy, but were required to search out and determine for themselves the matters in dispute upon which testimony had been offered. The practice of sending the jury to the pleadings for the matters in controversy cannot be approved in any case, and in this one it was clearly erroneous. It is the province of the court to determine and define the issues in the case, and the duty of the jury to accept the interpretation of the court and to follow its directions. *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40; *Kan. City Ft. S., etc., Railroad Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887; 11 Enc. Pl. & Prac. 154. A departure from this practice is especially hurtful and to be condemned where the pleadings, as in this case, are prolix, and contain important and intricate statements of fact. The attention of the jury should have been directed to the material questions; and the immaterial matters, and those upon which no proof was produced, should have been eliminated from the case, and taken from the jury by the court. Here the jury were required to hunt out the contentions of the respective parties, and it was left to them to decide what claims should be eliminated because of the absence of proof. For this error the judgment must be reversed, and the cause remanded for a new trial."

called in the law practice "inducement," that is allegations which are merely introductory to the statements of the plaintiff's alleged cause of action; and even though the jury may believe from the evidence that such inducement and introductory portion of the declaration and the allegations therein contained are true, yet, the court instructs you that they do not constitute a cause of action in this case, and standing alone the plaintiffs could not lawfully recover, and if they so stand alone in this case you should find the defendant not guilty.<sup>13</sup>

§ 3385. **Invasion of the Province of the Jury—Inference, Conjecture, and Personal Experience Not Proper.** (a) After all, gentlemen, there is, when a witness is testifying, an indefinable something that rings of truth, that, in spite of and in the face of everything, you have a right and should give heed to.<sup>14</sup>

(b) You have heard the old gentleman's testimony, both on his direct and cross examination as to what he did. He tells you that when he got near Court street corner at F.'s Hotel, that he stopped a moment; that he looked and listened, and that he did not see any team in sight; and that he approached on an average gait, such as he was in the habit of using, to cross this street at the proper crossing at the time. . . . What would you have had him do, any more than he did do?<sup>15</sup>

(c) The court instructs the jury that if they believe from the evidence that the purchase of the goods was fraudulent or that judgments taken were not in good faith for money due, then the declara-

13—*Samuels v. Fuller*, 104 Ill. App. 623 (626).

"Whatever may have been the object of the attorney who drafted this instruction, it certainly could not be understood by a jury as having any other office than to direct them to find for the defendant if the portion of the declaration referred to as inducement stood by itself. They were left to determine whether the introductory part of the declaration stood alone, and if they did so determine, then they were directed to find the defendant not guilty. It is difficult to understand how the jury following this instruction could have found otherwise than that the defendant was not guilty."

14—*Little v. Superior R. T. Ry. Co.*, 88 Wis. 402, 60 N. W. 705 (706).

"This made it the duty of each jurymen to define for himself this 'indefinable something,' and then to give heed to it, 'in spite of and in the face of everything' else, which, in his mind, may have included a preponderance of the evidence. This was an invasion of the province of the jury. Besides, it gave them an intangible and unwarranted license, and hence was misleading. Every party to an action at law in this state has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere

inference, conjecture or personal experience.' *Sherman v. Lumber Co.*, 77 Wis. 22, 45 N. W. 1079. True, the jury were told that the verdict must be based upon the evidence given in the case, and upon nothing else. But this did not cure the error. *Sears v. Loy*, 19 Wis. 96; *Imhoff v. Railway Co.*, 20 Wis. 344."

15—*Davis v. Dregne*, 120 Wis. 63, 97 N. W. 512 (514).

"This left the jury to infer that in the opinion of the court the plaintiff had done everything that the law required him to do, and that his statement as to what he did was a verity in the case and must be accepted as true by the jury. This we think was invading the province of the jury especially when considered in connection with the remarks of the court on the motion for a nonsuit, to which attention has already been called. Taken together the jury would naturally infer that the court was of the opinion that the plaintiff was worthy of credit, and that his testimony should be accepted as true, but that the testimony of defendants was unworthy of credit, and contrary to the presumption arising from their own testimony. The defendants were entitled to a fair trial by an unprejudiced jury. We do not think they have had such a trial."

tions of parties under oath on the witness stand who state such transactions were in good faith and without fraudulent intent, avail but little.<sup>16</sup>

§ 3386. **Common Sense and Experience, Omitting Other Elements, Not Proper Rules to Govern the Jury—Jurors' Own Special Knowledge, Experience and Observation.** (a) You are the sole judges of the credibility of these witnesses, and of the weight of the testimony that is given you. The law has wisely placed that and made that the province of twelve men selected from the county to listen to the evidence, weigh it, and give a fair consideration to the testimony of the different witnesses. The court cannot obtrude upon that part of your duty, and would not do it, but simply asks you now fairly to consider—determine—the evidence. Take the different witnesses, and give to each one such, and such only, weight as you, in your fair and deliberate judgment, using your common experience and common sense in regard to such matters, think they are entitled to, and then, giving the weight to the different witnesses in determining their credibility, you take the whole evidence, and determine what facts have been proven to you, and apply the law the court gives you to these facts, and deduce your verdict therefrom.<sup>17</sup>

(b) The court instructs you that you are to bring your own knowledge and experience in determining what the evidence and circumstances submitted for your consideration applicable to the question really establishes and means.<sup>18</sup>

(c) The court charges the jury that the jury has a right to look to the reasonableness or unreasonableness of any testimony, and if the jury believe the testimony of any witness to be unreasonable, and contrary to the observation and experience of the jury, the jury may disregard such testimony entirely.<sup>19</sup>

16—Henderson v. Miller, 36 Ill. App. 232 (237).

"This instruction does not declare a correct proposition of law, and usurp the functions of the jury, whose duty alone it is to decide what weight shall be given to the testimony of witnesses."

17—Lancashire Ins. Co. v. Stanley, 70 Ark. Sup. 1, 62 S. W. 66 (67).

"The court fails in the above instruction to call the attention of the jury to any of the well-established legal tests and methods by which the credibility of witnesses is determined. The jury are told to use their common experience and common sense in regard to such matters. The jury might not have any common experience about determining the credibility of witnesses who testify in court, and their common sense might not enable them to fix any definite and certain rules upon the subject. Such a standard would be capricious and variable. The law has wisely recognized certain tests and methods, such as 'interest in the result of the suit,' 'manner of testifying,' etc., which when applied to the testimony of witnesses, will enable the jury to determine what weight or

credit to give their testimony. The jury should have been told specifically that they had the right to consider the interest of any of the witnesses in the result of the suit, and their manner of testifying, in determining their credibility. It was not improper, or prejudicial either, in this case, to tell the jury they might consider the former life or history of any witness, as given by himself or herself, in determining the credibility."

18—Northern S. Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066 (1072).

"The instruction, so far as it permitted the jury to apply to the matter any special knowledge of their own, was erroneous. That is according to the elementary principles."

19—Hale v. State, 122 Ala. 85, 26 So. 236 (237).

The court held this instruction bad, "because its tendency to mislead the jurors to test the reasonableness of testimony solely by their experience and observation. They may have had no experience or opportunity for observation in respect of like situations and occurrences, or the facts deposed to, may have been inconsistent with their own experience and observa-



**§ 3387. Jury Should Not Be Influenced by Newspaper Accounts.**

The court further instructs the jury that in considering this case and in arriving at their verdict they should not in any manner or to any extent be influenced by anything they may have read in any newspaper (or heard in any other way), about the so-called Allen bill or the so-called gas consolidation bill or any other bill or any ordinance mentioned in the evidence in this case, but should decide this case precisely as they would decide it if they had not read or heard any criticism of either of said bills or ordinances.<sup>20</sup>

**§ 3388. Question whether Jury Believe Evidence Is True or Untrue, Not whether It Is Just and Right.** (a) The court instructs the jury that you may accept or reject all or any part of the evidence of any witness in the case according as you may believe the same to be just and right under the evidence before you.<sup>21</sup>

(b) There is no law involved in this case that amounts to anything. It is simply a question of fact; and it will be for you to say, under your oaths, which side is in the right. Look it all over carefully and honestly; and, if you believe this mortgage was all right, and was due, find for these plaintiffs six cents damages. If you are satisfied that it was not due, or was fraudulent, or was satisfied, find for the defendant six cents damages. Take into consideration all the dealings of these parties; all the evidence one way and another; the arguments of counsel, and everything in the case,—and do what is right between man and man.<sup>22</sup>

**§ 3389. Verdict Signed by Less than Twelve—Majority Verdict.** It will be proper for nine of your panel to concur in a verdict in this case; and in case nine of you, or any number of over nine and less than twelve, should concur in a verdict, it will be the duty of each of the jurors so concurring to sign the verdict. In case all of you

tion, and yet they may have had information and knowledge of the ordinary experiences and observations of mankind in the premises with which the testimony might have comported."

20—*Geringer v. Novak*, 117 Ill. App. 161 (165, 166).

"This instruction, so far as it tells the jury that they were not to be influenced by anything they may have 'heard in any other way' concerning the Allen bill, or the gas consolidation bill, or any ordinance mentioned in the evidence, is too wide. Under it the jury were directed to exclude from their consideration competent evidence which was before them without objection as to the support of said bills and ordinances by appellee, and as to the financial reward he received for that support. Whether such evidence was credible was for the jury. They had heard it, and it was not for the court to take its consideration from them, as is done by this instruction."

21—*Hall v. State*, 134 Ala. 90, 32 So. 750 (754).

"The above instruction was at

least misleading, if not a clear misstatement of the rule. To authorize a jury to accept or reject any part of the evidence depends upon whether they believe it to be true or untrue, and not upon whether they believe the same to be just and right."

22—*Hyde v. Shank*, 77 Mich. 517, 43 N. W. 890 (892).

"We think that the instruction to the jury that there was no law involved in the case that amounted to anything was erroneous. The court had given five instructions as to the law of the case, asked for by defendant's counsel, in the very words of the requests, besides his own instructions previously given; and the questions in dispute involved both law and facts; and the law should not, in effect, have been withdrawn from the jury. The instruction that the jury should find which side is in the right was too general. It allowed the jury to enter the domain of morals, and measure the liabilities of the parties by the individual notions of the jurors as to whether the conduct of the parties was right or wrong."

should agree on a verdict, then it will only be necessary for your foreman to sign the verdict.<sup>23</sup>

§ 3390. **Advice to Jury to Agree.** I desire to instruct you a little farther as to the duties in the matter of an agreement in this case, as it has taken considerable time; it has cost, of course, considerable money; and it is important and desirable that, if you can come to an agreement, that you should do so; and I will read to you what our Supreme Court has said in this regard, to the end that it may guide you in your further considerations. In a case that was tried before Judge Bardeen, now on the Supreme Bench, after the jury had been out some time and failed to agree they were brought into court, and informed by the court, in effect, that they ought not to stand out in an unruly and obstinate way, but should reason together, and talk over the existing differences, if any, and harmonize the same, if possible; that it was their duty to meet the testimony in a spirit of fairness and candor with each other, and not stand back obstinately, but to reason together, and to apply the law as given by the court to the facts in the case, and arrive at a verdict. And Justice Cassody approves that instruction as a proper instruction to the jury. So, also, in another case, the instruction was given, and approved by the court. It is the duty of each jurymen, while the jury are deliberating upon their verdict, to give careful consideration to the views his fellow jurymen may have to present

23—Adams Express Co. v. Aldridge, 20 Colo. 74, 77 Pac. 6 (9).

"The following is the law followed by the court in the first portion of the instruction: 'That hereafter in all civil cases in courts of record which shall be tried by a jury, not less than three-fourths of the number of jurors sitting in such case may concur in and return a verdict therein; and such verdict shall have the same force and effect as though found and returned by all the jurors sitting in such case; but whenever such verdict is found and returned by less than the whole number of such jury, said verdict shall be signed by each juror concurring therein.' In City of Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403, that law was adjudged unconstitutional. But in this case the verdict which the jury returned was unanimous, and was signed by their foreman. It fulfilled all the requirements of the law as it existed independently of the unconstitutional enactment, and, if there had been no instruction on the subject at all, it would hardly have occurred to any one to question its validity, and certainly it could not have been successfully assailed. A lawful verdict having been rendered, we confess to an inability to understand how it may be invalidated by an instruction which authorized an erroneous verdict, but which the jury ignored. The instruction was not followed, but the law was; and surely the result of the jury's deliberations should not be set aside simply because, in

reaching it, they acted lawfully, even though they disregarded an erroneous direction. Counsel seem to think that the instruction had the effect, in some way, of coercing the jury. They say there might have been three of the jurors who were opposed to a verdict in any amount against the defendant, but who, realizing the uselessness of opposition, might, for the sake of reducing the amount found by the other nine, have agreed with them in a compromise verdict. Why should the nine abandon their ground, when they were instructed that their finding would be just as good without the concurrence of the three as with it? And how could an instruction that the verdict need not be unanimous have a coercive effect to make it unanimous? While the instruction was erroneous, it evidently had no effect on the conduct of the jury, and was therefore harmless. But aside from all this, the question which the defendant asks us to determine is not properly before us. The instruction was partly good and partly bad. In authorizing three-fourths of the jury to sign and return a verdict, it was erroneous; but in directing a verdict, if unanimous, to be signed by the foreman, it was correct. It was met by one general exception, which was to the instruction as a whole. The exception did not distinguish the portion which was good from that which was bad, and was therefore wholly insufficient. *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, 83 Am. St. 92."

upon the testimony in the case. He should not shut his ears, and stubbornly stand upon the position he first takes, regardless of what may be said by other jurymen. It should be the object of all of you to arrive at a common conclusion. To that end, you should deliberate together with calmness. You may retire again and see if you can agree upon a verdict. If you become convinced that you cannot, then you will so notify the officer, and he will let me know.

To this was added the statement: Of course, each juror should be convinced beyond a reasonable doubt, as I have already instructed you; and I trust that you will now calmly deliberate, and see whether or not you can or cannot agree upon a verdict.<sup>24</sup>

**§ 3391. Restraint on Jury in Reaching a Verdict.** The verdict rendered in this case must meet the approval of the individual conscience of each juror rendering the same. While each juror should endeavor, by full and frank discussion with his fellows, to arrive at a verdict, yet the issues in this case are addressed to each juror under his oath, and unless he can agree with his fellows upon a verdict which he individually thinks, under his own oath and conscience, is a proper and just verdict, he should not agree; for he should not join his fellow jurymen in the return of any verdict which he individually does not believe is, in all regards, just and proper, and, if he acts otherwise, he has violated his oath, and committed moral perjury.<sup>25</sup>

**§ 3392. Sending the Jury Back for Further Deliberations.** A jury having been out all night without reaching a verdict, the Court charged them as follows:

Now, I have no doubt that you have done just as your foreman says,—gone over the testimony very carefully and conscientiously and endeavored to agree upon a verdict, so far as you have been able to; but, perhaps, on further reflection you may be able to do so. I certainly hope so. Now I make this suggestion: I have no doubt that each side has used all the powers of persuasion, that of the individual jurors, to convince his fellow-jurors of the case as it looks to him. Now, suppose you go out and try the reverse, and let each of you try as hard as he can to be persuaded instead of trying to persuade the others. Try and persuade yourselves, those who do not agree with their fellow-jurors, and see if, looking over the testimony carefully and listening to all the arguments that those who do not agree with you may use, you cannot come to the same verdict. In view, as I have said, of the importance of the verdict in this case, I do not feel like discharging you at this time. It is now early in the morning. You have had your breakfast. Make yourselves as easy and comfortable as you can, and think

24—*Secor v. State*, 118 Wis. 621, 95 N. W. 942 (947-8).

"It is said that these remarks were so far threatening or coercive as to come within the criticism made by this court in the case of *Hodges v. O'Brien*, 113 Wis. 97-106, 88 N. W. 901. It would have been better, had the question of expense and the reference to the justices of this court been omitted, but we are not ready to say that prejudic-

ial error results therefrom. In other respects, the instructions are unexceptional."

25—*San Antonio & A. P. Ry. Co. v. Choate*, 22 Tex. Civ. App. 618, 56 S. W. 214 (215).

"The charge was calculated to restrain discussion and deliberation in the jury room, and tended to make jurors unyielding in their views. It was properly refused."



the matter over carefully. Divest yourselves of all sorts of pre-conceived opinions about the case on either side up to this time. Start right in now, just as if you had first gone out, and see what you can do. You may again retire, gentlemen.<sup>26</sup>

26—*People v. Engle*, 118 Mich. 287, 76 N. W. 502 (503).

"Within an hour after this charge, the jury returned a verdict of guilty, but with the recommendation that the court fix the punishment or fine as light as the law would allow in such cases.

"We think the court was in error in this instruction, and that its substance had a tendency to make the jurors feel that they must give way to their honest convictions upon the merits, and agree with the majority, though they had a reasonable doubt of the guilt of the respondent. This may have been what the minority did, and in consequence of which the foreman, in announcing the conclusion, recommended that the court should be lenient in passing sentence. For this reason the verdict must be set aside and a new trial granted."

In *Cranston, Adm'x, etc.*, v. *New York C. & H. R. R. Co.*, 103 N. Y. 614, 9 N. E. 500, after the jury had retired to consider their verdict, they came into court, and one of them stated that there was no probability of their agreeing. To this the court replied as follows: "I can't take any such statement as that. Gentlemen, you must get together upon a matter of this kind." He then added: "No juror ought to remain entirely firm in his own conviction one way or another, until he has made up his mind beyond all question that he is necessarily right, and the others are necessarily wrong."

In comment, the Court of Appeals said: "We are of opinion that the instruction excepted to was not a correct statement of the law. It was incumbent upon the party holding the affirmative of the issue, who in this case was the plaintiff, to satisfy the jury by a preponderance of evidence of the facts upon which her right to recover depended. If she failed to do so, the defendant was entitled to a verdict. The jurors who were not satisfied by the evidence of the truth of the plaintiff's allegations were justified in refusing, for that reason, to find a verdict in her favor, although they might not have made up their minds, beyond all question, that they were necessarily right, and that those who were in favor of finding a verdict for the plaintiff were necessarily wrong. To sustain this instruction would be to cast upon the defendant, in a civil action, a burden quite as heavy as that which rests upon the prosecution in a criminal case, and perhaps still more onerous. If the evidence was

so clear as to lead to a conclusion with the degree of certainty required by the charge, there was nothing to submit to the jury, and it was the duty of the court either to direct a verdict or to nonsuit the plaintiff."

In *Bishop v. State*, 73 Ark. 508, 84 S. W. 707 (708), after the cause had been submitted to the jury, and they had been out considering it for about two hours, they returned into court and stated that they had not been able to agree upon a verdict, whereupon the court, after impressing upon the jury their duty to agree upon a verdict if possible, made the following oral statement over the objection of the defendant: "I should like to assist you if I could do so properly. I always have an opinion of the facts of a case, but it is not my province to indicate my opinion to you. It is your exclusive province to settle the facts, and mine to declare the law. However, I will say that if you agree upon the defendant's guilt, and are not able to agree upon the punishment, you may leave that to be fixed by me; but the question whether the defendant is guilty or not is for you to say, alone. I cannot assist you in that." Thereupon the jury retired, and in a few minutes returned into court a verdict as follows: "We, the jury, find the defendant guilty of involuntary manslaughter, and leave the penalty for the court to decide."

The Supreme Court said: "It is contended that the court, by the language employed, expressed or intimated an opinion as to the guilt of the accused. We think that it is fairly susceptible of that construction, and that the jury could have so understood the court, and probably did so. The learned judge made it plain to the jury throughout his remarks that they were the exclusive judges of the testimony, and its weight and sufficiency; but he also said to them, in plain terms, that he had an opinion upon the facts, which he could not indicate. We think the bent of his mind upon the question of the guilt or innocence of the accused was clear to the jury when he said that he had an opinion, and immediately followed it with this statement, 'However, I will say that if you agree upon the defendant's guilt, and are not able to agree upon his punishment, you may leave that to be fixed by me,' and the fact that the problem of guilt or innocence, over which the jury had disagreed, was in a few moments solved by a ver-

**§ 3393. Directing Method of Arriving at Verdict.** You are instructed that, in arriving at your verdict, you should do so after a careful consideration of the evidence, and instructions of the court, and not by the use of any method of chance, and none of you should consent to any verdict which does not meet with the approval and approbation of your individual judgment; and you are further instructed that you must not compromise between the questions of liability and amount of damages, that is, if after due consideration of the evidence and instructions of the court and based upon a view as to the preponderance of the evidence, some of you should believe the defendant not guilty and others of you upon like basis believe the defendant guilty and plaintiff entitled to substantial damages, you must not in such event, merely as a matter of compromise or as it were to split the difference between you bring in a verdict for some unsubstantial amount against the defendant. Further you must not fix or assess the damages, if there should be occasion therefor, by adding together the amount individual jurors may think ought to be awarded and then dividing the amount so obtained by the number of jurors voting.<sup>27</sup>

#### MISCELLANEOUS.

**§ 3394. Referring to Onlookers as Lobby in Favor of One or the Other Party.** (a) In passing upon this case, you will be governed by the law and the evidence; and it is your duty not to allow yourselves to be influenced by the presence of a lobby in the court room opposed to the granting of the plaintiff's petition.

(b) The law contemplates the public trial of causes, but it is improper for persons interested in causes to pack the court room

dict finding the defendant guilty, and leaving the punishment to be fixed by the court, leads to the conclusion that they were influenced more or less by these remarks of the court.

"The words of Mr. Justice Battle in disposing of a similar question in the case of *Sharp v. State*, 51 Ark. 147, 10 S. W. 228, 14 Am. St. 27, are peculiarly applicable here, viz.: 'In the midst of doubt as to what their verdict should be as to appellant, it was natural for them (the jury) to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the question which they were required to decide.' It is entirely proper for a trial judge, and it is his duty, at all stages of the deliberations of the jury, to make plain the obligation resting upon them if possible to agree upon a verdict consistent with the facts and the concurring individual convictions of each juror, yet, as said in *Sharp v. State*, supra, 'any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses, necessary for them to decide in order for them to render a verdict, would tend to deprive one or more of the parties of the benefits guar-

anteed by the Constitution, and would be a palpable violation of the organic law of the state.' It is unnecessary and improper for a trial judge to remind the jury that he has an opinion upon the facts, though they, of course, know that he has an opportunity equal with them of forming an opinion, and that he entertains one."

27—*Guaranty Construction Co. v. Broeker*, 93 Ill. App. 272 (274).

"Omitting the possible ambiguity of the expression 'based upon a view of the preponderance of the evidence,' we regard the instruction as in effect meaning that their verdict must be either not guilty or else they must give the plaintiff substantial damages. \* \* \* To the ordinary mind there is conveyed by the instruction the idea that if some of the jury believe the defendant not guilty and others of them believe the plaintiff is entitled to 'substantial' damages, they must reconcile their verdict by bringing in a verdict for an 'unsubstantial' amount. \* \* \* Other reasons can easily be thought of why the instruction was materially prejudicial, but we will not prolong the discussion. Its giving was material error."

with their friends and partisans for the purpose of influencing the action of a jury. You will be careful therefore not to allow the presence in the court room of the large number of persons who are taking an active interest in behalf of the defendants, and their actions and wishes, outside the evidence in the case, to influence you in favor of the defendants in making your verdict.<sup>28</sup>

**§ 3395. Referring to Probabilities and Circumstances Not in the Case.** So taking into consideration all the circumstances in the case appearing upon the trial, as part of the evidence in the case, and remembering that you are to consider probabilities and circumstances as part of the evidence in deciding this case, I submit it to you.<sup>29</sup>

**§ 3396. Lengthy and Argumentative Instructions—Limiting the Number of Instructions.** I notice every time we come to draw a panel, the question is asked, "Have you any prejudice against personal injury actions?" I hope not, gentlemen. I hope not. It is an unfortunate state of facts if we have got to swear a person can't come into court and have a fair show on a personal injury action. That is a bad state, if that is true, and it makes me out of patience, almost, to have that assumed that it may be true. However, personal injury actions are many of them humbugs,—made up. You want to search them as you do any other actions,—sift the wheat from the chaff; but don't brace up and say here: "It won't do to give verdicts in personal injury actions. It will only encourage people." Never say that. If you feel there are a good many humbug actions, why, search, search the evidence. That's right. But don't brace up against it. If anybody here has suffered an injury, then he has a right to come into court. We have time for them, and a sufficient punishment on them,—to put the costs

28—*Lynch v. Bates*, 139 Ind. 206, 38 N. E. 806.

"In so far as these instructions were calculated to inform the jury that they should decide the case according to the law and the evidence free from passion or prejudice, and without being influenced by public sentiment or popular clamor, they were correct; but in that respect, the instructions were fully supplemented by other instructions given to the jury. In so far, however, as the instructions characterized the people in attendance upon court as a lobby, who had packed the court room with intent to influence the jury in partisan spirit to decide the case without regard to evidence, we think the instructions were objectionable, as being themselves calculated to prejudice the jury against the remonstrants. It is the right of the people to attend trials in court, and, provided such attendance is orderly and respectful of the dignity and procedure of the court, no objection can be made simply on the ground that the questions of issue are of great public interest."

29—*Hughes v. Meehan*, 81 Minn. 482, 84 N. W. 331.

"This language was erroneously

injected into the charge, and we are of the opinion that it might have misled the jury to defendant's prejudice. It was at the end of the charge, and consequently at a time when it would naturally impress itself upon the minds of the jurors with great force. They were then expressly and emphatically directed to remember that in deciding the case they were to consider probabilities and circumstances as part of the evidence, not such only as had been made to appear by or in the evidence. If the instruction had clearly been that they could consider probabilities and circumstances disclosed by the evidence, the charge would have been less liable to mislead, and less objectionable. In fact, this was the substance of the first clause of the quoted paragraph, but it was immediately followed by the clause excepted to, which would, to some extent, at least, remove the effect of the prior language. The time when the erroneous language was used and its form served to direct special attention to it. If this had not been the case, it is probable that reversible error could not have been predicated upon it."



on them and send them out without a verdict, if they are not entitled to one. I am not going to lose my right to come into court and have my wrongs redressed because my neighbor may have come into court when he had no business to.<sup>30</sup>

§ 3397. **Depositions—Weight of.** I charge you, gentlemen of the jury, that testimony taken by deposition should receive the same consideration and weight at the hands of the jury as if the witness was testifying on the stand in their presence; that the prosecution has ample opportunity to cross-examine the witness by cross interrogatories, and, if the prosecution fails to cross-examine the witness, it is not to be taken against the defendant, in determining his guilt or innocence.<sup>31</sup>

30—Johnson v. Superior R. T. Ry. Co., 91 Wis. 233, 64 N. W. 753 (755).

"As was said by this court in another case, so we feel called upon to say of the lengthy charge in this case: 'An opportunity for elegant discourse is always tempting to genius and ability. But while some circumstances invite, others repel, the indulgence. To be apt, the expression must not only be accurate, but appropriate. A strict adherence to the case in hand is one of the highest qualities of juridical discussion. Such discussion is necessarily concise, direct, and restricted, rather than ornate. It is, moreover, cold, logical, pointed, and without superfluity.' Bradley v. Cramer, 66 Wis. 300, 23 N. W. 372."

In Sidway v. Missouri Land & Live Stock Co., 163 Mo. 342, 63 S. W. 705 (715), the trial court gave 33 instructions and the upper court said: "Next for consideration are the instructions, respecting which we say that nine and one-half printed pages of instructions is too much for an average jury to digest and understand. The only effect of such a multiplicity of instructions would be, not to instruct the jury, but to confuse and mislead them,—make their verdict mere guesswork. The changes rung on all the phases of this case, and some not of this case, by this vast

array of instructions, reminds one of what Judge Scott used to say was 'like the multiplication table set to music.' We have remonstrated with the trial courts for years about the great impropriety and frequent injustice resulting from writing or giving instructions by the acre, but without avail, and so resort must be had to more drastic measures. We therefore hold that the great number of instructions given in this instance, of itself, warrants a reversal of the judgment. \* \* \*"

31—Hogan v. State, 130 Ala. 104, 30 So. 358.

"This charge is clearly argumentative, and was therefore properly refused. There was not even the excuse for asking it sometimes found in the fact that the argument which the court is requested to make by an instruction is responsive to an argument made by the opposing counsel, for it affirmatively appears that no reference was made by counsel for the state to the fact that part of the evidence for the defense was taken on written interrogatories, and presented in the form of a deposition, though, of course, had this been otherwise, there still would have been no duty resting on the court to give the charge."

See also Olcese v. Mobile F. & T. Co., 112 Ill. App. 281, aff'd 211 Ill. 539, 71 N. E. 1084.

## CHAPTER CXII.

### ACCOUNT STATED.

See Approved Instructions, Chapter XXIV, Vol I.

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| <p>§ 3398. Presumption of acquiescence from retention of account rendered without objecting to it within a reasonable time.</p> <p>§ 3399. Presumption that all items each party had against the other was embraced in the</p> | <p>settlement — Burden to prove the contrary.</p> <p>§ 3400. Settlement of account—Interest on amount agreed.</p> <p>§ 3401. Accord and satisfaction—Definition.</p> <p>§ 3402. Accord without satisfaction.</p> |
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**§ 3398. Presumption of Acquiescence from Retention of Account Rendered Without Objecting to it Within a Reasonable Time.** The court instructs the jury that under the law, where one man makes out an itemized statement of his accounts with another, and mails or hands him a copy, and such person retains the same, making no objection thereto, then, in law, it constitutes a settlement of the accounts between them.<sup>1</sup>

**§ 3399. Presumption that All Items Each Party Had Against the Other Was Embraced in the Settlement—Burden to Prove the Contrary.** The court instructs the jury that if you believe, from the evidence, that on or about the — day of —, the plaintiff and defendant met together and looked over their accounts for the purpose of settling the same, and that they settled and agreed upon a balance due, then the law will presume that such settlement embraced all the items each had against the other that were then due and in such case it devolves upon the party asserting the contrary to prove by a preponderance of the evidence, that any item or items omitted were omitted by consent of the parties, or by accident, or unintentionally, or by the fraud of the other party.<sup>2</sup>

<sup>1</sup>—Rose v. Bradley, 91 Wis. 619, 65 N. W. 509 (510), 51 Am. St. 925, 30 L. R. A. 925.

"This is not a correct statement of the law," said the court, "either as applied to accounts between individuals generally, having business transactions with each other, or between partners. The mere making out by one person of his account with another, with whom he has had business transactions, and the sending of the same to him, and its retention by such other, without objection, does not necessarily constitute a settlement or account stated. If such other keeps the account, and fails to object within a reasonable time, the facts raise a presumption or inference of acquiescence. That is all. Such pre-

sumption or inference is more or less strong according to circumstances. The neglect to return or object may be for such a length of time as to render such presumption conclusive on the question of acquiescence so as to make the account stated. The mere retention of the account, however, without objection, is evidence of acquiescence only. Stenton v. Jerome, 54 N. Y. 480; Lockwood v. Thorne, 18 N. Y. 285, 72 Am. Dec. 503; Engfer v. Roemer, 71 Wis. 11, 36 N. Y. 618; Whart. Ev. para. 1140, and cases cited."

<sup>2</sup>—Beebe v. Smith, 194 Ill. 634, 62 N. E. 856. The court said: "We think the instruction as a whole was misleading and erroneous in that it cast the burden upon the

§ 3400. **Settlement of Account—Interest on Amount Agreed.** The court instructs the jury that if you believe, from a preponderance of the evidence, that the parties to this suit had some time prior to the commencement of this suit come to a settlement of the account between them, if any such account you believe from the evidence there was, and agreed upon an amount due from the plaintiff to the defendant, and he then and there promised to pay it, then the plaintiff is entitled to the interest at the rate of five per cent per annum on the amount so agreed upon from date of so agreeing on the amount due.<sup>3</sup>

§ 3401. **Accord and Satisfaction—Definition.** (a) To constitute an accord and satisfaction, where there is a bona fide dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to the condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. A party to whom an offer is thus made has no alternative but to refuse it or to accept it upon such conditions, and if he takes it his claim is cancelled.

(b) If you find from the evidence that there was a dispute, in good faith between P. and A. as to the amount of commissions due said agent or agents for the sale of said real estate to G. and H. such dispute might be legally the matter of compromise and settlement between said parties, and a payment of a smaller sum than the sum actually due might operate as a satisfaction of the amount due, if such compromise and settlement was agreed upon and the sum paid was tendered on the condition that it should be received, if accepted, in full settlement, and the same was so received. And in this case, if you find that prior to Dec. 4, 1902, there was a disagreement in good faith between the said agents and the said P., or said D., as to the amount due as commissions, and that thereupon said parties agreed to pay a certain sum which the said agents agreed to accept, and that in pursuance of such agreement, said D. did, on Dec. 4, 1902, send a check to said A. for the amount then due under the agreement of settlement, and that said A. indorsed and transferred said check to another by whom it was collected, and you further find that said check was tendered and received with the intention on the part of said D., and the said agents that it should operate as a full settlement and satisfac-

plaintiff to prove by a preponderance of the evidence that the indebtedness was omitted in that settlement either by consent of the parties, or by accident and unintentionally, or by the fraud of the other party. The party asserting that an omitted item of indebtedness was not included in a general settlement may overcome the presumption that it was included by proving that such item was not at that time due. *Straubher v. Mohler*, 80 Ill. 21."

3—*Bradley v. Keen*, 101 Ill. App. 519 (523).

The lower court modified the instruction as asked by inserting the

words given above after "defendant," viz., "and he then and there promised to pay it." . . . "We think," said the appellate court, "that the instruction should have been given as asked. The modification of it by the words 'and he then and there promised to pay it' was calculated to lead the jury into believing that, even though the parties agreed on the amount due the plaintiff, this would not warrant a recovery without an express promise to pay the amount, which is not the law."

For an instruction of interest on unsettled accounts, see *Weston v. Brown*, 30 Neb. 609, 46 N. W. 827.



tion of said claim, then there was a full accord and satisfaction thereof, and plaintiff cannot recover.<sup>4</sup>

§ 3402. **Accord Without Satisfaction.** If the jury believe by a preponderance of the evidence that there was a dispute and controversy between the plaintiff and the defendant as to the amount justly due upon the note introduced in evidence, and that the plaintiff and the defendant settled the dispute by agreement by which the defendant was to deduct fifty dollars from the amount of the face of the note, and the plaintiff agreed to pay fifty dollars more than he claimed to be due upon said note, then such agreement is binding upon both parties and if the jury further find that the defendant, by his agent, B., threatened to enforce the payment of said note in full by the seizure and sale of the property of the plaintiff covered by the mortgage that secured said note, and that the plaintiff paid said note in full to save his said property from said seizure and sale, then your verdict must be for plaintiff.<sup>5</sup>

4—Beaver v. Porter, 121 Ia. 41, 105 N. W. 346 (348).

"The conclusion is irresistible that the instructions must be condemned, because conflicting, because they were calculated to carry confusion into the jury box, and because they presented matters for the determination of the jury which had no place on the record."

5—Slover v. Rock, 96 Mo. App. 335, 70 S. W. 268.

The court said that this "trans-

action was only an accord, without satisfaction, which did not form a bar to the original note. In order to conclude the defendant, there should have been both accord and satisfaction. In other words, the agreement to substitute a new note and mortgage for the former ones should have been carried out by the parties. Vining v. Insurance Co., 89 Mo. App. 324; Gibony v. Insurance Co., 48 Mo. App. 185."

## CHAPTER CXIII.

### ADVERSE POSSESSION.

See Approved Instructions, Chapter XXV, Vol. I.

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| <p>§ 3403. Adverse possession—Hostile in its inception—Presumption as to possession.</p> <p>§ 3404. Adverse possession—Intent to acquire title—Mistake as to boundary.</p> <p>§ 3405. Open and notorious adverse possession for 10 years.</p> <p>§ 3406. Occupancy — Constructive possession — Prescriptive title.</p> | <p>§ 3407. What is actual possession is question of law and should not be left to jury.</p> <p>§ 3408. Adverse possession—Tax sale—Minors.</p> <p>§ 3409. School lands—Definition of "actual settlers" thereon.</p> <p>§ 3410. Title to lands—Need not be traced back further than to state.</p> |
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**§ 3403. Adverse Possession—Hostile in Its Inception—Presumption as to Possession.** (a) The jury are instructed that to constitute a valid and effectual adverse possession, the possession must have been hostile in its inception, that is, from the time the defendant claims he purchased the property; that no possession could be adverse except where the person in possession held for himself to the exclusion of all others, and under a claim of title entirely antagonistic to that of the true owner.<sup>1</sup>

(b) Adverse possession is to be taken strictly and not to be made out by inferences but it must be established by proof. Every presumption is in favor of possession subject to the title of the true owner.<sup>2</sup>

**§ 3404. Adverse Possession—Intent to Acquire Title—Mistake as to Boundary.** (a) The jury are instructed that if they find from the evidence that the defendants, or the grantor under whom they claim, took possession of the disputed land under the belief that the line contended for by them or him was the true line, and with no intention to

1—Fox v. Spears, 78 Ark. 71, 93 S. W. 560.

"Appellant's objection to this instruction, and given over his objection, is, it told the jury to find in favor of appellee as to adverse possession, unless the possession of appellant was hostile from the time when he claimed to have purchased the property. This was error, but it was not prejudicial. There was no evidence, and he did not claim that it was hostile, if it ever was, from any other period of time."

2—Fox v. Spears, 78 Ark. 71, 93 S. W. 560.

"This instruction is ambiguous. As we understand it, it means that possession is presumed to be in subordination to the title of the true owner until the contrary is

proved. The defects in it should have been pointed out by specific objections, and appellant should have asked additional explanatory instructions, which was not done. A general objection was not sufficient. Fordyce v. Jackson, 46 Ark. 602, 20 S. W. 528, 597; White v. McCracken, 60 Ark. 613, 31 S. W. 882; St. L. I. M. & So. Ry. Co. v. Warren, 65 Ark. 624, 48 S. W. 222; McGee v. Smitherman, 69 Ark. 632, 65 S. W. 461; St. L. I. M. & So. Ry. Co. v. Norton, 71 Ark. 314, 73 S. W. 1095; St. L. & I. M. So. Ry. Co. v. Pritchett, 66 Ark. 46, 48 S. W. 809; Williams v. State, 66 Ark. 264, 50 S. W. 517; Phenix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. 900."

claim any land except the land up to the true line, then in that event he would only be entitled to hold the land up to the true line, wherever that may be, and you will so find.

(b) You are instructed that no right or title can be gained against the owner of land by mere possession, and before you can find for the defendant you must find from a preponderance of the evidence that, when defendants' grantors entered upon the land herein claimed by plaintiff and took possession thereof, it was with the intent, to deprive the owner, and that same was not by reason of a mistake in the boundary line and without the intent to go beyond the true line.<sup>3</sup>

**§ 3405. Open and Notorious Adverse Possession for Ten Years.**

(a) If the jury find from the evidence that the plaintiff has been in open and notorious adverse possession of the premises in dispute for more than ten years before the alleged entries thereon by the defendant, then the jury are instructed to find for the plaintiff, unless the defendant has shown that, subsequent to such period, he or his landlord had likewise held and possessed the premises in the same manner for a like period of ten years, or unless the defendant has shown a deed from the plaintiff.<sup>4</sup>

(b) If you believe from the evidence, that the witness, M., was in the open, notorious and exclusive possession of the property described in the declaration, from the 15th day of June, A. D. 1903, to March 11th, 1904, and that upon said last mentioned date he sold said property to the defendant, S., and delivered possession of the same to said S., then under the law the jury could only discharge their duty by a verdict for the defendant, unless a preponderance of the evidence shows said M. was not the owner of said property and said S. had actual notice that said M. was not the owner of the said property.<sup>5</sup>

3—*Bayles v. Daugherty*, 77 Ark. 201, 91 S. W. 304.

"Both of these instructions were incorrect and should not have been given. From them the jury might have understood, and doubtless did understand, that if defendant's grantor at the time he took possession of the disputed strip of land, labored under a mistake as to the true boundary, and had no intention of taking that which was not his own, the plea of adverse possession could not be sustained, even though he intended to hold the strip as his own. This is not the law. The question of the good or bad faith of the transaction, or the intention of the party taking possession of land, is not material, provided the intention is to take and hold possession adversely. If the intention is to hold adversely, the statute runs, regardless of any mistake as to boundary or title. If the holding be not hostile, but in subordination to the rights of the true owner whenever asserted, recognizing the possibility of a mistake, then the statute does not run, because the holding under those circumstances, is not adverse. This is the doctrine established by the decisions of this court. *Wilson v.*

*Hunter*, 59 Ark. 626, 28 S. W. 419, 43 Am. St. 63; *Murdock v. Stillman*, 72 Ark. 498, 82 S. W. 834."

4—*Kolb v. Jones*, 62 S. C. 193, 40 S. E. 168.

"It is alleged that such charge was erroneous for the reason that 10 years' adverse possession without proving the equivalent to a grant, or that the state is not claiming the land in dispute, is not sufficient to make a perfect title. This exception must be sustained. The case of *Busby v. Railroad Co.*, 45 S. C. 313, 23 S. E. 50, shows that in order to establish a title to real estate, acquired by adverse possession, it is necessary to show that the title to such real estate has passed out of the state actually or presumptively."

5—*Ware v. Souders*, 120 Ill. App. 209 (210).

"The instruction is erroneous in that it submits to the jury the question as to what constitutes ownership; whether the facts relied upon to establish ownership exist, is a question for the jury, but whether the same constitutes ownership is a question of law. The instruction is misleading in that it tells the jury, in effect, to find that *Souders* must have had actual no-



**§ 3406. Occupancy—Constructive Possession—Prescriptive Title.** The possession of land if it is under color of title—that is, if possession is taken under a paper purporting to be a deed, describing the land, and the grantee goes into occupancy of a part of the land described in the deed, and claims the whole tract, such possession would be constructive possession of the whole tract, and if continued for ten years without interruption would ripen into an indefeasible title. So the possession of C. under that deed from her brothers and sisters if it began and continued for ten years without interruption would give her a title by adverse possession. If her possession was interrupted in 1898 that was not ten years from 1890, the date of the deed. If her possession had not been interrupted for a couple of years longer so as to complete ten years, she would have acquired title by such possession of part of the land. This is a good illustration of possession under color of title. If she went into possession of a part of the land described in that, claiming the whole tract so described, that would be possession under color of title; but that possession was interrupted by the building of the wire fence in 1898 so that does not conclude this case.<sup>6</sup>

**§ 3407. What Is Actual Possession Is Question of Law and Should Not Be Left to Jury—Title—Possession.** If the jury believe from the evidence in the case that on the — day of —, the date of the purchase by plaintiff from B., the defendant, K., was in actual possession of the tract of land in controversy in this action, claiming it as his own, to a well-defined or marked boundary, adversely to all the world, they will find for the defendant.<sup>7</sup>

**§ 3408. Adverse Possession—Tax Sale—Minors.** The court charges the jury that if they believe from the evidence that this land in con-

tice that Markwell was not the owner of the property.

What the jury understood by the expression "actual notice" as used in the instruction is exceedingly problematical. They may have readily taken it to mean that M. must have had direct and positive knowledge of the fact, or that he received express notice thereof. Such is not the law. If facts and circumstances which would have placed an ordinarily prudent person upon inquiry as to the ownership of the property, were shown by the evidence to have been brought to the knowledge of S., notice to him would be inferred. The use of words 'open, notorious and exclusive possession' was also objectionable as tending to lead the jury to believe that such possession was conclusive proof of actual ownership, disregarding the question as to whether such possession was adverse or otherwise. While open, notorious and exclusive possession raises a strong presumption of ownership, it is not conclusive thereof."

6—*Chastang v. Chastang*, 141 Ala. 451, 37 So. 799 (800).

"This charge was calculated to confuse the minds of the jury by

stating a hypothetical case not in accordance with the facts as testified to, and as shown in the latter part of the charge itself. It then assumes that C. had such a possession as would be in law adverse possession. It ignores the necessity of exclusiveness in the possession, in connection with the proof that the heirs of Z. who held the legal title had already acquired possession of this land under the United States patent, and were continuing to manifest their possession by acts equally notorious as those of plaintiff."

7—*Mayer v. Kenton*, 23 Ky. L. 1052, 64 S. W. 728.

"This instruction submitted to the jury both the question of law and fact, in that they were told that if defendant was in the 'actual possession' of the disputed land when plaintiff's deed was executed they must find for defendant. What might constitute such actual possession was thus left to the jury. We are of opinion that this was error. The court should have given the jury such a definition of the actual possession available to defendant in this case as would have guided them safely to a verdict."

troverſy was ſold for its taxes, and if they further find that at the time ſaid land was ſold for taxes the plaintiff was a minor, then he would only have two years after he became twenty-one years old to bring ſuit to recover the land in controverſy.<sup>8</sup>

**§ 3409. School Lands—Definition of “Actual Settlers” Thereon.**

An actual ſettler on ſchool land is one who has in good faith eſtabliſhed his reſidence thereon for the purpoſe of making his home thereon. It is not neceſſary for him to have his wife or family on the land at the very time he makes ſuch ſettlement, if in fact he has himſelf, in good faith, eſtabliſhed his reſidence upon the land with the bona fide purpoſe and intention of making his home upon the land.<sup>9</sup>

**§ 3410. Title to Lands—Need Not Be Traced Back Further than to State.** As againſt the defendant K. the burden is upon the plaintiff to entitle it to recover, to prove, by a preponderance of the evidence, a connecting chain of title from the United States down to itſelf.<sup>10</sup>

8—Jones v. Williams, 108 Ala. 282, 19 So. 317 (318).

“Section 546 of the Code of 1867—the only ſtatute cited as authorizing the inſtruction aſked by the defendant to the effect that plaintiff would have only 2 years within which to ſue for the land, after he became 21 years old, if it was ſold for taxes, and the plaintiff was then a minor—clearly has no application. That ſection relates to the period of redemption from tax ſales. Beſides, when the land in controverſy was ſold for taxes it did not belong to the minor, but to his father.”

9—Allen v. Frost, 31 Tex. Civ. App. 232, 71 S. W. 767.

“We are of opinion the charge is ſubject to the criticism that it is upon the weight of the evidence and therefore erroneous. As an abſtract propoſition of law it is doubtleſs correct, but in determining the all important queſtion whether or not the appellee had in good faith eſtabliſhed his reſidence

upon the land with the bona fide purpoſe of making his home there the abſence of the wife and family is a pertinent circumſtance for the jury's conſideration, tending to a greater or leſs degree, according to the circumſtances ſurrounding ſuch abſence, to diſprove the bona fides of ſuch ſettlement. The family's abſence may be eaſily explained, and may have been in this caſe, yet the fact remains that it is for the jury and not the court to ſo ſay. Chesser v. Baughman, 22 Tex. Civ. App. 435, 55 S. W. 132; Cordill v. Moore, 17 Tex. Civ. App. 217, 43 S. W. 298; Borchers v. Mead, 17 Tex. Civ. App. 32, 43 S. W. 300; Mayo v. Tudor's Heirs, 74 Tex. 471, 12 S. W. 117.”

10—C. & A. R. R. Co. v. Keegan, 185 Ill. 70 (78), 56 N. E. 1088.

“This inſtruction was clearly wrong. The ſource of the title was in the State of Illinois, and judicial notice is taken that the United States was the original proprietor and granted the land to the State.”

## CHAPTER CXIV.

### AGENCY.

See Approved Instructions, Chapter XXVI, Vol. I.

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| § 3411. Erroneous definition of general agent.   | his agent before his employment as such agent.   |
| § 3412. Authority of agent.  | § 3419. Assuming in instruction that agent made contract, when controverted, held error. |
| § 3413. Limited authority of agent—Notice of—Two issues submitted in one instruction.        | § 3420. Ignoring the issue of ratification.  |
| § 3414. Evidence establishing agency.  | § 3421. Ratification of tort by principal by accepting benefit.                          |
| § 3415. Agent dealing with himself—Singling the agent out for comment as to his credibility. | § 3422. Suit to recover of agent proceeds of sale.                                       |
| § 3416. Loaning money upon mortgage security—Ignoring defense of statute of limitation.      | § 3423. One merely assuming to act as agent, not liable to an action of deceit.          |
| § 3417. Agent suing for commissions—Instruction on an insufficient hypothesis.               | § 3424. Paying debt for another without his consent—No rights against that other.        |
| § 3418. Principal is not charged with notice of things known to                              | § 3425. Money spent for different purpose than intended.                                 |
|  | § 3426. Principal liable for fraud of agent.   |

§ 3411. **Erroneous Definition of General Agent.** (a) If the jury find from the evidence in this case that B. was employed by the plaintiffs to transact all of the business in relation to the lands mentioned in the agreement in evidence, then he was their general agent.<sup>1</sup>

(b) If the jury believe from all the evidence in this case that the plaintiffs had their lands in Blount county put into the actual possession of B., and that he for a long time, to wit, one year or more, had actual possession and control of them, renting part of them out, taking rent notes therefor, which were afterwards found in plaintiff's possession, who were collecting the same, employing surveyors, keeping off trespassers, and demanding and collecting pay for timber sold and for timber cut off said lands, then the jury will be warranted in finding that B. was the general agent of the plaintiffs in and about to said lands, and any person had a right to deal with him without inquiring the extent of his agency or authority.<sup>2</sup>

1—Birmingham Mineral R. R. Co. v. Tennessee C. I. & R. Co., 127 Ala. 137, 28 So. 679 (682).

The court said: "Authority to transact business in relation to lands did not, as a matter of law, constitute Bass plaintiffs' general agent as is asserted by this charge."

2—Birmingham Mineral R. R. Co. v. Tennessee C. I. & R. Co., supra.

The court said: "Nor did it follow as a legal conclusion, from the fact that B. was placed in charge of the lands, that he could by his acts define the scope of his agency so as to be binding on the plaintiffs without regard to whether these acts were authorized or were known to and ratified by the plaintiffs as is assumed."



§ 3412. **Authority of Agent.** You are instructed that whenever a person has held out another as his agent, authorized to act for him in a given capacity, or when his habits or course of daily dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it might be necessary to protect the rights of third persons who have relied thereon in good faith.<sup>3</sup>

§ 3413. **Limited Authority of Agent—Notice of—Two Issues Submitted in One Instruction.** Or if you find that L. was the agent of the defendant company, and that his authority as such agent was limited, and that plaintiffs were put on notice of the extent of the authority of said agent, or by the use of ordinary diligence could have been put on notice of his authority, and if you further find that the seed were shipped to H. subject to examination and weight before acceptance by defendant, and that same upon arrival at H. were found to be of unsound and unfit condition for the purpose for which they were contracted for, and you further find that defendant company had paid plaintiffs the fair value of same at that time, then you will find for the defendant.<sup>4</sup>

§ 3414. **Evidence Establishing Agency.** The court instructs you that in determining the question as to whether he was the agent, look to the testimony, to all of the past conduct of the defendant, as to what communications passed between them—between the plaintiff and the defendant that has been put in evidence here before you.<sup>5</sup>

3—*Quale v. Hazel*, — S. D. —, 104 N. W. 215 (217).

"This instruction was refused by the court, and we think, correctly, for the reason that there was no evidence in the case proving or tending to prove that the defendant had held out E. as his agent or as authorized by him to enter into any contract on his behalf. While the statement of the law as contained in this instruction may be correct, in the absence of evidence making it applicable to the case before the court, it would have been improper for the court to have given the instruction, as it might have tended to mislead the jury."

Where an agent's powers are limited it is error to charge that the principal is necessarily bound by the agent's acts.

In *Schollay v. Moffitt-West Drug Co.*, 17 Colo. App. 126, 67 Pac. 182, a woman conducted a pharmacy and employed her husband as her agent with limited powers to bind her, of which the drug company had notice. In an action by the drug company against her for the price of goods sold, held that an instruction stating that the receipt of such goods by her at her store and the sale of a part thereof by her or her agent amounted in law to a ratification and made her liable for the entire amount of the bill, was held bad, citing *Schutz v. Jor-*

*don*, 141 U. S. 213, 11 Sup. C. 906, 35 L. Ed. 705.

4—*Merchants' & Planters' Oil Co. v. Burow*, — Tex. Civ. App. —, 69 S. W. 435.

The court said: "Two issues were submitted by this instruction which were required to be found in favor of the defendant to entitle it to a verdict, when either of them would have been sufficient. The jury were required to find that the authority of L. as agent was limited so that he had no power to make the purchase, and that the seed were shipped to H. subject to examination and acceptance by the defendant."

5—*Brinson v. Exley*, 122 Ga. 8, 49 S. E. 810.

"In view of the evidence introduced on the trial, and of the peculiar circumstances of this case, we are of the opinion that this charge, if not erroneous, was at least confusing in its tendency. B. admitted having formerly acted as agent for E., but contended that whatever agency once existed had terminated several years before the sale of this land, and that in this particular transaction he was in no sense E.'s agent. If this evidence was to be believed, it is clear that the jury would not be authorized to consider 'all of the past conduct of the defendant in determining whether he was at the time under investigation the agent of the plaintiff.'"

**§ 3415. Agent Dealing with Himself—Singling the Agent Out for Comment as to His Credibility.** (a) The law does not absolutely prohibit an agent from dealing with himself, but it looks with suspicion upon all transactions of that character, and requires the agent to prove to the satisfaction of the jury that the transactions actually occurred, and were free from fraud. In such cases the agent is allowed to testify in his own behalf, and it is for the jury to determine whether, under all the circumstances of the case, his testimony is entitled to credit.

(b) When an agent bargains or deals with himself, he is often the only witness to the transaction; and, however unfair or fraudulent it may be, it is impossible to contradict the testimony he may give, by other direct testimony. As the law looks with suspicion upon such transaction by an agent, it likewise looks with suspicion upon the testimony which the agent may give of the transaction. In such cases the mere fact that there is no direct contradiction of the agent's own testimony does not preclude the jury from considering all the circumstances of the case, and giving to such testimony just as much or just as little weight as they may think it entitled to.<sup>6</sup>

**§ 3416. Loaning Money upon Mortgage Security—Ignoring Defense of Statute of Limitation.** You are instructed that if you find from the evidence that the defendant undertook to act for plaintiff in loaning her money upon mortgage security, and you further find that she directed him that the mortgage should be a first mortgage upon real estate security, and that defendant in violation of such instructions loaned her money on real estate upon which there was a prior mortgage for \$—, the plaintiff would be entitled to recover the money so loaned by him contrary to her instructions.<sup>7</sup>

**§ 3417. Agent Suing for Commissions—Instructing on an Insufficient Hypothesis.** If you believe from the evidence that the defendant had employed plaintiff to sell his cattle in question under a verbal contract to pay plaintiff whatever sum he sold cattle for in excess of \$46 per head, and you believe that the plaintiff secured a purchaser who was ready, willing and able to purchase said cattle, and you believe that thereupon the defendant took up the negotiations with said purchaser, while plaintiff was endeavoring to make to the said purchaser a sale of said cattle under said verbal contract and voluntarily reduced the price of said cattle, and finally sold said cattle to such purchaser at a reduced price, then the plaintiff would be entitled

6—In *Goodhue Farmers' Warehouse Co. v. Davis et al.*, 81 Minn. 210, 83 N. W. 531 (532), an action by the principal to recover profits made by its manager the court condemned the above instructions on the ground that it singled out the testimony of the agent for comment and the weight to be given to his testimony.

7—*Faust v. Hosford*, 119 Ia. 97, 93 N. W. 58 (90).

The court said: "This instruction was manifestly erroneous, and

taken in connection with No. 18, was unquestionably misleading and prejudicial. It entirely eliminated the main defense relied upon by defendant, and permitted the jury to find a verdict for plaintiff without reference to the question of the statute of limitations. That the instruction is erroneous see *Meyer v. Button Co.*, 112 Ia. 51, 83 N. W. 809, 84 Am. St. 323, 51 L. R. A. 141; *Quinn v. Railway Co.*, 107 Ia. 710, 77 N. W. 464."

to recover whatever the evidence shows to be the reasonable value of plaintiff's services.<sup>8</sup>

**§ 3418. Principal Is Not Charged with Notice of Things Known to His Agent before His Employment as Such Agent.** You are instructed that if you find, from the evidence, that E. held the goods of plaintiff under a written contract which provided that no title should pass to the goods so held until the same were paid for by E., then such contract would be binding and valid between E. and the plaintiff, and all the goods so held by E. under the said contract were not his, but those of the plaintiff until the same were fully paid for by him; and such contract would be binding on these defendants if they purchased the same of E. with notice of rights of plaintiff in said goods as hereafter defined in these instructions. Hence, if you find, from the evidence, that the defendants, or any one of them, or their manager, had notice of the rights of the plaintiff in said goods at and prior to the time of their purchase, your verdict must be for the plaintiff.<sup>9</sup>

**§ 3419. Assuming in Instruction That Agent Made Contract, when Controverted, Held Error.** In the case at bar, the defendant sets up an alleged contract of lease made by X. as the agent of plaintiff. If you find said X. was the agent of said plaintiff, and had authority from him to make the contract he did make, then plaintiff would be bound thereby.<sup>10</sup>

**§ 3420. Ignoring the Issue of Ratification.** The jury are instructed that the plaintiff cannot recover in this action against the defendants, or any or either of them, on her alleged cause of action in this cause, without first establishing by a preponderance of the evidence that G., who is alleged to have signed the contract, a copy of which is attached to plaintiff's petition, was the agent of the defendant, the Railroad Company, and that the making of such contract was within the general or apparent scope of his authority.<sup>11</sup>

8—Frey v. Klar, — Tex. Civ. App. —, 69 S. W. 211.

After noting that nothing was predicated in the instruction as to the price the purchaser was to pay, the court said: "We do not see how plaintiff can recover on the basis of reasonable compensation, when he is relying for recovery on his having performed the terms of an express contract which stipulates his compensation. The trouble is not so much with the charge as with the want of pleading to support it. Plaintiff nowhere alleged that defendant acted in bad faith toward him with respect to this purchaser. We have no doubt that upon sufficient allegations a case might be presented which would entitle the broker to reasonable compensation."

9—Samuelson v. Gale Mfg. Co., 1 Neb. (unof.) 815, 95 N. W. 809 (811).

In this case E. G. B., who sold the goods in question to defendants, was just after the sale employed by defendants as their manager. The court cannot hold that defendants

by employing him did not become immediately charged with the constructive notice of all the things that E. G. B. then knew with reference to the goods. The court said: "The rule of law is too well established to need a citation to support it that a principal is not bound by knowledge or notice coming to his agent before his employment, even as respects contracts made by the agent, after the employment. The logic of the instruction here complained of would vitiate contracts made by a principal, and rights acquired under it, by the mere employment of an agent who had previous knowledge of the matter involved in cases when notice is an element to be considered."

10—Long v. Osborn, 91 Ia. 160, 59 N. W. 14.

The court said: "The plaintiff objects to this paragraph on the ground that it assumes that X. made the contract, whereas that is a matter in dispute. We think the objection is well founded."

11—Knapp v. Chicago, K. & N. R. Co. et al., 57 Neb. 195, 77 N. W.



§ 3421. **Ratification of Tort by Principal by Accepting Benefit.** The jury are instructed that if a tort or wrong is committed by an agent, in the course of his employment, and it is not a wilful departure from such employment and business, the principal will be liable for the act, if ratified by him by accepting the benefit thereof, even though he had no knowledge of the agent's act at the time.<sup>12</sup>

§ 3422. **Suit to Recover of Agent Proceeds of Sale.** (a) The court instructs you that the principal is bound by the acts of his agent, so long as the agent acts within the scope of his authority, and because of the power thus given an agent, the law imposes upon the agent perfect fairness, honesty and fidelity in the business of his principal; and if you find, from the evidence in this case, that the defendants, or either of them, as the agents of X., deceived him, and induced him to accept \$10,000 for his farm, when, at the same time, he could secure for him \$11,000 therefor (if you believe, from the evidence, that such was the case), then the court instructs you that the defendants did not act with such honesty, fairness and fidelity as the law required.

(b) And if you further believe from the evidence that said defendants did actually sell said farm for \$11,000, but accounted to said Wilson for only \$10,000, the court instructs you that the plaintiff is entitled to recover from the defendants the said \$1,000, the difference between said \$10,000 and said \$11,000.

(c) And if you find from the evidence that said Y. and Z., the defendants, were the agents of the plaintiff and sold his farm for \$11,000, but reported that they received only \$10,000, and induced the plaintiff to accept \$10,000, then said defendants did not act honestly and fairly and with fidelity to the plaintiff, and they were not entitled to compensation for their services; and if you find from the evidence that the plaintiff X. did pay to the defendants \$250 or any other sum as commission for making such sale, then the plaintiff is entitled to recover back said sum so paid in addition to the said sum of \$1,000.<sup>13</sup>

§ 3423. **One Merely Assuming to Act as Agent Not Liable to an Action of Deceit.** The court instructs you that he should act in the

656 (657), holds the above to be bad because "it ignored the issue of ratification, and excluded it from the consideration of the jury."

12—*Oberne v. O'Donnell*, 35 Ill. App. 180 (183).

"This is a very bad instruction. It is viciously misleading in its tendency, though abstract in form, because it confusedly mingles fragments of principles of the law of agency, in such a manner that, taken as a whole, the proposition which it states is utterly indefensible. The statement that the principal becomes liable for the tort of the agent if ratified by him by accepting the benefit thereof, even though he had no knowledge of the agent's act at the time, is directly contrary to the well established doctrine."

13—*Henshaw et al. v. Wilson*, 46 Ill. App. 364 (365 & 366).

The court in holding these instructions erroneous commented as follows: "There are so many objections to these instructions that all of them must be passed by, except that contained in the middle paragraph. Notwithstanding the word 'further,' the effect of the instruction is that even if the first contract was still in force and the second purchaser bought from the first, with the knowledge and assent of X., yet he should recover as money had and received to his use \$1,000, whether appellants ever received it or not. The word 'deceived' in the first paragraph is too vague in its application to qualify the second paragraph."

matter in perfect good faith towards that principal, if he was his agent; and it would make no difference whether he was the general agent of E. for a long time ago, or whether he assumed at the time of the sale this relation. If he assumed to act as his agent at the time the sale was gotten up, he would be just as much his agent as if he had been his agent all the time.<sup>14</sup>

**§ 3424. Paying Debt for Another Without His Consent—No Rights Against That Other.** The court instructs the jury that if they believe and find from the evidence that the plaintiff owed \$—— for brick that was used in the construction of the L. house and that defendant —— paid therefor at the request of the plaintiff, or that he consented to such payment, either before or after the same was made, then the jury in making up their verdict will allow the defendant B. a credit for the amount paid.<sup>15</sup>

**§ 3425. Money Spent for Different Purpose than Intended.** If the jury find that there was no contract or agreement between the parties, and no gift, but that, after the transfer of the deposits to the defendant, all the money, with the exception of the amount paid by the defendant to discharge the mortgage on his house and the amount remaining in the —— bank on ——, and transferred back to the plaintiff by the defendant on that date, was expended by the defendant in the plaintiff's presence and with his knowledge and consent, whether in debauch or otherwise, and that the money paid to discharge the mortgage was so paid by the plaintiff's instruction and request, the plaintiff cannot recover.<sup>16</sup>

**§ 3426. Principal Liable for Fraud of Agent.** If you believe that W., although agent or trustee, made the representation alleged in

14—Brinson v. Exley, 122 Ga. 8, 49 S. E. 810.

"The gist of an action like the present is the confidential relation of principal and agent. The right of action rests upon the confidence which a principal is bound to repose in his agent in regard to matters peculiarly within the knowledge of the agent, and not known to the principal. If, therefore, one assumes to act as the agent of another when he is not in fact his agent, the other cannot hold him liable in an action of deceit, for there is absent that essential element of confidence abused. For this reason the charge just quoted is also error."

15—Morley v. Carlson, 27 Mo. App. 5.

The court said: "It is settled law that 'no person can make another his debtor without the consent of the party benefited. There must be a previous request, expressed or implied, or an assent or sanction given after the money is paid or the act done.' Allen's Adm'r v. Richmond College, 41 Mo. 303. And it is not the duty of an original contractor to pay claims

against the sub-contractor until liens for such claims have been filed, and actions brought on them."

16—Sullivan v. Sheehan, 173 Mass. 361, 53 N. E. 902.

The court said: "The instruction requested by the defendant need not have been given, in any event, in the terms requested, if the jury were correctly and sufficiently instructed upon the law involved in the request. We think that under the circumstances of the case an instruction that if 'all the money . . . was expended by the defendant in the plaintiff's presence, and with his knowledge and consent, whether in debauch or otherwise,' the plaintiff could not recover, would have been liable to mislead the jury, and to induce them to suppose that any money which the defendant spent in the presence of the plaintiff, and with his knowledge and consent, must be treated as, in effect, repaid by the defendant, whereas to have the effect of a payment it would be necessary that the plaintiff should understand and assent that such was to be the effect."

the declaration, and that he made it to induce the alleged purchase, and the representation was not true, and the purchase was made upon the representation his principal would not be bound, but he would be.<sup>17</sup>

17—Wheeler v. Baars, 33 Fla. 696, 15 So. 584 (589).

"The proposition contained in the first charge of the court, to the effect that 'a principal is not liable civilly for the frauds and deceits of his agent committed in the course of his employment' was clearly erroneous. It is well settled that for deceit and false representations made by an agent in the

course of his employment, both the agent and his principal are civilly liable; and so far as the liability of the principal is concerned, it makes no difference whether he authorized or was cognizant of the misrepresentation and deceit of his agent or not. 1 Lawson Rights Rem. & Pr. §§ 112, 114, and authorities therein cited."



## CHAPTER CXV.

### ALIENATION OF AFFECTION—CRIMINAL CONVERSATION— SEDUCTION.

See Approved Instructions, Chapter XXVII, Vol. I.

#### ALIENATION OF AFFECTION.

§ 3427. Alienation of affection of wife—Consent of husband—Burden of proof—Contradictory defenses.

§ 3428. Grounds for the action—Damages.

§ 3429. Action by wife against husband's parents for alien-

ation of husband's affections—Series.

#### CRIMINAL CONVERSATION—SEDUCTION.

§ 3430. Condonation by husband no defense.

§ 3431. Hypothesis of innocence—Comment on evidence.

§ 3432. Not liable for seduction by any one else.

#### ALIENATION OF AFFECTION.

§ 3427. **Alienation of Affection of Wife—Consent of Husband—Burden of Proof—Contradictory Defenses.** For answer, defendant says, first, that he denies each and every allegation made by the plaintiff; second, he admits that he had unlawful sexual intercourse with plaintiff's wife, and says that he had such intercourse with the knowledge, acquiescence, and consent of the plaintiff. \* \* \* The burden is on the plaintiff to show a preponderance of the evidence for the truth of the allegations of his petition. As the defendant admits that he had unlawful sexual intercourse with plaintiff's wife, you will treat that fact as proven, and it is unnecessary for the plaintiff to prove that claim in his petition. But before the plaintiff can have a verdict, he must prove every claim made in his petition, except that defendant had intercourse with plaintiff's wife, by a preponderance of the testimony. That is, he must so prove that he was damaged as he claims in his petition, and all other allegations of both counts of the same, except the fact of intercourse.<sup>1</sup>

<sup>1</sup>—Rudd v. Dewey, 121 Ia. 454, 96 N. W. 973 (974).

"By this instruction the jurors were plainly told that the colorable confession made in the second division of the answer for the purpose of supporting an allegation of new matter by way of avoidance obviated the necessity of proving the matter thus colorably confessed, although in another division of the answer all the allegations of plaintiff's petition were denied. It is evident that this was an erroneous interpretation of the effect of the division of the answer in which the defendant sought to confess and avoid plaintiff's allegations. . . .

Under our Code it has uniformly been held, in a series of decisions, the first of which was rendered before there was any specific provision on the subject, that defendant might, in different divisions of his answer, plead a general denial and a confession and avoidance, and that the effect of the general denial would not be nullified by the colorable confession necessarily alleged in connection with the avoidance. Grash v. Sater, 6 Ia. 301; Shannon v. Pearson, 10 Ia. 588; Quigley v. Merritt, 11 Ia. 147; Treadway v. Sioux City & St. P. R. Co., 40 Ia. 526; Barr v. Hack, 46 Ia. 308; Heinrichs v. Terrell, 65 Ia. 25,

§ 3428. **Grounds for the Action—Damages.** The jury are instructed that an action lies in favor of the wife and against any one who alienates the affections of her husband from her. Ground of such action is the infliction on the wife of the following injuries: (1) The loss of the husband's affection; (2) the loss and comfort of his society; (3) the loss of his support and care of her when he abandons her; (4) the mortification and shame that must surely follow these domestic wrongs. The extent of the injury generally depends upon the previous relations of the parties, and, if these relations were cordial and affectionate, the wrong of one who succeeds in withdrawing the husband's affections from the wife it is impossible almost to adequately measure. In such cases it is the duty of the jury to give such damages to the wife as may seem just and reasonable.<sup>2</sup>

§ 3429. **Action by Wife Against Husband's Parents for Alienation of Husband's Affections—Series.** *Plaintiff's Instructions:* (a) A wife is entitled to the society, companionship, comfort, protection, and aid of her husband. The law gives her a right of action against any person who willfully and maliciously entices, persuades, induces, or influences her husband to separate or remain apart from her. Therefore, if you shall believe from the evidence that the defendants E. B. and G. B. willfully and maliciously acted in concert or co-operated together with the purpose and intent to cause the separation of the plaintiff's husband from her, and to cause him to remain apart from her, and that they did thereby accomplish such purpose and intent, then your verdict shall be in favor of the plaintiff and you should assess her damages at such sum as you may believe from the evidence will reasonably compensate her for the deprivation and loss, if any, of her husband's society, comfort, companionship, protection, and aid, provided your verdict should not exceed the sum of ten thousand dollars.

(b) The law does not justify or excuse parents in willfully and maliciously interfering in the domestic affairs of their married children; therefore, although you may believe from the evidence that the defendants G. B. is the sister and E. B. the parent of plaintiff's

21 N. W. 171. And on the same reasoning it has been held that the pleading of matter in confession and avoidance in the reply does not waive the general denial, which, by virtue of Code, §§ 3576, 3622, 3648, is interposed to all allegations of new matter in the answer by operation of law. *Day v. Mill Owners' Mut. Ins. Co.*, 75 Ia. 694, 38 N. W. 113; *Nichols v. Chicago G. W. R. Co.*, 94 Ia. 202, 62 N. W. 769; *Schulte v. Coulthurst*, 94 Ia. 418, 62 N. W. 770."

2—*Rath v. Rath*, 2 Neb. (unof.) 600, 89 N. W. 612 (613).

"The first part of this instruction is correct, but we do not feel warranted in giving our full approval to the language, 'the wrong of one who succeeds in withdrawing the husband's affections from the wife it is impossible almost to adequately measure.' This language is certainly too argumenta-

tive, and by its terms likely to inflame the minds of the jurors against a defendant, and cause them to return an excessive verdict. Hence we cannot give it our unqualified approval. But where the giving of an instruction which may not be technically correct is followed by no act of the jury which would indicate that it in any manner influenced them in arriving at a verdict, the giving of such an instruction will be held to be error without prejudice. In this case the verdict of only \$500 is so small that we can safely say that the giving of this instruction in no manner influenced the minds of the jurors upon the question of the measure of damages. We therefore hold that the giving of this instruction was error without prejudice, and for which a new trial will not be ordered."

husband, still if you shall further believe from the evidence that they were guilty of procuring or bringing about the separation of plaintiff's husband from her, and causing him to remain apart from her, as in the foregoing instruction stated, your verdict should be in favor of the plaintiff.

(c) The court instructs the jury that neither the defendant E. B. nor G. B. had the right voluntarily or unasked by plaintiff to intermeddle with the domestic affairs of plaintiff, and if you find and believe from the evidence that said defendants intentionally urged, persuaded or induced plaintiff's husband to desert and abandon her, and that as a result of such urging, persuasion, or inducement, if any, by said defendants, plaintiff's husband did leave and abandon her, then your verdict should be for the plaintiff.

(d) The court instructs the jury that the wife is entitled to the society, comfort and support of her husband. The law gives a right of action to the wife against any person who entices or persuades him to separate or remain apart from her, and if the jury believe from the evidence in the cause that the defendants E. B. and G. B., as charged in plaintiff's petition, intentionally persuaded or induced plaintiff's husband to separate from her and sever the relation of husband and wife, or remain apart from her, and they did in fact intentionally effect and bring about a separation, then the jury will find a verdict for plaintiff.

(e) In order to entitle plaintiff to maintain this action it is not necessary that she should prove by the evidence in the cause that defendants directly requested plaintiff's husband to leave her or to remain apart from her, but if the jury believe from the evidence in the cause that defendants E. B. and G. B. were intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against her, and to alienate him from her, and to induce him to leave her and to remain apart from her, and that such effect was intended by said defendant to be produced and was actually produced by their conduct, then the jury should find a verdict for the plaintiff.

(f) Plaintiff is not required to prove that said defendants enticed and persuaded her husband away from her by direct and positive testimony, but these facts may be proved by circumstantial evidence, and it is the duty of the jury, in passing on those questions, to take into consideration all the facts and circumstances given in evidence in the cause; and if from all the evidence the jury believe that said defendants intentionally persuaded plaintiff's husband to separate and remain apart from her, and did in fact intentionally effect and bring about such separation, then it will be the duty of the jury to find a verdict for the plaintiff.

(g) If the jury believe from the evidence in the cause that said defendants intentionally prejudiced plaintiff's husband against her, and intentionally caused him to leave her and separate himself from her, and remain apart from her, as charged in plaintiff's petition, and that aside from said defendants' said conduct and influence he would not have left her or remained apart from her, then, and in that event, although the jury may believe that plaintiff's husband was addicted to the use of ardent spirits, or had even become an habitual drunkard, yet the verdict should be for the plaintiff.



(h) Although the jury may believe from the evidence that plaintiff's husband was addicted to the use of ardent spirits, or even had become an habitual drunkard, yet this does not constitute any defense to this suit.

(i) Although the jury may believe from the evidence that the conduct of the plaintiff's husband toward her afforded sufficient grounds for obtaining a divorce from him, and yet if the jury further believe from the evidence that, notwithstanding such misconduct on the part of plaintiff's husband, plaintiff was still willing to live with him, and her husband still would not have separated and remained apart from her if it had not been for the acts and conduct and influence of said defendants toward him, and that said defendants purposely and intentionally by such acts, conduct, and influence, induced and caused him to separate and remain apart from plaintiff, then the fact of the misconduct of plaintiff's husband toward her does not, of itself, constitute any defense to this suit.

(j) If the jury find for the plaintiff, then in estimating her damages they may take into consideration the injury, if any, sustained by her in the loss of the comfort, society, protection, affection, and support of her husband, and the wrong and injury, if any, done to her own feelings, character, and condition, and assess her damages at such sum, not exceeding \$10,000, as from the evidence in the cause they may believe will fairly and reasonably compensate her for said injuries.

(k) The jury are instructed that, although you may believe from the evidence that plaintiff had just cause for separation or divorce from her husband, yet she might have elected to abide by her situation, and remain with her husband, nevertheless, and if you find and believe from the evidence that she chose to do so, defendants E. B. and G. B. had no right to intermeddle with the domestic and marital relations of plaintiff and her husband, and if you find that said defendants voluntarily did so, without plaintiff's request, and with the intention of bringing about or affecting the separation of A. B. and his wife, and that as a result of such intermeddling, if any, by said defendants plaintiff's husband did leave and abandon her, your verdict should be for the plaintiff.

(l) The court instructs the jury that the term "malice" as used in the instructions in its legal sense does not mean mere spite or ill-will, but it means the intentional doing of a wrongful act.

(m) The court instructs the jury that the word willful as used in these instructions means, intentionally; that is, not accidentally.

*Defendant's Instructions:* (n) The court instructs the jury that, under the law it is no part of the duty of defendants, or either of them, to support the plaintiff or to furnish her a home.

(o) The court instructs the jury that the plaintiff and A. B. are husband and wife, notwithstanding that they do not now live together as such. And you are further instructed that it is the duty of the husband, under the law, to support and provide for her, and that if he fails so to do, or neglects to provide and support her, then, under

the law, she may compel him to do so out of any property he may have. And you are further instructed that it is no part of the duty of defendants, or either of them, to provide for or to support plaintiff.

(p) The court instructs the jury that, if they find and believe from the evidence in the cause, that the plaintiff so demeaned herself, while at the home of the defendant, Mrs. E. B., as to worry, annoy and humiliate the defendant, and that by reason thereof Mrs. E. B. insisted that the plaintiff leave her home, then your verdict should be for the defendant Mrs. E. B., unless you find and believe that defendant, as charged in plaintiff's petition, alienated the affections of plaintiff's husband or caused them to separate.

(q) The court instructs the jury that the plaintiff charges in her petition that the defendants E. B. and G. B., by malicious motives and intent, caused the husband of plaintiff to leave and abandon her. You are therefore instructed that it devolves upon the plaintiff to prove said charges by a preponderance of the testimony, to the satisfaction of the jury, that the defendants did induce and persuade the plaintiff's husband to leave her and separate from and live apart from her, as is charged in her petition; and unless she has so shown by a preponderance of the proof in this cause, then your verdict should be for the defendants.

(r) Although the jury may find and believe from the evidence in the cause that the defendant E. B. ordered and directed plaintiff to leave her house and go to her parent's home in Arkansas, and that said defendant directed the husband of plaintiff to secure a carriage to convey the plaintiff to the depot, and furnished the necessary money to pay for her transportation to her parent's home, and that defendant wrote to the mother of the plaintiff, asking her to send for the plaintiff, still, if you find and believe from the evidence in the cause that defendant did those things because of the conduct, acts, demeanor, and behavior of the plaintiff while in the home of the defendant, and not with any intention or purpose to alienate the affections of A. B. from his wife, or to cause their separation as man and wife, then you are instructed that such acts upon the part of the defendant constitute no cause of action against defendants.

(s) Although the jury may find and believe from the evidence in the cause that the defendant E. B. suggested that A. B., son of defendant and husband of plaintiff, join the United States Navy, still, if you further find and believe from the evidence in the cause that such suggestion was made in good faith, for the purpose of reforming said A. B., and not for the purpose of inducing him to leave, separate, or abandon plaintiff as his wife, then such fact constitutes no cause of action against defendant E. B.

(t) The court instructs the jury that if you believe from the evidence that A. B., the husband of plaintiff, ceased to live with her as her husband and of his own accord, and was not influenced or induced so to do by the defendants, or either of them, your verdict should be for the defendants.

(u) Although the jury may find and believe from the evidence in the cause that plaintiff's husband did separate from and abandon her while they resided at the home of defendant, Mrs. E. B., yet unless you further find that defendants, or one of them, caused or in-

duced said separation or abandonment, your verdict should be for the defendants.

(v) The court instructs the jury that the defendant, Mrs. E. B., had the right, under the law, to order, and, if necessary, to use a reasonable amount of force to compel the plaintiff to leave her house; and, although you may believe from the evidence that said defendant Mrs. E. B. did order the plaintiff to leave her house, yet such facts alone will not warrant you in finding a verdict for plaintiff.

(x) The court instructs the jury that, although you may find from the evidence in the cause that defendant Mrs. E. B. invited plaintiff's husband to her home, and permitted him to remain there, either while alone or with his wife, yet if you find that she did these things in good faith and from good motives, neither seeking nor intending to separate plaintiff's husband from her or alienate his affections from his wife, then such facts do not constitute any cause of action against said defendant.

(y) The court instructs the jury that, if you believe from the evidence in the cause that plaintiff's husband, A. B., separated from and left her on account of her conduct toward him, or her mistreatment, if any, of him, and not because of anything defendants may have done or said, then your verdict should be for defendants.

(z) The court instructs the jury that, although you may find and believe from the evidence in the cause that defendant Mrs. E. B. did order the plaintiff to leave her house, and did tell her that she must go to the home of her parents in Arkansas, yet if you find that she did these things because of the worry, distress of body and mind, and humiliation, if any, which the conduct of plaintiff caused her, and not because of any purpose or intention on her part of separating plaintiff's husband from, or of causing him to abandon her, then your verdict should be for defendant Mrs. E. B.<sup>3</sup>

3—*Barton v. Barton*, 119 Mo. App. 507, 94 S. W. 574 (578, 581, 584).

The series of defendant's instructions were not assigned for error and were not passed on by the court, but they are referred to in the comment of the court.

The series of plaintiff's instructions was criticized by the court. See comment of the court as follows:

"The case was profusely instructed, but we are not entirely satisfied with the manner in which this was done. One fault in the instructions given at the plaintiff's request is that, considered in the mass, they left out of view the vital fact of the relationship between A. B. and his mother, and her maternal right to advise and influence him regarding his domestic affairs. Some of the charges made her right to do this depend on a request from the plaintiff, which is not the law. Other instructions erroneously omitted to require a finding that the defendants co-operated to bring about the separation, and others were comments on portions of the evidence. The latter fault occurs, too, in instructions given at the

instance of the defendants, which are not the subject of complaint on this appeal. The first and second instructions given for plaintiff are copies of instructions approved by the Supreme Court in *Nichols v. Nichols*, 147 Mo. 387, 392, 48 S. W. 947, and, of course, properly presented the case for the present plaintiff, and we may say stated quite fully the essential facts she was bound to prove to entitle her to a verdict. The fourth, fifth, sixth and seventh instructions given for plaintiff did not require the jury to find that the defendants co-operated or acted maliciously in inducing the separation, and therefore are erroneous, or at least weaken the force of the instructions in which those findings were required, and were apt to mislead the jury. This is a case in which we feel that the plaintiff should be held to strict rules, to use the remark of Judge Cooley in a suit against a parent for a like cause of action. *White v. Ross*, 47 Mich. 172, 10 N. W. 188. The petition is a copy of the one passed on in *Nichols v. Nichols*, 134 Mo. 187, 35 S. W. 577, and charges that the defendants



## CRIMINAL CONVERSATION—SEDUCTION.

**§ 3430. Condonation by Husband No Defense.** The jury are instructed that the gist of this action is the loss of the comfort and society of the plaintiff's wife, and if you find from the evidence that the plaintiff continued to live with her after he has heard of her

wrongfully and maliciously acted and co-operated together, with the wrongful, wicked, and malicious intent to cause plaintiff's husband to leave and abandon her and cease living with plaintiff as her husband, and to deprive plaintiff of the aid, support, companionship, society, protection, and affection of her said husband; . . . that the defendants, pursuant to their said wrongful and malicious intent, did wrongfully, wickedly, and maliciously entice, influence, and induce plaintiff's said husband to leave and abandon her; and her said husband being influenced by, and acting under, the said wrongful, wicked, and malicious enticement, did then leave and abandon her. One essential fact to be proved was that the defendants co-operated with the intention of bringing about the separation. *Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55. This is so, not merely because the petition avers a conspiracy, but because the nature of the case is such that defendants are not jointly liable unless they co-operated. The case is for an intentional, and not a negligent, tort; one in which each defendant must have designed to cause the resultant mischief. Where the concurrent negligence of two or more persons contributes to do harm, the tortfeasors may be jointly sued, as in the case of a collision between two trains of different railway companies. *Newcomb v. Railroad Co.*, 169 Mo. 409, 69 S. W. 348; *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. 254; *Missouri, etc., R. R. Co. v. Vance*, — Tex. Civ. App. —, 41 S. W. 167, 1 Kinkead, Torts, Par. 46. But where the torts are intentional and independent of each other, though their combined influence may result in an injury, it seems that there is no joint liability. 1 Kinkead, Torts, Par. 44-46.

"Not only must the defendants have conspired or co-operated in causing the separation, and have done so intentionally, they must also have acted maliciously, which, as said, means without just cause or excuse. Circumstances will excuse a parent for advising a child regarding his or her domestic affairs, and even influencing a separation from the child's spouse, which will not always suffice to excuse the like interference by other persons. All the authorities support this proposition, and it is es-

pecially applicable to the case of a minor child like A. B., who is still under the guardianship of his parent. We are not to be understood as intimating that a parent may, without good cause, influence a child to separate from a spouse. To do so is a tort, for which the parent, like any other person, is liable. We mean to say that the law recognizes a superior right of interference on the part of a parent, and will justify the interference for causes which would be no justification in favor of another person. This rule prevails because of the law's respect for that anxiety parents feel for their children, and which impels to efforts to promote the child's welfare and happiness. This natural impulse prompts advice and assistance in domestic troubles, as well as in others. Moreover, there is a moral duty on the part of a parent to look after the child's well-being even in its adult life; a duty which prevails with greater urgency and force while the child is yet a minor under parental control, and untrained by experience to care for itself. It has been declared that a stronger proof is required in an action against a parent for causing a separation between husband and wife than in actions against other defendants. In *Pollock v. Pollock* (Com. Pl.), 29 N. Y. Supp. 37, the court said: 'Increased intensity of the proof is required in actions of this character, when recovery is sought against a parent. The motives of a parent in harboring, sheltering, and otherwise extending aid and assistance to a child are presumed to be good until the contrary is shown. Such is the current of opinion of text writers, and such is ruled in adjudged and reported cases.' In *Cooley on Torts* is this text: 'If, however, the interference is by the parents of the wife, on an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible.' *Cooley, Torts* (2d ed.), p. 264.

"In *Huling v. Huling*, 32 Ill. App. 519, an action against parents for inducing their son to leave his wife, the court said: 'The instructions

alleged illicit connection with the defendant, the jury is justified in concluding that the plaintiff has condoned the offense of the wife; and the circumstance is entitled to great weight in considering the question of damages the plaintiff has sustained by reason of the wrongful conduct of the defendant, provided that the jury shall believe that the defendant has in fact committed any wrong against the plaintiff.<sup>4</sup>

§ 3431. **Hypothesis of Innocence—Erroneous Comment on Evidence.** The court instructs the jury that although you find from the evidence that the defendant and plaintiff's wife were found alone together in defendant's bedroom while defendant was yet in bed and undressed, the act charged is one that tends to degrade the parties, and inflicts great injury upon society; and, if the facts shown by the evidence may as well be explained upon the hypothesis of innocence as of guilt, then you should always adopt the former rather than the latter hypothesis. And, if you find from the evidence that this act has been fully explained upon the hypothesis of innocence, then you should find for the defendant.<sup>5</sup>

§ 3432. **Not Liable for Seduction by Any One Else.** The court instructs the jury that the defendant is not liable for the seduction of said daughter by any person other than himself.<sup>6</sup>

given for the defendant advised the jury that a parent has a right, in a moderate, intelligent, and careful manner, to advise a son as to his domestic affairs, and even as to living with his wife, and that, if such counsel and advice be given in good faith and from worthy motives, the wife has no cause of complaint, even though such advice may contribute in some degree to the result of causing a separation. The distinction between the case of a stranger and that of a parent has been frequently recognized, and it is no doubt well settled that a parent may, when acting in good faith, give his advice on this important subject without incurring liability. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 195; *Smith v. Lyke*, 13 Hun (N. Y.) 204; *Payne v. Williams*, 4 Baxt. (Tenn.) 583; *Schouler's Domestic Relations*, par. 41; 2 *Hilliard on Torts*, 510.

"Other decisions announcing the same doctrine are *Pollock v. Pollock* (Com. Pl.), 29 N. Y. Supp. 37; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Burnett v. Burkhead*, 21 Ark. 77, 80, 76 Am. Dec. 358; *Young v. Young*, 8 Wash. 81, 35 Pac. 592; *Love v. Love*, 98 Mo. App. 562, 569, 73 S. W. 255."

4—*Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006 (1908).

"This instruction was properly refused, because loss of comfort and society of the wife were not the only injuries for which compensatory damages could be awarded. Again, it was not the province of the court to tell the jury what circumstances was 'entitled to great weight.' It was for the jury alone

to determine the weight to be given the testimony."

5—*Robertson v. Brown*, 56 Neb. 390, 76 N. W. 891.

"In every case where guilt exists, there is a sufficient temptation to excuse it on mistaken grounds of humanity, without the encouragement of courts, whose duty it is to administer exact justice between litigants. The comments upon the evidence in this case serve to illustrate the wisdom of leaving the consideration of mere questions of fact to the jury, uninfluenced by comments thereon by the court. For the error in giving the above instruction on its own motion, the judgment of the district court is reversed."

6—*Kreag v. Authes*, 2 Ind. App. 482, 28 N. E. 773.

The court said that "this cause had been 'submitted to the jury clearly upon the theory that the appellee could not recover unless he proved, by a preponderance of the evidence, that the appellant was guilty of the things charged against him in the complaint. The idea of holding the appellant responsible for the wrongful acts of another was fairly excluded by the instructions given. There are many things common in legal proceedings which the jury may be presumed to know, and every remote hypothesis need not be guarded against by instructions. The jury heard the evidence and argument of counsel, after which they were instructed, and we cannot presume that they understood appellant to be on trial for anybody's wrongful acts but his own. There was no error in refusing the instruction."

## ALTERATION OF WRITTEN INSTRUMENTS.

**§ 3433. Adding of additional name**      **§ 3434. Alteration — Leaving blank material.**      **spaces—Negligent conduct.**

§ 3434. **Alteration—Leaving Blank Spaces—Negligent Conduct.** The court instructs the jury that the rule of law is, that where one of two parties must suffer loss, he who by his negligent conduct made it possible for loss to occur, must bear it; and if you believe from the evidence that the defendant, B., signed the note in suit, leaving a blank where the figure 8 indicating the rate of interest now stands, in such a condition that said space could be filled without indicating any change in said note, then said B. is guilty of negligence; and if you further believe from the evidence that the figure 8 was placed in said blank, and said note was afterward delivered to the agent of the plaintiff without any knowledge on the part of said agent that

Upon grounds of good public policy courts ought to discountenance alterations of contracts once agreed upon, reduced to writing and formally signed, and refuse to receive

The addition of another maker to a note may operate to greatly damage and prejudice all other payors, and when, as in this case, the addition is made with the assistance and complicity of the holder, it must be deemed and held a material alteration and to destroy the validity of the note as evidence. 2 Parsons on Notes and Bills, 557, 561, 571 and 581; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Hamilton v. Hooper*, 46 Ia. 515, 28 Am. Rep. 161; *Addison on Contracts*, § 1280; *Haskell v. Chanion*, 30 Mo. 136; *Wallace v. Jewell*, 21 Ohio 8, 163, 8 Am. Rep. 48; *Sheriff v. Suggett*, 9 B. Mon. (Ky.) 8."



said change had been made, then said change or alteration of said note can not be interposed to prevent the plaintiff from recovering in this suit.<sup>2</sup>

2—Yost v. Minneapolis Harvester Works, 41 Ill. App. 556 (559).

"This instruction was quite misleading and highly prejudicial to defendants. This was not a suit by a bona fide holder of a note assigned to him for value before maturity, and the makers. But the payee is plaintiff, and if its agents having authority to take notes for it, or a right to the custody and control thereof, placed the figure 8 in the blank space, and thereby

changed the note from a non-interest bearing instrument to one bearing eight per cent interest, without the knowledge or consent of the makers, such alteration would be a fraud, vitiating the note and defeating a recovery. Black v. Bowman, 15 Ill. App. 166; Burwell v. Orr et al., 84 Ill. 465. This instruction was in direct conflict with the law as laid down in the cases cited, and the court erred in giving it."

## CHAPTER CXVII.

### ARCHITECTS.

See Approved Instructions, Chapter XXIX, Vol. I.

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| <p>§ 3435. Duty of examining work and give certificate.</p> <p>§ 3436. Defective plans, damages caused thereby — Recoupment.</p> | <p>§ 3437. Architect's liability for negligence concerning materials furnished.</p> |
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§ 3435. **Duty of Examining Work and Giving Certificate.** The jury are further instructed that the architect had no right to refuse plaintiff a final certificate for the amount due him upon the contract simply because the defendant directed them not to give such certificate, or threatened them with trouble if they did; that it was the duty of the architects to fairly and impartially examine the work, and decide whether or not it was done according to the contract, and if upon so doing, it was their honest opinion and judgment that plaintiff was entitled to any sum of money under his contract, then it was their duty to give the plaintiff a certificate for the amount that they believed to be so due him.<sup>1</sup>

§ 3436. **Defective Plans, Damages Caused Thereby—Recoupment.** The jury are instructed that, if they believe, from the evidence, that the plaintiff in this case did not use reasonable care and diligence in the performance of his work as an architect, and the buildings of defendant were not properly constructed, then the defendant may recoup or set-off the damages he may sustain on that account; and if, from the evidence, the jury find the damages sustained are equal to or greater than the amount plaintiff might claim for services, then the jury should find for the defendant.<sup>2</sup>

1—Channon v. Kerber, 44 Ia. App. 269 (271).

The court said that it "assumes two facts, both of which are disputed by appellant. 1st. That the architects refused to give a final certificate 'simply because the defendant (appellant) directed them not to give such certificate or threatened them with trouble if they did.' 2d. That there was an amount due to the appellee upon the contract."

It further "assumes that the defendant directed the architect to do something which the jury alone were competent to find from the evidence he had done. It is error for a court in an instruction to assume as true any fact which is in dispute; and where the fact assumed is of the very gist of the controversy, the error is of a char-

acter sufficiently grave to warrant an appellate court in reversing the judgment. Ill. Cent. R. R. Co. v. Zang, 10 Ill. 594; Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429; C. St. L. & P. R. R. Co. v. Hutchinson, 120 Ill. 587; Sherman v. Dutch, 16 Ill. 283; Dart v. Horn, 20 Ill. 213; Davies v. Cobb, 11 Ill. App. 587; Village of Warren v. Wright, 3 Ill. App. 602."

2—Lindeman v. Fry, 178 Ill. 174, aff'g 77 Ill. App. 89, 52 N. E. 851.

The court said in comment that "if the jury had found that the buildings were improperly constructed, and that the plaintiffs had not exercised reasonable care and diligence, then, under the above instruction, they must have found for the appellant, even though they believed that the improper construction was not the fault of appellees.

§ 3437. **Architect's Liability for Negligence Concerning Materials Furnished.** The jury are instructed that, under the written contracts and other evidence offered in this case, X. could not nor can his estate now be held responsible for any imperfections found in the materials furnished or work done under any such contracts, unless such imperfections were fraudulently accepted by said X., and the jury are instructed that no such fraud was shown by the evidence in this case.<sup>3</sup>

The instruction was also erroneous in that the evidence showed that the carpenters' and painters' work was not complete, and that the appellant accepted the work with knowledge of its incompleteness. This evidence, the court is by instruction asked to ignore, and in effect to exclude it from the jury."

3—Lasher v. Colton, 80 Ill. App. 75 (76).

The court said that "the instruction should have stated the law correctly, because the evidence tended to show negligence by the architect concerning the materials and work furnished and done by one of the contractors."



## CHAPTER CXVIII.

### ASSAULT—CIVIL.

See Approved Instructions, Chapter XXX, Vol. I.

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| <p>§ 3438. Assault and battery mutually entered into—Mitigation of damages—Defense.</p> <p>§ 3439. Assault, force in retaking property in the peaceable possession of another, not justifiable.</p> <p>§ 3440. Assuming violence in instruction, when controverted, is error.</p> | <p>§ 3441. It is held error to leave it to a jury to say what constitutes "sufficient provocation."</p> <p>§ 3442. Unjustifiable assault by officer in making arrest.</p> <p>§ 3443. Assault—Undue familiarity with female—Damages—What may be taken into consideration.</p> |
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§ 3438. **Assault and Battery Mutually Entered Into—Mitigation of Damages—Defense.** If the jury, after considering the testimony of all the witnesses, believe that the affray of June 14, 1902, between the plaintiff and the defendant, was a mutual affair, and they both sought the encounter, and that both mutually and willingly entered into a fight, and that both were equally guilty of the assault, then the plaintiff cannot recover, and it will be your duty to find for the defendant.<sup>1</sup>

§ 3439. **Assault—Force in Retaking Property in the Peaceable Possession of Another, Not Justifiable.** If the defendant in this case ordered and directed the plaintiff to let go of the scraper and quit work, and discharged him, and the plaintiff refused to let go of the scraper and refused to quit work, then, after such order and refusal, the defendant had a right to use proper and reasonable force to enable him to control the scraper in question, and the jury must determine from all the evidence how much and what kind of force the defendant did in fact use.<sup>2</sup>

1—Thomas v. Riley, 114 Ill. App. 520 (522).

"This is not the law. That the assault and battery complained of was committed by defendant in the course of a fight with plaintiff by agreement or mutual consent, could be shown in mitigation of damages, but such agreement or consent to fight being unlawful, it cannot avail to relieve defendant from all liability for the injury inflicted. 2 Greenleaf on Evidence, § 85; Adams v. Waggoner, 33 Ind. 531; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853. An affray is defined as 'the fighting of two or more persons in some public place to the terror of the people.' 1 Bouv. 98. The instruction improperly assumes that plaintiff and defendant were engaged in an affray."

2—Monson v. Lewis, 123 Wis. 583, 101 N. W. 1094 (1095).

"The instruction admits at least of the construction that, if the defendant had discharged the plaintiff, the defendant was entitled to take the scraper from plaintiff's possession by force, if the force used was reasonable and proper to accomplish the purpose. We do not understand this to be the law. It was held in Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670, that the owner of property which is in the peaceable possession of another has no right to retake the property by force. This principle is based upon public policy. It is in the interest of peace and public order. Any other rule would substitute the strong arm for the court of justice, and promote lawbreaking and violence."

**§ 3440. Assuming Violence in Instruction, when Controverted, Is Error.** If the jury believe, from the evidence, that the defendant assaulted and beat the plaintiff, as charged in the declaration, then they should find the verdict for the plaintiff, unless they further believe, from the evidence, that such assaulting and beating when done were reasonably and apparently necessary in defense, etc., and that the force and violence used by defendant were no more than a reasonable man would have deemed reasonably necessary in such defense.<sup>3</sup>

**§ 3441. It Is Held Error to Leave It to a Jury to Say What Constitutes Sufficient Provocation.** If the jury believe, from the evidence, that the defendant sometime on or about, etc., struck and kicked the plaintiff as alleged in plaintiff's declaration, without sufficient provocation therefor, as explained in these instructions, and that the plaintiff was injured by such striking and kicking and has suffered any damage therefrom, then the jury should find the issues for the plaintiff.<sup>4</sup>

**§ 3442. Unjustifiable Assault by Officer in Making Arrest.** Our statute prescribes the acts and duties incumbent on an officer in making an arrest, and provides that the officer in making the arrest must inform the person he is arresting that he acts under the authority of a warrant, and must show the warrant, if required; and if you find, from the evidence in this case, that, at the time the defendants attempted to arrest the plaintiff, they, or either of them, did not inform the plaintiff that they were acting under the authority of a warrant, and you further find that the plaintiff, without being so informed, attempted to escape from his father's house, and while so doing was shot and injured by the defendants, or either of them, then in that event the defendants would be trespassers, and would be liable in damages for the injuries sustained by the plaintiff.<sup>5</sup>

**§ 3443. Assault—Undue Familiarity with Female—Damages—What May Be Taken into Consideration.** (a) You are instructed that every person is the sole custodian of his person, and no one has a right to touch it unlicensed, and that any unlawful touching of the person of another constitutes an assault; and if you believe from the evidence in this case that the defendant, D., did make an assault upon the person of R. by making use of any violent or indecent familiarity towards her, or embracing, touching or handling her person in an indecent manner, then your verdict should be for the plaintiff for such an amount as you believe she is entitled.

(b) That for every unlawful assault the law conclusively presumes some damage.

3—*Mohr v. Kinnare*, 85 Ill. App. 447 (448).

The court said that for the court to assume as a fact that it (violence) existed or had been exercised was to assume the pivotal fact in issue, and was in such respect a clear invasion of the province of the jury.

See also *Judd v. Isentort*, 93 Ill. App. 520 (522), for assuming liability on the part of the defendant.

4—*Mohr v. Kinnare*, 85 Ill. App. 447. The above was held bad on account of leaving to the jury to

determine what constituted sufficient provocation.

5—*Strick v. Yates*, 30 Ind. App. 441, 66 N. E. 177.

The court said: "From the language used, the jury must have understood that both defendants would be trespassers, and would be liable in damages if either one of them shot and injured the appellee, without reference to the part taken in the transaction by the other defendant, or whether he was a party to it or not."

(c) That the law presumes every female to be chaste and virtuous.

(d) If a man takes improper liberties with a female, or fondles her against her will and consent, he is guilty of indecent assault.

(e) If you find for plaintiff, in arriving at the amount of damage to which you think the plaintiff is entitled, if you find that the assault was committed, you should take into consideration the actual damage sustained by reason of the assault, in which is included not merely the physical injury suffered, but you may also consider the mental suffering, humiliation, mortification, and injury to her feelings and sensibilities, if such you find to be the consequence of the assault, together with the disgrace, insult and indignity to which the plaintiff is subjected by reason of said assault, as well as its effects upon her future condition in life, all of which are proper elements of damage to be considered by you in making up your verdict; and if the jury further believe that said assault was unprovoked and willfully, wantonly, or maliciously done, you may assess an additional sum as damages, as a punishment to defendant, and to deter others from the commission of a like offense. And in estimating such damage, you may consider the financial condition of the defendant.<sup>6</sup>

6—Davis v. Richardson, 76 Ark. 348, 89 S. W. 318.

"The trial court erred in giving to the jury instruction No. 4. (d) Under it they might have found that appellant committed an assault upon appellee by making the indecent and insulting proposal to her at Mrs. G.'s, and under instruction No. 5 returned a verdict against him for damages. The proposal was not an assault, and, being unaccompanied by a physical injury, did not give the appellee the right to recover damages on account thereof. It was not an element of damage. Peay v. Western Union Telegraph Company, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

"What we have said as to the fourth instruction applies to the words 'or indecent familiarity towards her' in the first instruction (a).

"Appellant objects to the fifth instruction (e) because it directs the jury to allow the appellee damages for the 'effects upon her future conditions in life.' There was no evi-

dence of such damage, and the direction should not have been given.

"Appellant objects to the same instruction, the fifth, because it told the jury that they might consider the appellant's wealth in computing damages, both actual and punitive. We do not think that this is a correct interpretation of the instruction. The court told the jury in this instruction what is included in actual damages, and in this connection said: 'In estimating such damage you may consider the financial condition of the defendant,' having reference to punitive damages. Surely the court did not mean that the wealth of the appellant could assist in measuring actual damages. Construed in the way suggested, the instruction, in that respect, is correct. 2 Sutherland on Damages (3d Ed.) 404, and cases cited. But it is defective in form and should not have been given as it is. The defect, however, should have been pointed out by a specific objection."



## CHAPTER CXIX.

### ATTACHMENT.

See Approved Instructions, Chapter XXXI, Vol. I.

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| <p>§ 3444. Money extorted by threat of attachment.</p> <p>§ 3445. Suing out of attachment by agent—Ratification by principal must be with knowledge of all the material facts.</p> | <p>§ 3446. The right of an officer to seize property.</p> <p>§ 3447. Action on attachment bond.</p> <p>§ 3448. Title, purchase and possession being in good faith.</p> <p>§ 3449. Liability of justice of the peace for acts of special officer.</p> |
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§ 3444. **Money Extorted by Threat of Attachment.** The threats to cause an attachment to issue against the property of a person, when no ground for attachment exists, is a threat to detain said property unlawfully.<sup>1</sup>

§ 3445. **Suing Out of Attachment by Agent—Ratification by Principal Must Be with Knowledge of All the Material Facts.** The court instructs the jury that the plaintiff cannot recover against the defendants O. & H. unless she shows by a preponderance of the evidence that the said defendants directed or authorized the suing out of the writ of attachment therein and that in so doing they were actuated with malice toward the plaintiff, and acted without probable cause; and if the jury believe from the evidence that the said writ of attachment was sued out by the attorney for the said O. and the said H. without their knowledge, then the said O and the said H. are not liable to the plaintiff herein, unless they ratified the same by sharing in the benefit thereof subsequently.<sup>2</sup>

1—Weber v. Kirkendall et al., 44 Neb. 766, 63 N. W. 35 (37).

The court said: "It has been frequently held and may be accepted as sound law, that payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress. See Fitzgerald v. Mallory Construction Co., 44 Neb. 463, 62 N. W. 899, and authorities cited.

"But the mere apprehension of legal proceedings, unaccompanied by any act of hardship or oppression, has never been held sufficient ground for avoiding the contract. The books, on the other hand, abound

in cases holding that, where the parties are on terms of equality towards each other, one threatened with civil process is required to make his defense in the first instance to the merits of the claims, and cannot postpone litigation by paying the demand and afterwards maintain an action therefor."

It has been held that money extorted by threats of attachment may be recovered back when the person from whom it is extorted does not owe it and the circumstances amount to duress. Weber v. Kirkendall, 39 Neb. 193, 57 N. W. 1026.

2—Oberne v. O'Donnell, 35 Ill. App. 180 (183).

The court said: "A principal may render himself liable for the tort of his agent by receiving and

§ 3446. **The Right of an Officer to Seize Property.** The court instructs you that an officer with a writ of attachment has not any right or authority to take and hold possession of any building in which the personal property to be seized is, and that he and his bondsmen are liable in damages if he takes possession of such room or premises.<sup>3</sup>

§ 3447. **Action on Attachment Bond.** In order that the plaintiff may recover in this action, he must satisfy you by a preponderance of all the evidence—first, that defendants S. and K., in a suit brought by them against him, caused an attachment to be issued and levied on his bottling works; second, that said attachment was dissolved in due course of law; third, as to the amount of damages, if any, suffered by him as a direct result of the issuance and levy of said attachment; fourth, that the attachment bond was duly executed by defendant O.<sup>4</sup>

§ 3448. **Title, Purchase and Possession Being in Good Faith.** The court instructs the jury that if they believe, from the evidence, that the plaintiff was the owner of the tobacco in question, and that he had possession of the same, and the defendant, by his deputy, took and carried away the tobacco on a writ of attachment against one H., the jury should find the issues for the plaintiff.<sup>5</sup>

§ 3449. **Liability of Justice of the Peace for Acts of Special Officer.** You are instructed that the writ of attachment issued Justice B. in the case of X. Co. v. Y. was directed only against the property of Y., and if you should find that, in the service of such process, Z. or any other person under his authority committed any wrongful acts against the person of said Y. not authorized or sanctioned by the

appropriating the fruits thereof, but in order that such appropriation of the fruits shall be held a ratification, so as to charge the principal, it is indispensable that he shall be shown to have full knowledge of all the material facts and circumstances of the tort. *Wilson v. Tumman*, 6 Man. & Gr. 236; 2 Hilliard on Torts 411; *Mechem on Agency*, § 148. This rule applies to contracts as well as to torts. *McCormick v. Nichols*, 19 Ill. App. 334; *Bensly v. Brockway*, 27 Ill. App. 410; *International Bk. v. Ferris*, 118 Ill. 465."

3—*Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711 (712).

"An officer has the right to enter a business place against the will of the occupant, permission having been asked and refused, and to seize the property therein belonging to the occupant and subject to levy. It is impossible to make such levy in many cases, as where a whole stock of goods is seized, and without taking possession of the place where the goods are. The officer must not linger longer than reasonably necessary to pack up and prepare the goods for removal (*Waples, Attachm.*, par. 298); to do

this packing may take an hour or it may require a week."

4—*Story v. Finkelstein*, 50 Neb. 177, 69 N. W. 856.

"The effect of the instruction was to withdraw from the consideration of the jury whether the attachment had been wrongfully obtained, and to allow a recovery if they found the writ had been discharged for any cause. The authorities generally hold that an attachment is not wrongfully obtained, unless it is shown that the plaintiff has no meritorious cause of action against the defendant, or, having such a cause of action, the ground stated in the attachment affidavit is untrue. The word 'wrongful' as used in the statute, does not apply to a dissolution of an attachment on account of defects in the form of the proceedings, or for mere omissions, irregularities, or informalities which the officer may have committed in the issuance of the process."

5—*Johnson v. Hirschberg*, 185 Ill. 445 (447), aff'g 85 Ill. App. 47, 57 N. E. 26.

This instruction was criticized for omitting the elements of purchase and possession in good faith.

said Justice B., or within the scope of the authority conferred upon him by such justice, then such justice and his official bondsmen are not liable for such acts.<sup>6</sup>

6—*Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711 (713).

The court said: "The statute makes the justice responsible for the official acts of the special officer. What are official acts? An act, although unauthorized, may be an official act. If the act of the deputy from which an injury results is an official act, the chief is answerable. If not official, but personal, then the latter is not liable. But by an official act we do not mean what the deputy may lawfully do in the execution of his office. If so, no action would ever lie against a sheriff for the misconduct of his deputy. An official act is what is done under color or by virtue of his office. *Knowlton v. Bartlett*, 1 Pick 273; 9 Am. & Eng. Enc. Law, p. 393, and cases cited. The ordinary citizen un-

learned in the law, and not knowing his rights, may resist one's servants in doing certain things which if done by an officer of the law, having a writ of attachment or execution, and wearing the badge of his office, he would fear to oppose. If the officer destroy property instead of seizing and holding it as security for a debt sued for, or imprison the debtor while seizing and holding the goods, and pretend to do these things under warrant or color of his office, such acts, under the law as we have stated it, would be in excess of his authority, and wrongs done under color of his office, and the principal and his sureties would be liable for any natural and proximate damages resulting therefrom to the injured person."



## CHAPTER CXX.

### ATTORNEYS.

See Approved Instructions, Chapter XXXII, Vol. I.

§ 3450. Expression of doubts of success does not effect recovery of compensation.

§ 3451. Error to charge that reasonableness of charges should be shown by competent evi-

dence and without uncertainty.

§ 3452. Special compensation for obtaining dissolution of injunction bond on appeal.

§ 3453. Attorney and client—Misrepresentation.

§ 3450. **Expression of Doubts of Success Does Not Effect Recovery of Compensation.** The fact that said R. expressed doubts as to the recovery of the claim of the defendants against said H. cuts no figure in this case. If, as a matter of fact, said claim was a good and valid claim, as it afterwards proved to be by the judgment of this court, and of the supreme court of this state, said R. or his representatives are entitled to recover their share of it. The defendants cannot retain the fruits of their contract and avoid paying the share to which said R. was entitled because he expressed doubts as to their rights to recover.<sup>1</sup>

§ 3451. **Error to Charge That Reasonableness of Charges Should Be Shown by Competent Evidence and Without Uncertainty.** That the plaintiff must make out his case as to all points, and to show to the jury by competent evidence the reasonable amount of the charges sought to be enforced against the defendant, and, if there is not such evidence without an element of uncertainty therein which the jury cannot solve, they must find for the defendant as to such matters.<sup>2</sup>

§ 3452. **Special Compensation for Obtaining Dissolution of Injunction Bond on Appeal.** The court instructs you that the defendants are not liable for the value of the attorneys' fees for services in the supreme court in this case. That if the plaintiff contracted with his attorneys to pay them a reasonable attorneys' fee for the whole case, and that service has not been completed, the plaintiff cannot recover on a *quantum valebat* or *meruit* for part of the services involved in the whole service, without at least showing, to the reasonable satisfac-

1—Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912 (916). The court said: "This was properly refused as it stood. The expression of doubts by R. would not preclude his recovery, but part of this request was faulty. It did not follow, as the facts were disclosed, that, if the D. claim against H. was good, the plaintiff was entitled to one-fourth of it."

2—French Piano & Organ Co. et al. v. Porter et al., 134 Ala. 302,

32 So. 678, 92 Am. St. 31. "The charge requires the jury to return a verdict for the defendants if there be an element of uncertainty in the evidence which they cannot solve, notwithstanding the jury might otherwise be satisfied, from the evidence, of the plaintiff's right to recover. The charge is also faulty in that it requires the plaintiffs to 'show to the jury by competent evidence the reasonable amount of the charges,' etc."

tion of the jury, the proportion of the value of the service proposed to be recovered to the whole service. That if the fee to attorneys is not established in amount by agreement with them, or a liability for a specified amount is shown, the plaintiff cannot recover in this case for such attorneys' fees upon a *quantum meruit* or *valebat* for part of such fees, if it appears that there is an agreement; for the entire fee is shown, and the ratio of the special services to the whole is not shown.<sup>3</sup>

§ 3453. **Attorney and Client—Misrepresentation.** If the jury find from the evidence that the defendant was induced to enter into the contract of employment with the plaintiff, under statements made by the plaintiff at the time or immediately preceding the making of the same, in which he falsely magnified the amount of work, labor and expense necessary to accomplish the purposes, or by any other false representation about the place of the death of M., or that he falsely represented to her that it was the wish of the attorneys of her mother's estate that she should sign or enter into such contract, or that he falsely represented to her any other material fact or concealed from her any information of which he had knowledge which would have aided her in determining as to whether or not such contract was just or equitable, then the defendant had the right, upon the

3—French Piano & Organ Co. et al. v. Porter, 134 Ala. 302, 32 So. 678 (679), 92 Am. St. 31. The court said: "The damages recoverable in an action for breach of an injunction bond must be such as are the natural and proximate result of the issuance of the writ. That attorneys' fees incurred in procuring the dissolution of the injunction are such damages is not now to be questioned. The measure of such damage is the fair and reasonable value of the services rendered in procuring the dissolution of the injunction and this without reference to the value of such services might bear to the value of services rendered throughout the entire case in which the injunction is obtained, but not to exceed what the plaintiff has contracted to pay in case the compensation has been agreed on and fixed between the plaintiff and his attorney.

The price, however, fixed by contract between the plaintiff and attorney is not the measure of defendant's liability, since the plaintiff and attorney cannot by their contract place a liability on the defendant beyond and in excess of what would be fair and reasonable compensation for the services actually rendered. In the injunction suit, an appeal was taken by the defendants from the decree of the chancellor dissolving the injunction, and it is now contended, by appellants here, that there can be no recovery, in a suit on the injunction

bond, for attorneys' fees incurred by the plaintiffs on such appeal. The purpose of the appeal was to review and reverse the decree dissolving the injunction, and the reversal of the decree would necessarily reinstate the injunction. Attorneys' fees incurred in resisting the effort to have the decree of dissolution set aside are as much the natural and proximate result of the issuance of the writ as are the fees incurred in procuring the dissolution in the first instance. There is no merit in the argument of counsel that attorneys' fees for resisting a application for an injunction might as reasonably be claimed as damages in the suit as fees incurred after decree of dissolution, on the appeal from such decree. Fees incurred in resisting an application for the injunction cannot possibly be damages resulting from the issuance of the writ. The bond sued on contracts to pay damages caused by the issuance of the writ, and such as are the natural and proximate consequence of its issuance, are not antecedent damages. It is insisted that what was said in *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5, in this connection, is dictum, and should be departed from. We approve of the reasoning employed in that case, and now sanction as the law what is insisted by counsel was dictum. *Bolling v. Tate*, supra, *Jackson v. Millsbaugh*, 100 Ala. 285, 14 So. 44; *Cooper v. Humes*, 93 Ala. 280, 9 So. 341."

discovery of such representations being false, or that important information about the estate had been concealed or was not disclosed, to repudiate the contract, and she is not liable under the same, and the jury will so find.<sup>4</sup>

4—Weil v. Fineran, 78 Ark. 87, 93 S. W. 568 (569, 570). This instruction is objectionable in telling the jury that if Mrs. F. was induced to enter into the contract with W. by 'false representation about the place of the death of M., they might find in favor of appellee. There is nothing in the record to warrant the conclusion that appellee was induced to enter the contract on account of a false representation by appellant of the place of the death of appellee's mother. But if it was material, appellee does not show how it was material and how she was prejudiced by it, yet the court treats this specific and particular representation as material in the case. The court points it out and tells

the jury if it was false and induced the contract that appellee was not liable. The instruction, in this respect, we think, was highly prejudicial, because the jury may have found in favor of appellant on other alleged matters of false representation, about which there was a conflict in the evidence and found in favor of appellee upon this one. The vice of the instruction is in giving prominence to this specific representation and treating it as material to the contract, when there is no proof to show that it was. The question is not even submitted to the jury as to whether it was a material representation or not. The court assumes that it was."



## CHAPTER CXXI.

### BANKS AND BANKING.

See Approved Instructions, Chapter XXXIV, Vol. I.

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| § 3454. Bank's knowledge of insolvency of another bank.                                  | bank liable only for his own negligence and lack of fidelity. |
| § 3455. Liability of bank director for allowing improper loans upon collateral security. | § 3457. Damages for dishonoring check.                        |
| § 3456. President or director of a   | § 3458. Receiving deposit knowing bank to be insolvent.       |

§ 3454. **Bank's Knowledge of Insolvency of Another Bank.** (a) You are instructed that, if you find from the evidence that the State Bank of Gothenburg had notice of the failing condition of the People's State Bank at the time it received its checks, then it was the duty of the said State Bank of Gothenburg to present the check for payment forthwith to the People's State Bank.<sup>1</sup>

(b) The court instructs the jury that if you find from the evidence that the State Bank of Gothenburg and the People's State Bank cleared accounts on the morning of May 28th, 1901, and at that time the State Bank of Gothenburg, having reasonable grounds to believe that the People's State Bank was in a failing condition, paid over to the People's State Bank an amount equal to or greater than the check in controversy, then the failure of said State Bank of Gothenburg to retain sufficient funds for the payment of the check in question will prevent the recovery of the plaintiff in this action, and your verdict will be for the defendants.<sup>2</sup>

1—*Temple v. Carroll*, — Neb. —, 105 N. W. 990.

"Two complaints are urged against this instruction: First, that there is no evidence tending to show that the State Bank had notice of the failing condition of the People's State Bank at the time it received the check; second, that it requires a presentation of the check outside banking hours. As to the first, the evidence is clear that on the morning after receiving the check the president of the State Bank had reason to believe that the other bank was in a failing condition. Just when or how he acquired this knowledge does not appear, but taking into account all the facts and circumstances in the case, we are inclined to think there was sufficient evidence to warrant that portion of the instruction. But the other complaint is more substantial. The State Bank received the check after banking hours and in the absence of special circumstances, or some special custom, not shown in the

case, the holder of a check is not required to present it for payment after banking hours. But under this instruction, the jury were told in effect that it was the duty of the State Bank to present the check for payment as soon as it received it, although the banking hours were over for the day. The instruction is therefore erroneous and prejudicial.

2—*Temple v. Carroll*, *supra*.

"One objection urged against this instruction," said the court, "is that there is no evidence that the person who cleared for the State Bank had any knowledge of this check. Such evidence was not necessary to warrant the instruction. The bank had received and cashed the check over its counter. It left its affairs in the hands of the person who effected the clearance, and it is not claimed that such person was not authorized to make the settlement. If the bank saw fit to withhold from such person the information necessary to enable her properly to con-

**§ 3455. Liability of Bank Director for Allowing Improper Loans upon Collateral Security.** If you find that the defendant X. consented to the defendant Y.'s taking money from the bank upon his note, with the insurance policy mentioned as collateral, and that such collateral was not, in the exercise of ordinary judgment, believed by said X. to be good for such amount of money, then for just so much as you find was permitted to be taken, you will find a verdict for the plaintiff.<sup>3</sup>

**§ 3456. President or Director of a Bank Liable Only for His Own Negligence and Lack of Fidelity.** (a) As a director and as president of the bank, the defendant X. was charged with a duty of fidelity and prudence such as a careful man would exercise in his own affairs of like magnitude and importance, and if you find that, by reason of his neglect to exercise such fidelity and prudence the bank has lost, then you will find the amount, and for such amount a verdict for the plaintiff. X. as director was required to exercise such degree of supervision and diligence as the situation and nature of the business of the bank required. It was his duty to watch over and guard the interests committed to him. In fidelity to his oath, and the obligation he assumed, he should do all that a prudent and careful man ought to do for the protection of the interests of others intrusted to his charge and if he failed to do this, and by reason of such failure the bank suffered a loss, you will find the amount of such loss, and a verdict therefor for the plaintiff.

(b) There has been much law cited here in this case on both sides of it, and I find myself unable to agree with the attorneys on either side; and I charge you, as a matter of law, that if X. acted in good faith believing that Y. would pay that note, and was fairly responsible for it, that he is not liable. . . . Now, gentlemen of the jury, you will retire to your room, and determine the simple question if X. in this matter, has acted in good faith. If he did, you will find a verdict in his favor.<sup>4</sup>

duct the business intrusted to her, it cannot urge her ignorance as an excuse for a lack of due diligence on its part. The instruction, however, is open to the objection that there is no evidence to support a finding that the State Bank, at the time of the settlement, paid over to the other bank 'an amount equal to or greater than the check in controversy. The extent to which the evidence goes on that point is that the amount paid was small. The instruction, therefore, is erroneous."

3—Commercial Bank v. Chatfield et al., 121 Mich. 641, 80 N. W. 713 (714).

"The court refused to give this request, and several others, which read much like it. We think this refusal was proper, for the reason that the requests ignore the claim of defendant X. that the loan was presented in the usual course of business to the board of directors and approved by them. If X.'s claim is true, he cannot be held liable for the negligent acts of the other directors if the acts were negligent."

4—Commercial Bank v. Chatfield et al., supra.

In holding these instructions erroneous the court said: "We think the lower court erred in his understanding of the law. We also think counsel's requests ignore the claim of defendant that the loan to Y. came to the knowledge of the other directors, and was ratified by them. As before suggested, X. can be held only for his own negligence, and is not liable for the negligence of his co-directors. If the requests had been modified so as to allow the jury to take cognizance of the defendant's claim, by way of defense that the directors had knowledge of the loan, and ratified it, they should have been given as a correct statement of the law. Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924; Stearns v. Lawrence, 28 C. C. A. 66, 83 Fed. 738; Dykman v. Keeney, 154 N. Y. App. 483, 48 N. E. 894; Williams v. McDonald, — N. J. —, 7 Atl. 866; Williams v. McKay, 46 N. J. 25, 18 Atl. 824; Horn Silver Mining Co. v. Ryan, 42 Minn. 196, 44 N. W.

§ 3457. **Damages for Dishonoring Check.** The plaintiff is entitled to recover merely nominal damages, and such temperate damages as you may judge to be a reasonable compensation for the injury, if you find any from the evidence, plaintiff sustained from the dishonoring of its check.<sup>5</sup>

§ 3458. **Receiving Deposit Knowing Bank to Be Insolvent.** (a) If the jury believe from the evidence that B. received the deposit from A. without instructions from C., then they must find for the defendant.

(b) Unless the jury are satisfied, beyond a reasonable doubt, from the evidence, that C. authorized or directed B. or had knowledge of B. receiving the deposit made by A., then they must find for the defendant.<sup>6</sup>

(c) If the jury believe from the evidence that the defendant was, on the — day of —, engaged in a banking business in D. county, —, under the firm name and style of T. B. Banking Company, and that the said banking company was a partnership composed of the defendant and his wife, and that the said banking company was at said time insolvent, or in a failing condition, and defendant knew or had good cause to believe it, and employed B. to act as assistant cashier of the bank, and made it his duty to receive deposits, and that he (B.) did receive \$— from A. on deposit on the — day of —, then you should find the defendant guilty.

(d) If the jury believe from the evidence that T. B. Banking Company, composed of defendant and his wife, were on the — day of —, doing a banking business, that said T. B. Banking Company had in its employ B., whose duty it was to receive deposits, and

56; *Bank v. Reed*, 36 Mich. 263; *Ang. & A. Corp.* 11th Ed. para. 314; 3 *Thomp. Corp.* para. 4104; *Reid Corp. Finance*, para. 223; *Elliott Priv. Corp.* para. 239. While we do not regard it as error that the requests as framed were not given, for the reason before stated, we do think it was error for the court to say, in effect, that if X. acted in good faith, he would be excused from liability whatever his negligence."

5—*Metropolitan Supply Co. v. Garden City Banking Co.*, 114 Ill. App. 318 (321).

In comment the court said that "the leading case upon the questions here presented is that of *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917. There the facts were similar to those in the case here. On the trial of that case the maker of the check was permitted to show that he had afterwards written to the payee of a check erroneously dishonored, asking said payee to send an agent to call, as he wished to purchase more goods, but that no reply was received to the letter and the agent did not call for further orders. That evidence—the only evidence tending to show actual injury—was not regarded as sufficient to have sustained a judgment for more than nominal damages, if substantial damages were recoverable only in cases where it appeared there had been

actual damage or loss. But according to the doctrine of that case (*Mr. Justice Craig* dissenting) 'more than merely nominal damages are in such cases recoverable.' The court says: 'To return a check marked "Refused for want of funds" to the holder, especially through a clearing house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business, and it need no argument to show that a single refusal of that kind might often and frequently does bring ruin upon a business man; and yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specifically in what manner he had been injured.'"

6—*Carr v. State*, 104 Ala. 43, 116 So. 150 (151, 154).

"Several of the charges requested were to the effect that C. could not be convicted unless he authorized B. to receive this deposit from A. Of course, it was essential that B. should be shown to have acted in the matter by authority of the firm or C.; but it was by no means necessary to show that he had any specific authority to receive this particular deposit, as the manifest tendency of these charges was to induce the jury to conclude. They were therefore obviously misleading."



believe further that said T. B. Banking Company was on said — day of —, in a failing or insolvent condition, and that defendant knew or had good cause to believe it was in a failing or insolvent condition, and further believe that on the — day of —, B., in the employ of defendant, received from A. \$—— on deposit, then the jury should find the defendant guilty as charged in the indictment.<sup>7</sup>

<sup>7</sup>—Carr v. State, *supra*.

<sup>7</sup>These charges, given at the request of the state, are patently bad, under the decisions of this court, in that they severally authorize a conviction upon the mere belief by the jury of the facts necessary to make

out the case for the state, without regard to the degree of their belief, i. e., whether they so believe beyond a reasonable doubt. *Pierson v. State*, 99 Ala. 144, 13 So. 550; *Rhea v. State*, 100 Ala. 19, 14 So. 853."

## CHAPTER CXXII.

### BOUNDARIES.

See Approved Instructions, Chapter XXXV, Vol. I.

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| § 3459. Boundary agreement—Estoppel.  | § 3461. Deeds—Disregarding monuments—Survey.                       |
| § 3460. Boundaries — Government corners—Exception to rule that monuments are to govern. | § 3462. Boundaries—Fences—Agreement as to line—Adverse possession. |

§ 3459. **Boundary Agreement—Estoppel.** The jury are instructed that it is competent for parties owning adjoining tracts of land to settle by agreement what disposition as between themselves shall be made of a piece of land adjoining their premises and claimed by each of them; and if the jury shall believe, from the evidence, that the plaintiff and defendant owned adjoining tracts of land between which is the piece of land in controversy in this suit, and a disagreement or dispute had arisen between them as to which one should have the piece of land in question, and that they agreed upon a settlement of the dispute in regard to such piece of land and acted upon such agreement, and that the defendant in good faith carried out his part of it and thereupon parted with his money in reliance upon said agreement, then both parties are bound by such agreement.<sup>1</sup>

§ 3460. **Boundaries—Government Corners—Exception to Rule that Monuments Are to Govern.** (a) The court instructs you that recognized government corners, standing in the same township, should be considered, and section lines tested by both east and west distances, and north and south distances, as given by the field-notes of the government surveyor.

(b) The general rule, that known monuments are to govern, is subject to exceptions, as where an adherence to the rule would be plainly absurd in its results.

(c) The rule that, in the construction of a deed, courses, distances and quantities must yield to natural or artificial monuments called for by the grant, is not inflexible. It applies with less force to artificial than to natural monuments, and, where there is anything in the description showing that the courses and distances are right, they will prevail.<sup>2</sup>

<sup>1</sup>—Hayden v. McCloskey, 161 Ill. 351 (357), 43 N. E. 1091.

"This instruction is erroneous in applying the doctrine of estoppel in pais to the conveyance of permanent interest in real estate."

<sup>2</sup>—Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066 (1069), 39 Am. St. 783.

The court said: "We presume these instructions express correct rules of law for locating or establishing confessedly lost corners and

boundary lines. In this case the primary issue was whether the government corner determining the boundary line between plaintiff and defendant was lost or not. The instruction as asked assumed the affirmative against the plaintiff. These instructions, admitting them to be good law in the abstract, could only have been properly given in this case upon the condition that the jury should first find that the

§ 3461. **Deeds—Disregarding Monuments—Survey.** The court instructs you that the fifth and sixth distances in the administrator's deed to S. must yield to the fifth and sixth calls in said deed, and the monuments respectively called for, to-wit, "the Main road" and "the place of beginning," provided you can, by following this proposition under the evidence, locate all the land intended, as shown in the Orphan's Court records and deeds, to have been conveyed; but if you cannot thus locate all the land shown in the records and deeds to have been conveyed, and in order to do so must extend the fifth and sixth distances, then you may do so, and in that event you will not be governed by the proposition contained in this point.<sup>3</sup>

§ 3462. **Boundaries—Fences—Agreement as to Line—Adverse Possession.** (a) Although some of the persons through whom plaintiff claims to derive title to the premises in question prior to the purchase thereof by plaintiff agreed upon a line therefor, and actually took possession and occupied up to said agreed line, yet if defendants abandoned the same, and removed and changed their fences therefrom, they cannot now plead such former agreement and possession in bar of plaintiff's claim. It is not enough to divest the real owner of the land of the title thereto, that he and the adjoining owner, believing

original corner in question was lost, and this condition should have accompanied the instructions; for, as we will notice further on, if the corner established by the government surveyors and in reference to which the patent was issued is found and definitely located, all inquiry as to its mathematical correctness is foreclosed; and so it was not error to refuse these instructions without the qualification suggested; for if the jury found with the plaintiff that the marks testified to by his witnesses were the marks of the government surveyor, and constituted the corner established by government survey, these instructions, however correct in a proper case, would have been inapplicable to this case."

<sup>3</sup>—*Pringle v. Rogers*, 193 Pa. 94, 44 Atl. 275 (278).

"There is no ambiguity in the description on the face of the instrument. The petition, return, and deed are as precise and clear as the language of the conveyancer could make them. There was, however, a latent ambiguity, according to Bacon's maxims, as approvingly quoted by Sharswood, J., in *Insurance Co. v. Sailer*, 67 Pa. St. 108: 'Latent is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.' Here the parol evidence showed a mistake by somebody, when the unambiguous description was applied to the marks on the ground. In two instances the lines were shorter than in the deed, when the monuments called for were reached. Either the lines were erroneously measured, or er-

roneously written, or the monuments called for were not at the end of the measured distance. This was a mistake collateral to the deed. Either the monuments must be disregarded or the lines shortened. What should be judicial decision in such dilemma? The court below conceded that, as a general rule, the monuments on the ground must control the distance; but said, in substance, that, if the jury could not locate all the lands shown by the record to have been conveyed, then they were at liberty to disregard the monuments, and locate the land by the distances. This, we think, was a flat reversal of a well-established rule. It put the measurement as the controlling fact, instead of a fixed, conspicuous, enduring monument in the ground. The rule is a very ancient one. As early as 1818, in *Hall v. Powell*, 4 Serg. & R. 456, Duncan, J., said, regarding it, that it had been many times settled, and 'the law had ever been so held.' This court has since strictly adhered to it. Hundreds of thousands of acres of land in this commonwealth are now held because of the judicial enforcement of it; for it is a well-known fact that but few of the recorded distances of the early surveys were afterwards found correct, when run between the monuments on the ground. Today, owners of lands under deeds, which have not been the subject of judicial interpretation, rest secure in the conviction that their boundaries are determined by the monuments on the ground. The legal profession understand the rule to be so irrevocably settled that they do not counsel litigation in the face of it."



the line to be at a certain place, erect a fence and make improvements thereon, or in reference thereto, or even that such adjoining owners expressed to each other their opinion, and really believe, that a certain line is the true one; but in order to bar the owner of the real title from a recovery of it, no difference how long held, what improvements may have been made thereunder, by another, by reason of the statutes of limitations pleaded by defendants, it must appear to the reasonable satisfaction of the jury, and by the preponderance of the evidence, that said adjoining owners mutually agreed and understood that, regardless of where the true or real line might be, a certain specific line should be the true and real line, and, unless the defendants have so shown in this case, the verdict should be for the plaintiff for all the lands, if any, defendants occupy of his; and if the jury should find that the survey as testified to by County Surveyor Brown is correct, and that defendants occupy certain portions of plaintiff's land, they can make their verdict in the following form: We, the jury, find for the plaintiff, that at the time of the institution of this suit defendant did, and now does, occupy of the lands, i. e., a strip of from — feet to — feet on the east side of the west half of the southeast quarter of section 12, and the northwest fourth of the northeast quarter of section 13, all in township 61, range 24,— said strip being between the fences now upon said premises and the survey made by said Brown; and we assess plaintiff's damages and the monthly rents and profits at \$—. Foreman.\*

4—*Brummell v. Harris*, 148 Mo. 430, 50 S. W. 93 (94).

"The law as defined in *Blair v. Smith*, 16 Mo. 273, has been so declared by this court in several cases since and is the settled law of this state. *Turner v. Baker*, 64 Mo. 210, Am. Rep. 226; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. 135; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. 549; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. 159; *Krider v. Milner*, 99 Mo. 145, 12 S. W. 461, 17 Am. St. 549. The possession and use up to the line by the adjacent property owners, respectively, are important facts in such a case, for two reasons: First, it is the concession that each makes to the other, and in that sense is the consideration of the agreement. The one says to the other, 'Although monuments that we now know nothing of may hereafter be uncovered, and show that I am entitled to a broader boundary, yet, since it may also show that the broader field would be yours, now I concede to you the advantage that would come to me in the one case, and you concede to me the advantage that would be yours in the other case, and for that mutual consideration we draw the line here.' Then, when the line is drawn and the possession is taken, the deed is accomplished, and each owns up to the line as fully as if it were a natural boundary, and their respective deeds called for it. Second, such possession and use are evidence that there was an agreement to establish the line,—not only to corroborate other evidence of

such an agreement, but even if there be no other such evidence. *Turner v. Baker*, supra; *Jacobs v. Moseley*, supra. There is no definite period prescribed for the duration of such possession for this purpose. It is only necessary that it continue long enough to indicate that the adjacent landowners so understood it. On the other hand, when a party relies on the statute of limitations to fix his boundary line, he need not show an agreement, but he must show that he has held possession up to the line for the period prescribed by the statute; that he has claimed it as his line against the world, without condition as to subsequent developments. If the circumstances show that he claimed the line believing it to be the true boundary, but subject to correction as the fact might afterwards develop, then, no matter how long he thus held it, he would acquire no title beyond his true line. But if he claimed it, against all comers, to be the true line, and held it for the period prescribed by the statute, it became his against the world. And if the adjacent property owners each occupied up to a line, both believing it to be the true line, but neither so maintaining as against what might thereafter be discovered to be the true line, the possession of neither is adverse to the other. The character of the occupancy in either of these supposed cases is to be determined, not only from what the parties while occupying said about it, but their acts and the surrounding circumstances.

Atchison v. Pease, *supra*; Krider v. Milner, *supra*; Goldterman v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, and 20 S. W. 161; Shotwell v. Gordon, 121 Mo. 482, 26 S. W. 341. Applying to the law as above shown to the case at bar, it will be seen that the instruction given at the request of the plaintiff is erroneous. That instruction carries the idea that although the line was agreed upon in 1863 by the then adjacent owners, and they built their division fence on it, and the land up to that line on each side was taken possession of and occupied by the property owners respectively, yet, if the defendants ever thereafter moved their fences from it, they abandoned it, and lost whatever rights they have acquired under the agreement. If there was such an agreement as defendants' evidence tended to prove, and if the division line became an accomplished fact by both parties taking possession and occupying according to its demarkation, then defendant's title to that line vested, and they were no more required to keep up their fence on that line, to protect their title to it, than to keep up a fence on any part of their land to enable them to hold their own. The decay of the fence, its removal, its shifting, were all proper facts in evidence, as bearing on the question of whether or not it was built, as defendants claim it was, in pursu-

ance to the alleged agreement; but, the agreement once established, possession of both sides under it, and their rights, became fixed. The decay, removal and shifting of the fence had no effect on defendant's title. The fence, as finally reconstructed, shifted from four to six feet to the west on plaintiff's land; but the plaintiff's rights under that agreement, if there was such an agreement, were not affected by that shifting. He could recover possession to the old rail fence at any time, unless there was something else to preclude him. Any defendant's rights were equally secure. The fourth (second) instruction given for the plaintiff is also a misconception of the law. Under that instruction, although defendants may have been in adverse possession up to the old fence for 10 years or more, yet unless the possession began under an agreement between the then owners of the land that that should be the division line between them, regardless of where the true line might afterwards be found to be, the statute of limitations was of no avail. The giving of these two instructions shows that the court confounded the two defenses pleaded by defendants, holding that the title by the agreement depended on continuous possessions, and the title by limitation depended on the agreement in its inception."

## CHAPTER CXXIII.

### BROKERS.

See Approved Instructions, Chapter XXXVI, Vol. I.

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| <p>§ 3463. Must be a licensed real estate broker at the time of the transaction.</p> <p>§ 3464. Assuming broker had exclusive sale of the property.</p> <p>§ 3465. A person is personally liable to pay commissions to a broker unless he discloses his agency.</p> <p>§ 3466. Broker cannot be agent of both seller and buyer and receive commissions from both.</p> <p>§ 3467. Introducing buyer to seller—Sale afterward resulting.</p> <p>§ 3468. Compensation is earned when a purchaser is found, if purchaser is able, ready and willing.</p> <p>§ 3469. Broker must be the "procuring cause" of the sale in order to recover.</p> | <p>§ 3470. Commissions of a broker cannot be cut off by any fault of the owner.</p> <p style="text-align: center;">BOARD OF TRADE TRANSACTIONS.</p> <p>§ 3471. Board of Trade—Broker—Recovery of commissions—Notice of Rules and Regulations.</p> <p>§ 3472. Options on Board of Trade—Commissions—Usages.</p> <p>§ 3473. Options in grain—Defense to promissory note alleged to have been given for gambling—Burden on defendant.</p> <p>§ 3474. Liability of a minor on a Board of Trade contract.</p> <p>§ 3475. Actual intention on the part of the buyer to receive, and on part of seller to deliver required—Agreement of parties not material.</p> |
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**§ 3463. Must be a Licensed Real Estate Broker at the Time of the Transaction.** (a) If the jury believe from evidence the plaintiff is a licensed real estate agent and defendant placed with the plaintiff certain property for sale and agreed with plaintiff to pay a certain commission if plaintiff found a purchaser for defendant's property, and if you believe plaintiff did find such purchaser who was ready, willing and able to take the property, and defendant refused thereupon to sell the same, then it makes no difference whether sale was carried out or not, and your verdict must be for the plaintiff.

(b) If the jury believe from the evidence the plaintiff is a licensed real estate dealer in the city of C., doing business in said city, and defendant placed with plaintiff property for sale, and agreed to pay plaintiff a certain commission therefor, and if you further believe from the evidence plaintiff did find a purchaser for defendant's property, who was ready, willing and able to purchase same, and thereupon defendant refused to sell, the plaintiff is entitled to recover.<sup>1</sup>

<sup>1</sup>—Eckert v. Collet, 46 Ill. App. 361 (363, 364).

"It was erroneous to instruct the jury, as was done, that if they believed from the evidence that 'the plaintiff is a licensed real estate agent,' or dealer, etc. The instructions should have referred to the time of the transaction, and not to the present time of the trial. The instructions are also in other re-

spects especially faulty, in that they ignore all reference to the terms upon which the sale was authorized, and a compliance with them. The gist of the controversy between the parties is the terms upon which defendant consented that plaintiff might sell his property; and to omit all reference to the terms, and their being complied with, was to deprive defendant of the benefit of the only defense he was making."



§ 3464. **Assuming Broker Had Exclusive Sale of the Property.** I instruct you, also, gentlemen of the jury, if you believe from the evidence that A. was unable to bring a purchaser ready, willing and able to buy the property in question at the price demanded, and if you further believe that after such inability had taken place a reasonable time had elapsed within which to complete and to consummate the negotiations on his part—that is to say, on A.'s part—after such a time had elapsed, the defendant would be at liberty to proceed on its own account to negotiate and sell, even with A.'s customer, and would have the right to consummate that sale through its own efforts or through the efforts of other persons, without the aid of A.; and, if you believe that the evidence in this cause conforms to that state of facts which I have just mentioned, your verdict will have to be for the defendant in this cause.<sup>2</sup>

§ 3465. **A Person Is Personally Liable to Pay Commissions to a Broker Unless He Discloses His Agency.** Even if you should believe from the evidence that defendant placed the property in question for sale in the hands of the plaintiffs, yet if you further believe from the evidence that in doing so he was acting as the agent for his mother and wife, and that the plaintiffs knew he was acting as the agent, and knew that his mother and wife were the owners of the property and the parties who were desirous of selling the same, then you are instructed as a matter of law that the defendant in this case is not personally liable for the services of the plaintiffs in furnishing the customer for said property.<sup>3</sup>

§ 3466. **Broker Cannot Be Agent of Both Seller and Buyer and Receive Commissions from Both.** (a) You are instructed that if you find that the plaintiffs were acting as the defendant's agents for the sale of the real estate described in the complaint, and that, as such agents, they procured one — to become the purchaser of said real estate, and if you further find from a fair preponderance of the evidence that he purchased said real estate in trust for either of said plaintiffs, then it will be your duty to inquire whether the fact that one of the plaintiffs composed one of the persons in said syndicate was fully understood by the defendant, and whether all the facts and circumstances were revealed to him by the plaintiffs, and after such full knowledge of all the circumstances and facts, he deliberately and freely ratified the act of his agent; if you find from a fair preponderance of the evidence that the plaintiffs were the defendant's agents for the sale of said property, and if you find that he did so ratify said sale, under the circumstances as stated

2—*Van Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788 (791).

"It is plain from the language of the instruction that the court was attempting to charge the jury upon the appellant's theory that the broker had abandoned his efforts to make a sale before it sold to the broker's customer. The instruction was altogether in the appellant's favor, and, even though it be admitted that it does assume the fact imputed to it, the error is harmless in so far as the appellant is concerned. It could in no way have been prejudiced by it."

3—*Porter v. Day*, 44 Ill. App. 256 (262).

"It is a settled rule in verbal contracts 'if the agent does not disclose his agency and name his principal, he binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction in the same manner as if he were the principal in interest' *Wheeler v. Reed*, 36 Ill. 81, and cases cited. The instruction upon the assumption granted did not go far enough to take in the principle of law thus announced."

above, then the fact that one of the plaintiffs' firm was a shareholder in said syndicate to purchase said real estate would not of itself defeat the plaintiffs' right to recover in this cause.<sup>4</sup>

(b) If the jury believe from the evidence that defendant employed plaintiff as a broker to find a purchaser for lands claimed by the defendant, at a price which should be satisfactory to defendant, and the purchaser when they met, then defendant cannot defeat the action for commissions (which) defendant agreed to pay plaintiff by proof that plaintiff was also to be paid for services by the purchaser.<sup>5</sup>

**§ 3467. Introducing Buyer to Seller—Sale Afterwards Resulting.**

(a) The court instructs the jury that a real estate broker in order to earn his commission need not conduct the actual negotiations of sale or even be present at the time the terms of sale are agreed upon. If he shall introduce the buyer and seller to each other, and as a result they agree upon terms and make a sale, the commission of the broker is earned.

(b) A broker cannot be deprived of his commission by the seller when he has been introduced by the broker to the buyer by dealing with the buyer alone or in the office of another broker. If you find from the evidence that it was through the instrumentality of the plaintiffs that the buyer and seller were brought together, and the negotiations began that resulted in a sale, then the interference or the intervention of another broker, even though the defendant thereby contracted a liability for another commission, does not affect the right of the plaintiffs to their commission.<sup>6</sup>

4—*Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872.

The court said that the policy of "the law is to exact from an agent the strictest integrity with reference to the duty owing from him to his employer. The rule, therefore, that prohibits the agent from representing interests antagonistic to those of his principal, stands upon the great moral obligation that one employed by another shall be honest in the performance of his duty to his employer, and not let self-interest conflict with his integrity. In the case of *Simonds v. Hoover*, 35 Ind. 412, where the question presented was whether or not *Simonds*, who was employed by one *Zellers* to sell real estate for him, in making a sale to or exchange thereof with *Hoover*, could recover a commission from *Hoover* who had also employed him to make a sale of his property, *Petit, J.*, speaking for the court, says: 'Law and morals (which are the same) alike forbid that a man shall be the agent of two persons, and receive pay from both in the transaction of business between them, where their interests are antagonistic. He cannot, or at least he is not likely to, discharge his duty with fidelity to both. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at

the highest price; of the agent of the purchaser, to buy it for the lowest.' *Farnsworth v. Hemmer*, 1 Allen 494, 79 Am. Dec. 756. How much more forcible the inhibition if the agent's own interests and those of his principal are opposed to each other."

5—*Green v. Southern States Lumber Co.* 141 Ala. 680, 37 So. 670 (672).

"The principle asserted is unsound. The broker has other duties than merely fixing the price—a privilege more frequently withheld than conferred. He should fairly set forth to the purchaser, all the reasons known to him, why the purchase would be a desirable and advantageous one to him. Such an attitude of good faith would be inconsistent with a secret and interested motive to induce the buyer to make the purchase, when the latter was under the impression and belief that his agent was acting alone for his good, free from any personal interest in the matter."

6—*Bowser v. Mick*, 29 Ind. App. 49, 62 N. E. 513.

The instructions were held erroneous for the reason that they "might readily make the impression that an agent who introduced to an owner of property one who afterwards became its purchaser was entitled to a commission for the sale, whether that sale was effected by himself or someone else."

§ 3468. **Compensation is Earned When a Purchaser is Found, if Purchaser Is Able, Ready and Willing.** The jury are further instructed, as matter of law, that in order to make a valid and binding contract for the sale of real estate, it is necessary that some note or memorandum of the sale, describing or stating the land to be sold and the price to be paid, should be made in writing and signed by the party to be bound by the contract, or his agent. And if the jury find from the evidence that no such note and writing was ever made and signed by the defendant, B., or by the plaintiff, A., or by any other person acting in behalf of the defendant, B., contracting to sell the land in question to C. and D., or either of them, and that said C. and D. never made any deposit of money on account of such purchase, and never, by themselves or their agent, signed any contract in writing agreeing to purchase and pay for said land, then the jury are instructed that no binding contract for the sale of said land was made with C. and D., and that C. and D. were not legally bound nor compellable to make such purchase, nor was the said defendant, B., legally bound to convey or cause the said land to be conveyed to said C. and D., or either of them.<sup>7</sup>

§ 3469. **Broker Must be the "Procuring Cause" of the Sale in Order to Recover.** (a) If you find from the evidence that A. was B.'s authorized agent for the sale of real estate and that as such agent he was the first agent to particularly direct the purchaser's attention to it, and was the first agent to visit such property with a man who became a purchaser, with a view of selling it to him, then, even though another agent or the owner himself afterward took such person to the property for examination, and for the purpose of selling it to him the first broker, A., in the absence of a specific agreement, is entitled to the commission, and you must find for the defendant.

(b) If you find from the evidence that both A. and C. had the property for sale, and that said A. first procured D. as a customer for A.'s said property, and first particularly directed said D.'s attention to said property, and that afterward said C. presented the said property to D. and formally introduced said D. to said B., the instruction by C. under such facts becomes a mere incident in negotiations; and, in the absence of any special agreement, the plaintiff cannot recover.<sup>8</sup>

§ 3470. **Commissions of a Broker Cannot be Cut Off by Any Fault of the Owner.** (a) The court instructs the jury that if they believe from the evidence that the defendant agreed to pay the plaintiff

7—In *Swigart v. Hawley*, 40 Ill. App. 610 (611, 612), Rev. 140 Ill. 186 (190), 29 N. E. 883.

The court said: "The law is that the compensation is earned when a purchaser is found who is ready, able and willing to take the property upon the terms fixed by the owner. The completion of the sale, when the broker is only employed to find the purchaser, devolves upon the owner, and whether the proposed purchaser has ever become bound or not, makes no difference if he is able, ready and will-

ing. *Mechem on Agency*, Sec. 966."

8—This instruction refers to *Bowser v. Mick et al.*, 29 Ind. App. 47, 61 N. E. 513.

The court said it was not error to refuse this instruction. "The agent who is the procuring cause of the sale is entitled to the commission. *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294. A broker may be the first to direct the attention of a prospective buyer to the property, or to introduce him to the owner, and yet not be the procuring cause of the sale."



\$— as commissions on the sale of the real estate described in the declaration, in case a sale of said property should be made through the efforts of the plaintiff, and that in fact no sale or contract for the sale of said property was ever made by or through the plaintiff, nor to any purchaser procured by him, then the jury will find the issues herein for the defendant.<sup>9</sup>

(b) The court instructs the jury that where a principal contracts with an agent or broker to sell lands for or on behalf of the principal, and the broker performs his part of the agreement by finding and introducing a purchaser therefor, which purchaser negotiates with the principal and comes to an agreement with him respecting the price and terms of sale, and which purchaser is ready, able and willing to carry out such agreement with the principal, then in such case the principal cannot evade payment of commission to the agent by refusing to make such conveyance to such purchaser.

(c) And this would be true even though the principal's title were defective, and even though he had no title at all. It would also be true even though the agent had agreed to take his commissions out of the purchase money, and even though he agreed to charge no commissions unless a sale were actually made, for it is the law that a principal in such a case has no right to, himself, arbitrarily or wrongfully refuse to consummate such sale, and then say for that reason he will not pay commissions to the agent.

(d) If you believe, from the evidence, that the defendant employed the plaintiff as a real estate agent to sell for him, the defendant, the land in question at a specified price, and that the plaintiff entered upon such employment, and did, on behalf of him, the defendant, find and negotiate with C. and H. as proposed purchasers, and bring them and the defendant together, and that they and the defendant did agree upon the price and terms of such proposed sale, and that said C. and H. were ready, able and willing to make such purchase, according to such agreement; and that it was no fault of theirs or of the plaintiff that such sale was not finally made, then such facts would entitle the plaintiff to recover for his services in that behalf.<sup>10</sup>

9—*Swigart v. Hawley*, 40 Ill. App. 610 (611, 612), Rev. 140 Ill. 186 (190), 29 N. E. 883.

The court said that if the appellant was in fault he could not thereby cut off the claim of the appellee to compensation. *Monroe v. Snow*, 131 Ill. 126, 25 N. E. 402.

10—*Swigart v. Hawley*, supra.

The court said:  
"These instructions are similar in character to the one which was quoted and commented on in *C. & N. W. Ry. Co. v. Moranda Admx.*, 108 Ill. 576. In regard to an instruction given there, we said: 'Where there is evidence before a jury upon which it is legally admissible there may be a difference of opinion, it is error to allow any opinion of Judge or court to be obtruded upon the jurors to influence their determination. There was here such evidence, in our opinion, and the giving of the instruction

was, therefore, clearly erroneous.' The language thus quoted is precisely applicable to the case at bar, where the facts are controverted, and should be submitted to the jury for their determination. It is error to assume the existence of such facts as is done in the first two of the above instructions. *Chambers v. People*, 105 Ill. 409; *Coon v. People*, 99 Ill. 368, 39 Am. Rep. 28; *Olsen v. Upsahl*, 69 Ill. 273; *Yundt v. Hartrunft*, 41 Ill. 9. We do not hold that it is always erroneous to give an instruction which only states an abstract proposition of law, but where an instruction groups together a number of facts or circumstances similar to or identical with those disclosed by the evidence, and assuming or taking for granted the existence of such facts or circumstances, draws a legal conclusion therefrom, an improper impression may be made upon the minds of the jury."

## BOARD OF TRADE TRANSACTIONS.

§ 3471. **Board of Trade—Broker—Recovery of Commissions—Notice of Rules and Regulations.** If the jury believe, from the evidence, that the plaintiff was a commission merchant or broker, a member of and acting on the C. Board of Trade, and that the defendant employed him as such commission merchant or broker to make purchases and sales for future delivery of commodities on the C. Board of Trade, and further believe, from the evidence, that there are well-known rules and regulations governing transactions on said board, then it is presumed in so employing plaintiff the defendant knew and intended that any transactions under said employment would be in accordance with and under the said rules and regulations; and if the jury further believe, from the evidence, that the plaintiff did, under such employment, make purchases and sales of commodities for future delivery for the defendant on the C. Board of Trade in accordance with said rules and regulations, then the plaintiff is entitled to recover from the defendant his reasonable commissions for transacting such business; and if the jury further believe, from the evidence, that the plaintiff under said rules and regulations was required to and did pay out money on account of said purchases and sales, then he, the plaintiff, has a right to recover from the defendant all such moneys so paid out.<sup>11</sup>

§ 3472. **Options on Board of Trade—Commissions—Usages.** The jury are instructed, that if a person employs a broker to transact business for him upon the market, with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages only, providing they are such as regulate the mode of performing the contract and do not change their intrinsic character. Unless you believe from the evidence that the defendant, —, had competent knowledge of the rules, regulations and usages of the Board of Trade relating to the settlement of contracts, by offsets, and relating to the exchange and substitution of contracts, then — was not and is not bound by such rules, regulations and usages; nor in that case could or did any substituted, exchanged or offset contract, if any were made by the plaintiff for him, supplant or take the place of any original contracts, if any were made by the plaintiffs for him, upon said Board of Trade.<sup>12</sup>

11—Partridge v. Cutler, 168 Ill. 504 (511), reversing 68 Ill. App. 569, 48 N. E. 125.

"The law applicable to different questions may be stated in separate instructions, and the entire law applicable to all the questions involved in a case need not be stated in each. In such case, the instructions supplement each other, and, if they present the law fairly when viewed as a series, it will be sufficient, but, if an instruction directs a verdict for either party or amounts to such a direction in case the jury should find certain facts, it must necessarily contain all the facts which will authorize the verdict di-

rected. \* \* \* The evidence was that the facts stated in the instruction existed, and there was practically no dispute about them. \* \* \* Here was an instruction substantially directing a verdict regardless of defenses, which there was evidence fairly tending to prove, and the error in such an instruction is not obviated by giving conflicting instructions. Illinois Linen Co. v. Huff, 91 Ill. 63; Quinn v. Donovan, 85 id. 194."

12—Curtis v. Wright, 40 Ill. App. 491.

"This court is committed to the contrary of the proposition announced in said instruction, and we

§ 3473. **Options in Grain—Defense to Promissory Note Alleged to Have Been Given for Gambling—Burden on Defendant.** The court instructs the jury that the making of the two notes in suit being admitted by the defendant, and the ownership of the plaintiff being shown, the burden of proof to establish a defense to the notes rests on the defendant. And the only defense set up by the defendant being that the notes were given in renewal of a note, which was itself given to settle a claim for differences and certain fictitious dealings in grain or options, it devolves on the defendant to satisfy the jury that the said notes were given in renewal of said note, and to satisfy the jury by a clear preponderance of the evidence that such note was given for differences in pretended dealings in grain.<sup>13</sup>

§ 3474. **Liability of a Minor on a Board of Trade Contract.** It is perfectly legitimate for you and me or any one else to purchase property for future delivery, and if we do so, and the property rises or falls, we have a right to put up the margin to keep it good; that does not make gambling, and (so far as this case is concerned, it is immaterial whether or not this was a gambling transaction or not). In the first place, because if there was no wheat purchased by these defendants, but that they simply determined the question as to what should become of this money by betting upon the price of the raise or fall of the wheat, then the plaintiff is entitled to recover, but (if on the other hand he employed these parties to purchase wheat for future delivery, and put up the margins to them, and they, acting as his agents, went and bought the wheat, and then they bought and sold wheat as he ordered them and not otherwise, and acted as his agent he cannot recover against such agents for what money he lost, and if that was the transaction the plaintiff in this case is not entitled to any verdict at your hands). \* \* \* This young man (the plaintiff) I think it may be conceded is proven to be a minor. I don't believe there is any question under the testimony. (But if he put his money upon the purchase of wheat for future delivery, and it was actually purchased, he received the benefit of the rise or fall of the market according to the sale, whether it was a sale or purchase, and he cannot restore that benefit, and therefore he cannot rescind the contract and pay back the benefits he received; he is not in that position.)<sup>14</sup>

must therefore hold that there was no error in refusing to give it to the jury. *Oldershaw v. Knoles*, 4 Ill. App. 63; same case on 2nd appeal, 6 Ill. App. 325."

13—*Dow v. Higgins*, 72 Ill. App. 302.

"The instruction is faulty in that it requires something more than the mere preponderance of the evidence, necessary in civil cases, as the basis of the finding of the jury. *Stratton v. The Central C. H. Ry. Co.*, 95 Ill. 25; *Ottawa, O. & F. R. V. Ry. v. McMath*, 4 Ill. App. 356; *Bauchwitz v. Tyman*, 11 Ill. App. 186."

14—*Braucht v. Graves*, 92 Minn. 116, 99 N. W. 417 (418).

In commenting on the foregoing instruction, the court said: "It must be kept in mind that the plaintiff was a minor, and that the same

rules of law with reference to the transactions in question do not apply to him that would to a person of legal age. The law as to when a minor may rescind his contract, and on what conditions he may do so, must be regarded as settled in this state. His contract, except for necessities, is voidable, and so long as it is executory he may unconditionally repudiate it. But if his personal contract has been executed on both sides, and he seeks to recover what he has parted with in performance, he must restore what he received, by virtue of the contract if he have it as a condition precedent. Where, however, a minor has parted with what he received under such a contract or the benefits received are of such a nature that he cannot restore them he



§ 3475. **Actual Intention on Part of the Buyer to Receive and on Part of Seller to Deliver Required—Agreement of Parties Not Material.** The court instructs the jury that even though it was arranged or understood between the plaintiffs and the defendant that the sales and purchases to be made on account of or for the benefit of the latter, should be so made that there should be, before the time of delivery should arrive, as much of any certain commodity sold as there should be purchased so that as between the plaintiffs and the defendant, the sales might be offset against the purchases, yet if it was also further arranged or understood at the same time that all the contracts for sale or purchase to be made, should be lawful and for actual delivery, then the whole contract or arrangement as above stated was not unlawful.<sup>15</sup>

may rescind and recover what he parted with under the contract, unless the other party shows that the contract was a fair, reasonable and provident one, free from fraud or overreaching on his part. *Johnson v. Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. 473; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9. Tested by these rules the instruction was erroneous and prejudicial, for it assumes and decides as a matter of law, that, if the transactions were as recited in the instruction then the plaintiff received benefits, and that he could not rescind because he could not restore them. Such is not the law for he had the right to rescind in such a case, although the benefits received were of such a nature that they could not be restored unless the jury found that the contract was a fair, reasonable and provident one. It cannot be held as a matter of law that such was the character of the transaction."

15—*Wheeler v. McDermid*, 36 Ill. App. 179 (188).

The court said: "The first objection to this instruction is, that its different clauses are inconsistent and repugnant to each other. If the hypothesis supposed in the first part of the instruction was established by the proof, then the second member of the proposition could not exist, and could not be performed, or certainly would not be, for no occasion could arise after the contracts were balanced before the day of delivery and thus canceled for an actual delivery on the day set for such delivery. But the first clause of this instruction is directly within the prohibition of the statute, and informs the jury that the parties may do what the statute declares they shall not do, and this palpable misdirection was not cured by the second clause, adding that still, if they agreed at the same time the transaction should be lawful, and the grain should be for actual delivery, the whole arrangement would not be unlawful. The instruction all taken together means simply that if parties contract to do an unlawful

thing, and afterwards execute such unlawful contract, still if they further agree that such contract should be lawful, and they reserved the right to do some act to make it lawful, but never performed the act necessary to make it legal, the whole transaction would be legal. It will hardly be seriously contended that a transaction prohibited by law can be made legal and valid by simply calling it so.

"The first clause of this instruction falls within the definition of a gambling contract laid down by the Supreme Court of the United States in *Irwin v. Williams*, 110 U. S. 225. The court says: 'When brokers in form make contracts for future delivery in their own names with other brokers claiming to base said contracts upon orders received by them from persons whose names they do not disclose, and when from all the facts and circumstances surrounding the transactions it appears that no actual delivery was intended, but merely the settlement and payment of differences such brokers can not receive from those undisclosed principals money paid out by them in their own names.' In *Barnard v. Backuss*, 52 Wis. 593, 'When contracts are made as a cover for gambling without intention to deliver and receive the grain, but merely to receive the difference between the price agreed upon and the market price, at some future day, they come within the statute of gaming and are void in law.'

"To uphold such a contract it must affirmatively and satisfactorily appear that it was made with an actual view to deliver and receive the grain and not as an evasion of the statute or as a cover for gambling transactions.

"And in *Carrol v. Holmes*, 24 Ill. App. 453, the court say: 'No matter what the forms of the several transactions were on their face, if the facts and circumstances show that such forms were colorable, and that it was the real intent of both parties that there were to be no actual sales, no delivery or acceptance of the subject matter of the contracts,

but that the damages were to be adjusted upon differences, then they were gambling transactions and within the purview of the statute.' *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349.

"The foregoing cases and many others which might be cited hold that all such contracts as are to be settled by merely ascertaining differences between the agreed price and the market price, and when it does not affirmatively and satisfactorily appear that there was an actual intention on the part of the buyer to actually receive, and on the part of the seller to actually deliver or make a bona fide offer to deliver, the grain itself, or a warehouse or other valid receipt or voucher calling for and representing actual grain, then as to all such contracts they are held to be merely colorable and are within the statute

against gambling, and in all such cases the burden of proving the legality and good faith of such transactions is upon him who asserts its legality and seeks to enforce it.

"We must not be understood as holding that when either one of the parties is acting in good faith, and entering into his contract with a present intention to carry it out, and does so carry it out, or offer in good faith to do so, with an ability to make his offer and contract good, that he may not enforce his rights against the other, although the other may not be acting in good faith.

"The above instruction was directly contrary to all the decisions we have above cited and contrary to the principles we have announced; it was against the plain language of the statute; was erroneous and should not have been given."

## CHAPTER CXXIV.

### CONTRACTS.

See Approved Instructions, Chapter XXXVII, Vol. I.

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| <p>§ 3476. Negligence in signing contract without reading.</p> <p>§ 3477. A promise for a promise is not always a good consideration—Conditions in contract must be complied with.</p> <p>§ 3478. The construction of a contract is a matter for the court.</p> <p>§ 3479. Full compliance required—Substantial performance not enough.</p> <p>§ 3480. Plaintiff must recover on contract sued on—Cannot prove a different contract.</p> <p>§ 3481. Compliance with terms of contract.</p> <p>§ 3482. Assuming facts to be proven Breach of contract.</p> <p>§ 3483. Extension of time for delivery attempted to be shown</p> | <p>by oral evidence is incompetent, where the original contract is in writing.</p> <p>§ 3484. Whether delivery was made.</p> <p>§ 3485. Examining part and opportunity to examine all of certain bags of shelled corn, does not prevent plaintiff from proving bad condition of some of the corn.</p> <p>§ 3486. Receipt is not conclusive evidence of payment.</p> <p>§ 3487. Action on account—Setoff.</p> <p>§ 3488. Joint liability, does not necessarily follow joint ownership.</p> <p>§ 3489. Where there is evidence of a contract being renewed after rescission, it is error to ignore theory of renewal in instruction.</p> |
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§ 3476. **Negligence in Signing Contract Without Reading.** What is negligence in signing a contract without reading the same is not a question of law, but one of fact for the jury, to be judged of from the peculiar facts and circumstances of each case.<sup>1</sup>

§ 3477. **A Promise for a Promise Is Not Always a Good Consideration—Conditions in Contract Must Be Complied with.** The court instructs the jury that one promise is a good consideration for another promise, and if the jury believe, from the evidence, that Y. had promised to have a life policy issued to X. in the ——— Insurance Company for \$——, and afterwards, before any policy had been issued by the ——— Insurance Company, Y., as agent for the ——— Life of K. City, agreed with X. that he would give him a policy in the ——— Life of K. City for the same amount in lieu of the ——— Insurance Company if he, X., successfully passed the medical examination, and, if he did not, Y. would pay back to him, X., the \$—— X. had first advanced, and that thereupon X. submitted himself to an examination of the ——— Life of K. City physician,

1—Buckley v. Acme Food Co., 113 Ill. App. 210 (215).

"This instruction should have been refused. As we have said, the question of negligence was not involved in the case. It is a suit between the original parties; the rights of third parties are not in controversy; and no matter how

negligent the defendant may have been in signing the contract without reading the same, if he was induced to do so through the intentional and deliberate fraud of plaintiff or its agent, it cannot recover thereon."

See Hicks v. Harbison-Walker Co., 212 Pa. St. 437, 61 Atl. 958, for another erroneous instruction on this subject.



and the ——— Life of K. City rejected him, X., on such examination, then Y. was liable to pay over to X. the money so advanced to him, and the jury should so find.<sup>2</sup>

**§ 3478. The Construction of a Contract Is a Matter for the Court.**

(a) The court instructs the jury that they should find for the plaintiff in the sum of \$——, with interest from the —— day of ——, less \$—— freight charges, unless they shall believe from the evidence that the plaintiff failed or refused to send a man to the defendants to introduce the medicines sold defendants, in accordance with the terms of the contract between the parties.<sup>3</sup>

(b) The court instructs the jury that it will be for you to say as to whether, taking everything into consideration—the entire surroundings, the entire evidence in the case, it was the contemplation of the parties, according to this contract, that the plaintiffs in this case were to assume and bear the burden of any loss that might result because of the increased danger to the defendant by putting in and operating these two new side tracks; and if this loss was caused by reason of the proper operation and necessary management of cars on these two tracks, or either of them, why, the plaintiffs haven't any right to complain in this case; and in that case if you so find, and find that is established by the evidence in this case—by a fair preponderance of it—the plaintiff cannot recover.<sup>4</sup>

(c) In the contracts or agreement, where there is a conflict in the evidence as to the terms of the contract or agreement, it is the duty of the jury to determine the intention of the parties from the evidence in the case.

(d) If there is a conflict in the evidence as to the terms of the contract made between the plaintiffs and the defendants, then it is the duty of the jury to determine the intention of the parties;

2—*Lewis v. Carr*, 86 Ill. App. 412 (415).

In holding the instruction erroneous the court said: "One promise is not always a good consideration for another promise. Although appellant, as agent of the Insurance Company, had promised appellee a policy, the promise was upon condition that appellee should take and pass the required medical examination. Appellee refused to take the examination. No duty rested upon appellant to procure a policy or return the money. There was not, therefore, mutuality of agreement. Had appellee taken the examination and passed, the obligation would have rested upon appellant to procure the policy. Had he taken the examination and failed, the obligation would have rested upon appellant to pay back \$..... In either case, there would have been mutuality of engagement in the alleged agreement. The instruction entirely ignored the condition mentioned."

3—*Locke & Ellison v. Lyon Medicine Co.*, — Ky. —, 84 S. W. 307 (308).

"The instruction required the jury to construe the written contract, yet furnished them no guide as to the manner of arriving at its mean-

ing, and, in addition, excluded from their consideration all evidence in appellants' behalf that conduced to support their contention as to the mistake in the writing. Where a written contract is so explicit in terms as to be susceptible of but one construction, it is the duty of the court to advise the jury as to its meaning and effect; but when, as in this case, its language is indefinite or ambiguous as to one or more of its provisions, or it is averred by one of the parties that by mistake some provision of the contract was let out of the writing, and parol evidence is required to explain what was intended by the parties, it is the province of the jury to determine from the evidence its meaning. It seems to be well settled that, where there has been a defective attempt to put in writing the terms of an agreement actually made, parol evidence is admissible to establish that fact, and to show what the true agreement was. A. & E. Ency. of Law, vol. 15, 638, 639."

4—*Todd v. Carr*, 17 S. D. 514, 97 N. W. 720.

The submission of the construction of the contract to the jury where no ambiguity existed was held to be error.

and in arriving at the intention of the parties the jury have the right from the evidence to look to the circumstances under which the contract was made, the subject-matter, and the object the parties intended to accomplish.<sup>5</sup>

**§ 3479. Full Compliance Required—Substantial Performance Not Enough.** (a) The court instructs you that if the plaintiff substantially complied with the contract he was entitled to recover of defendant the balance unpaid thereon.<sup>6</sup>

(b) The court instructs you that if respondent did not satisfactorily complete the contract he was yet entitled to recover the actual value of the plant as he installed it at the time of the installation thereof less payments made by appellant.<sup>7</sup>

(c) The court instructs you that if the evidence regarding the contract is so conflicting or uncertain that they are unable to arrive at the exact terms of the contract between the plaintiff and de-

5—*Wellman v. Jones*, 124 Ala. 580, 27 So. 416, 82 Am. St. 209.

The court said that where "the contract declared on is in writing, as is the case here, it is the duty of the court to construe it, and not the jury. Charges 1 and 2 given at the request of the plaintiff, besides being misleading, are obnoxious to this principle, and should have been refused."

6—*Manning v. School Dist. No. 6 of Ft. Atkinson*, 124 Wis. 84, 102 N. W. 356 (361).

The court said: "This is not the law. The proper rule is stated in *Ashland Lime Salt & Cement Co. et al. v. Shores*, 105 Wis. 122, 81 N. W. 136, in effect, thus. When a contract has not been fully, but has been substantially performed, in that it has been in good faith complied with in all essentials to the full accomplishment of that which was contracted for (*Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515); and the contract labor and material wrought into the property of the proprietor has been appropriated to the use intended, such contractor is entitled to recover the contract price, less such deductions therefrom as will make good to the proprietor the imperfections in the work. Such equivalent for the imperfections and the substantially completed work as regarded as affording the proprietor the full performance of the contract to which he is entitled. So far as the imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract and the proprietor's property, the contract price is to be reduced by so much as will measure the reasonable cost of applying such remedy, and otherwise the contract price is to be rebated to the extent of the diminished value of the subject of the contract by reason of the defects. The learned court's idea that substantial performance calls for the full contract price is entire-

ly wrong. One who contracts with another for the erection of any structure, or the installation of a plant of any kind for a stipulated price is entitled to the full benefit thereof in consideration of rendering the full price therefor. If he only received substantial performance, he is, of course, upon proper proof, entitled to such rebate from the agreed price as will constitute a fair equivalent for the difference between such and full performance of the agreement, and in an action for such price the damages mentioned are properly pleadable, either as a matter of defense or as a counter claim. The very idea suggested by the term 'substantial performance' is, that the contractor has delivered something less than what he agreed to, and that the full consideration for the full price, according to the terms of the contract, being due to the proprietor as a matter of right, the courts must accord him a remedy, which in some form will secure to him that right."

7—*Manitowoc Steam B. Works v. Manitowoc G. Co.*, supra.

The court said that the contract, being entire, "the respondent was not in any event entitled to recover quantum meruit for mere partial performance as a matter of course. In such a case, in the nature of things, there is no opportunity to accept or reject the defective work by merely keeping it or returning it. It is incorporated into the proprietor's property in such a way as to render him substantially powerless to do otherwise than to accept whatever is delivered. In such circumstances notwithstanding mere part performance by the contractor in good faith and some enrichment of the proprietor at the contractor's expense, under the rule prevailing in this jurisdiction there can be no recovery at all without proof of acceptance other than such as is inferable from the mere fact that the improvement is retained and used.

fendant, then they are entitled to consider the value of the services of the plaintiff as shown by the witnesses in this case, and to use their testimony as bearing upon the reasonable statements of the plaintiff and defendant for the purpose of arriving at the truth of the contract between the plaintiff and defendant.<sup>8</sup>

**§ 3480. Plaintiff Must Recover on Contract Sued on—Cannot Prove a Different Contract.** (a) If the jury believe from the evidence that there was a contract between the plaintiff and the defendants, and that plaintiff has fully complied with his part of said contract, and that defendants have failed and refused to comply with their part of the contract, then your verdict must be for the plaintiff.<sup>9</sup>

(b) The court instructs the jury that, although you may find from the evidence that the defendant did make requisition of the plaintiff during the current year — for the minimum number of five hundred sticks of piling of the dimensions named, still, if you believe from the evidence that the requisition for any part of said 500 sticks was made so late in the year as to render it physically impossible for the plaintiff to fulfill said requisition, then the law is for the plaintiff, and you will find for him the damages he may have sustained, fixing same according to other instructions given herewith.<sup>10</sup>

(c) The court instructs the jury that if they believe from the evidence in this case that the plaintiff, X., agreed with the defendant, as alleged in the declaration, to travel as its salesman, and that the defendant by its officers agreed to pay plaintiff for such services a commission of fifteen per cent on all orders within the territory

8—*People's Claim Adjust Co. v. Darrow*, 172 Ill. 62 (65), aff'g 70 Ill. App. 22, 49 N. E. 1005.

The court said: "We do not think the value of the services had anything to do with or any bearing upon the reasonableness of the statements of the plaintiff and defendant, and the instruction ought to have been refused."

9—*Wellman v. Jones*, 124 Ala. 580, 27 So. 416 (417), 82 Am. St. 209.

"The plaintiff, if he recovers at all," said the court, in commenting upon this instruction, "must recover upon the contract declared on, and cannot recover on some contract that may be disclosed by the evidence, different from the one upon which the suit is based. The charge given at the request of the plaintiff is faulty in that it does not limit the plaintiffs' right of recovery to the contract sued on, but leaves it open to recover on any contract that may be disclosed by the evidence. The common counts had been eliminated by the charge of the court, which left only the count declaring on a special contract. Under the pleadings, the contracts declared on was in issue, and there was a material conflict in the evidence as to what was the contract between the parties. The testimony of the defendant W. shows a different contract from the one sued on. He

states that the contract into which he entered with the plaintiff did not contain the word 'covenant,' nor the words 'fully and permanently cured,' but that the contract was an agreement that the treatment would cure plaintiff's brother of the 'morphine habit,' whereas the contract sued on provided not only for the cure of the morphine habit, but also for the habit and excessive use of chloral."

In *Andrews et al. v. Tucker et al.*, 127 Ala. 602, 29 So. 34 (38), the instructions requested were refused for the reason that they could have withdrawn from the jury the question of the defendants' liability upon the contract as modified, if there was a modification, or upon the quantum meruit by reason of the acceptance of the work, if there was such acceptance; which questions the jury was, in view of the evidence, bound to consider.

10—*Reed v. Illinois Cent. R. Co.*, 25 Ky. L. 389, 75 S. W. 200 (201).

"In our opinion the railroad company was bound under its contract to order not less than 500 pieces of piling in time to have enabled the appellant to have delivered it on or before the 1st day of June; and the jury should have been instructed on this theory, instead of upon the theory that the railroad company had the right to have ordered this piling at any time during the year 1901."



mentioned in the declaration, and if the jury further find from the evidence that the said X. performed his part of the agreement and that there is a balance due said X. from the defendant for commissions, then the jury shall find for the plaintiff the amount due, as shown by the evidence.<sup>11</sup>

§ 3481. **Compliance with Terms of Contract.** (a) The burden of proof in this case is upon the plaintiff, and, before he can recover, he must satisfy you by a preponderance of the evidence that the patterns sold and inventoried to defendants, and for which he seeks to recover in this action, complied with the terms and conditions of the contract sued upon; that is, that said patterns so sold and inventoried to defendants were staple and down to date. If plaintiff has so satisfied you, it will then be your duty to return a verdict for plaintiff for such sum as, under the terms and conditions of said contract and the evidence, you find to be due. If plaintiff has failed to satisfy you, your verdict will be for the defendant.

(b) The only question for your consideration in this case is whether or not the patterns sold defendants by plaintiff complied with the terms and conditions of the contract introduced in evidence,—that is, were staple and down to date; and, in determining this question, you must look solely to the evidence that has been introduced by the parties, and from this evidence determine this question.<sup>12</sup>

§ 3482. **Assuming Facts to Be Proven—Breach of Contract.** (a) If the jury believe from the evidence that the plaintiff has complied with his part of the terms of the contract made and entered into between him and the defendants, and the defendant or defendants have failed to comply with their part of the terms of said contract, then your verdict should be for the plaintiff.

(b) If the jury believe from the evidence that Dr. ——— was not permanently cured by the treatment of the H. Institute of the use of morphine and chloral, and that the plaintiff has complied with all the terms of the contract, that he placed his brother in the ——— Institute, that he paid the amount agreed upon, and that on demand the same has been repaid to him, then your verdict must be for the plaintiff against the defendant W.

11—Eugene Glass Co. v. Martin, 54 Ill. App. 288.

Erroneous because it left the jury to infer that if the plaintiff merely agreed to travel as the defendant's salesman, and did so travel, he was entitled to recover. Whereas, the declaration required him to solicit orders and make sales before he could recover.

An instruction is erroneous that assumes that either party has been guilty of a breach of the contract when that is one of the controverted issues in the case.

Terry v. Beatrice Starch Co., 43 Neb. 866, 62 N. W. 255 (258).

12—Hayden et al. v. Frederickson, 59 Neb. 141, 80 N. W. 494 (495).

"These instructions submitted to the jury the single question whether the patterns were 'staple and down to date,' and withdrew from the consideration of the triers of fact the

issue whether there had ever been a delivery to the defendants of the patterns in question. Manifestly this was error. The defendants were entitled to have this point passed upon by the jury."

In an action against a subscriber who refused to perform his contract to take and pay for a serial publication, it is error to charge that if defendant refused to take "said books" the plaintiffs were thereby prevented from performing their contract.

Barrie v. King, 105 Ill. App. 426 (430), holds that such a request was properly refused. No effectual tender of the books or any portion of the volumes could be made unless the books so tendered complied in all material things with the contract, both as to the books themselves and also as to the time at which such tender was made.

(c) If the jury believe from the evidence that Dr. ——— was not cured by the treatment of the ——— Institute of the habit of the use of morphine and chloral, and that before the commencement of this suit the plaintiff demanded of the defendant ——— the return of the one hundred dollars that he had paid under the agreement of contract, and he refused to return the same, then your verdict must be for the plaintiff.<sup>13</sup>

(d) If you believe from the evidence that the plaintiff might have obtained and purchased, delivered in N. Y., full fleeced turkey body feathers, at the several times when the plaintiff claims the same should have been delivered in N. Y. by the defendant, and at a price not exceeding 4¾ cents per pound; then the jury are instructed that the plaintiff cannot recover in this case.<sup>14</sup>

§ 3483. **Extension of Time for Delivery Attempted to Be Shown by Oral Evidence Is Incompetent, Where the Original Contract Is In Writing.** The jury are instructed that if the defendant has established by a preponderance of the evidence that on ——— it brought and had for delivery at Irwin, Nebraska, five hundred head of calves of the character and description required by the contract, and that the defendant was ready, willing and able to make a delivery of said calves to the purchaser in accordance with the contract, then your verdict should be for the defendant, unless the plaintiff has established by a preponderance of evidence that on the day the contract was made, it was agreed between the purchaser and seller, that if the purchaser so desired he might have an extension of time to receive said calves at a date later than ———, and that within the time extended, if you find by preponderance of evidence that the time was extended, that the plaintiff was ready and willing to receive and pay for said calves at Irwin, Nebraska, and perform all the condition of said contract upon his part, and that the defendant failed, refused, and neglected to perform said contract upon its part, then you should find for the plaintiff; or if the plaintiff has established by a preponderance of the evidence that said contract was by mutual agreement between the parties, canceled, then you should find for the plaintiff.<sup>15</sup>

§ 3484. **Whether Delivery Was Made.** It is incumbent upon the plaintiffs to establish by a preponderance of the evidence that the plaintiffs offered to deliver the clover seed in question, in accordance with the contract at the defendant's place of business, and at a time when, by virtue of the postponements agreed upon between the

13—Wellman v. Jones, 124 Ala. 580, 27 So. 416 (417).

"It is error, in charging the jury, for the court to assume as established or proven any fact that is in dispute in the evidence. The charges are vicious in assuming as proven the contract declared on, and should have been refused."

14—Rau v. Trumbull, 68 Ill. App. 490 (495 and 496).

It was "equivalent to telling the jury that though the appellee had broken his contract, yet if appellant might have purchased feathers in any market in the world, delivered

in New York at the price contracted for by appellee, no recovery, not even nominal damages, could be had. Such is not the law. Appellant was not bound to buy the feathers anywhere to be entitled to a recovery. Summers v. Hibbard, 153 Ill. 102, 38 N. E. 899."

15—Nebraska Land & Feeding Co. v. Trauerman et al., 70 Neb. 795, 98 N. W. 37 (40).

"Under our view of the law it was error to instruct the jury that they might consider the question of the change of time of delivery attempted to be shown by oral evidence."

parties they still had a right to deliver it; and to further establish that the defendant refused to accept the same. It is immaterial, in the consideration of this question, when such offer to deliver was made, provided you find upon the evidence it was a time when by reason of the postponement agreed upon between the parties, the plaintiffs had a right to deliver, and made the offer to deliver in accordance with the terms of the contract, and the defendant thereupon refused to take the seed so offered.<sup>16</sup>

§ 3485. **Examining Part and Opportunity to Examine All of Certain Bags of Shelled Corn, Does Not Prevent Plaintiff from Proving Bad Condition of Some of the Corn.** If the plaintiff was present when the corn was shelled, and saw some of it, and had an opportunity to examine all of it, and afterwards took possession of all of it, and removed it from the mill of the defendant, and then paid for the shelling, and made no objection to it on account of its being broken or injured in shelling, such taking possession of the corn and removing it was an acceptance of the corn, and he cannot recover in this action any damages for the broken condition that was apparent when he removed it.<sup>17</sup>

§ 3486. **Receipt Is Not Conclusive Evidence of Payment.** (a) The court instructs the jury that the paper in evidence dated —, which is in part a receipt in full, is a written contract signed by the plaintiffs, C. & D., and as they do not dispute that they signed it voluntarily you are instructed that it amounts in law to a written contract; that all matters prior to that date are finally adjusted between them and discharged; so if you believe from the evidence that it was entered into by the respective parties fairly and in good faith, it shuts out all conversations or promises which may have occurred at that time or prior thereto, which might tend to vary or contradict its terms, and no new promise to pay plaintiffs their claim made at that time, or before or after, would make the defendant liable.<sup>18</sup>

16—Gehl v. Milw. Prod. Co., 116 Wis. 263, 93 N. W. 26.

"These instructions were certainly misleading and confusing by reason of their very general and indefinite character, if not positively erroneous. As before indicated, an offer to deliver at any time prior to the expiration of the defendant's optional period would not suffice to put the defendant in default. The goods were to be delivered at defendant's option, and the offer must have been made either at some time when the defendant requested delivery, or at the expiration of the period if no request was made. The instructions are not clear upon this point but might easily have been misunderstood. Again the instructions say that there must be an offer to deliver 'in accordance with the contract' at the defendant's place of business. This is certainly very indefinite."

17—Chase v. Blodgett Milling Co., 111 Wis. 655, 87 N. W. 826 (827).

"The instruction so requested would have relieved the defendant of liability if the jury had found that the plaintiff took possession of

all the corn and removed it, and without objection paid for the shelling, even though he was entirely ignorant of the actual condition of the 29 bags of the corn which the evidence on his part tended to prove were bad. In other words, if the jury found that the plaintiff 'had an opportunity to examine all of' the corn, but failed to do so as to 29 bags of the corn, yet that the consequences to him were the same as though he knew the actual condition of all the corn in each of the 29 bags, when he paid for the shelling without objection. That is to say, the defendant was relieved of all liability for its negligence if the plaintiff failed to examine and ascertain the contents of every bag before paying for the shelling."

18—Counselman & Day v. C. C. Collins, 35 Ill. App. 68 (69).

"So far as relates to a subsequent promise the instruction is correct. 1 Ch. Cont. 58, note k; 1 Pars. on Cont. 434, note n.

"But notwithstanding the execution and delivery of the receipt to the attorney of the appellee it was admissible for the appellants to



(b) The receipt which has been given in evidence concludes both of the parties in every respect,—not only for the individual articles mentioned in this, but as I understand the contract, it shows a settlement of all accounts between them. Therefore it is a matter of no consideration in this case what the relations of the parties were before that contract was entered into.<sup>19</sup>

§ 3487. **Action on Account—Set-off.** (a) If the jury believe from the evidence that the defendant, A., has proven the items claimed by her as a set-off, then the jury should deduct from the claim of the plaintiff such sum as the jury may, from the evidence, believe has been proven; and if the jury further believe, from the evidence, that the items of set-off claimed by the defendant, A., exceed in amount the sum claimed by the plaintiff, then the jury should find a verdict for such sum as the evidence shows, to your satisfaction, that she has proved herself entitled to recover from the plaintiff over and above his just claim against her.<sup>20</sup>

(b) The court instructs you that in the trial of this cause it is your duty to carefully scrutinize any claim or set-off presented by the defendant against the estate of the deceased, B., and if you believe from the evidence that in his lifetime the said B. presented to the defendant the bill and account sued on in this cause and demanded the payment thereof, and that the defendant at that time, or at any other time, prior to the death of the said B. never presented any claim for set-off, that such fact, if proven may be considered by

show that by a previous agreement between the parties, the receipt had no effect between themselves; that it was never intended as a contract but was made for another purpose. The authorities to this point are cited in 1 Greenl. on Ev. Sec. 284, note 2, and 2 Tay. on Ev. 967, note 4. What application to the facts of this case the phrase 'fairly and in good faith' has, it is not easy to determine, but it is not susceptible of any meaning that could put before the jury the question whether the receipt was, between the parties, intended to have or not to have any effect. This is not a variation of a written contract by parol, but showing by parol that a paper purporting to be a contract, is not a contract. *Earle v. Rice*, 111 Mass. 17; *Pym v. Campbell*, 6 E. and B., 370, 88 E. C. L. R."

19—*Cole v. High*, 173 Pa. 590, 34 Atl. 292 (293).

"We do not regard the receipt as concluding both parties, or as showing a settlement of all accounts between them, considering the aspect in which the case was presented to the jury."

20—*Rolfe v. Rich*, 149 Ill. 436 (438), 35 N. E. 352.

"The rule laid down by the instruction as given, disregarding the landmark fixed by the jury for the guidance of courts and juries in determining questions of fact in civil cases,—that conclusions should be reached by weighing the evidence

and finding in accordance with what they believe to be its preponderance,—left the jury at liberty to require, in their discretion, such proof as would satisfy them of the justness of the defendant's claim. The word 'satisfaction' as here used would be understood, and properly, in the sense given in *Worcester's* fourth definition: To release from suspense, doubt or uncertainty; the sense of certainty; conviction. 'To satisfy' is: To free from doubt, perplexity or suspense; to set the mind at rest; to convince. And one of the synonyms given is, to 'convince the understanding.' While one person may be satisfied of the truth of a matter upon a mere scintilla of evidence, and another require that all doubt be removed before it is shown to be true to his satisfaction, it can not be said that one is satisfied,—that his understanding is convinced of the truth of the matter in respect of which he entertains a reasonable doubt. It would seem that to require the juror to be 'satisfied' would necessitate removing from his mind all reasonable doubt of the truth of the matter. It has repeatedly been held by this court, in civil cases, that the jury are only required to find from a preponderance of the evidence, and that to require that they be satisfied, imposes a higher degree of proof than the law requires. *Warner v. Crandall*, 65 Ill. 195; *Herrick v. Gary*, 83 id. 85; *Graves v. Colwell*, 90 id. 612; *Ruff v. Jarrett*, 94 id. 475."

the jury in determining whether the defendant should recover such set-off or any part thereof.<sup>21</sup>

(c) The court instructs the jury, as a matter of law, that where the defendant files a notice of set-off, it must prove its claim by a preponderance of the evidence, and unless the jury believe that the defendant in this case has proved its claim of set-off by a greater weight of all the evidence, then the jury have a right to disregard the same and find for the plaintiff the amount, if any, shown to be due him under the agreement for commissions, as appears from evidence in this case.<sup>22</sup>

**§ 3488. Joint Liability, Does Not Necessarily Follow Joint Ownership.** The court instructs the jury that if they believe from the evidence, that W. made a verbal agreement with defendant, X., and a written agreement with the defendant, Y., to do certain work, and that the premises where such work was to be done belonged to both of the defendants, and that W. proceeded with such work and received from them money on account thereof, even though the jury should further believe from the evidence that X. did not sign or was not a party to the written agreement offered in evidence, still the jury should find the issues for the plaintiff and against both the defendants, provided the jury shall further believe, from the evidence, that there is a balance due to the plaintiff under such agreement.<sup>23</sup>

**§ 3489. Where There Is Evidence of a Contract Being Renewed After Rescission, It Is Error to Ignore Theory of Renewal in Instruction.** The court instructs the jury that, under the terms of the contract between the plaintiffs and the defendant dated February 21, 1894, the plaintiffs had the right to abrogate the said contract and declare it null and void in the event that the defendant failed to keep any of the covenants of the said contract by it to be kept;

21—Farro v. Flatt, 61 Ill. App. 118 (120).

"No reason is known why the court should advise the jury to carefully scrutinize the set-off of the defendant more than the claim of the plaintiff.

"Each demand should stand upon its merits, and should be fairly considered, but the suggestion here contained might, and probably did, lead the jury to discriminate unfairly against the set-off. For some reason they discredited testimony in support thereof, which, according to the record was not contradicted or impeached. As to the latter clause of the instruction it is argued there is no evidence that payment of this bill was ever demanded by the deceased, which seems to be a fair statement, in view of the proof, but the chief objection is in the assumption that the omission by the defendant then to set up her counterclaim is evidence against its validity to which the attention of the jury is specially directed."

22—Eugene Glass Co. v. Martin, 54 Ill. App. 288.

This instruction was held erroneous for the reason that it very likely would be understood by the jury

that the plaintiff was entitled to recover if the defendant failed to prove its set-off by a preponderance of all the evidence.

23—Fischer v. Spang, 43 Ill. App. 378.

"If joint liability could follow joint ownership, as the instruction assumes, there is no proof of such joint ownership, and while probably no case can be found that does in terms decide (though it is assumed in Lee v. Nixon, 1 A. & E. 201, and Collins v. Prosser, B. & C. 682) that there is no joint liability upon separate individual contracts, although for the same matter, upon principle it is so clear that we do not hesitate to make one.

"For anything done under the contract under seal, signed by Y. he could not, before a recent statute, be sued in assumpsit (1 Chitty on Plg. 115); and if X. was liable on a verbal contract, she could be sued only in that form. It can not be supposed that by permitting an action of assumpsit to be brought upon a sealed instrument, the legislature intended to make joint contractors of those who had separately, part by deed and part by parol, engaged for the same thing."

if the jury believe, from the evidence, that the said defendant failed to keep any of the covenants of the said contract by it to be kept, and that the said plaintiff thereupon elected to and did vacate and annul said contract, and wrote, signed and delivered to the defendant a letter dated June 16, 1894, and that the said letter gave notice to the defendant that said plaintiffs had elected to abrogate said contract because of the failure of the said defendant to keep the covenants thereof; and you further find from the evidence that the defendant has paid the said plaintiffs in full for all royalties due under the terms of said contract up to the time of the receipt of said letter; and you further find from the evidence that the plaintiffs had been paid for all telephonic apparatus made, used or vended by the defendant since said June 16, 1894, then in that case, you should find the issues for the defendant.<sup>24</sup>

24—Stromberg v. Western Telephone Construction Co., 86 Ill. App. 270 (272).

The court said: "The contract in question might after a rescission thereof be renewed either by an express agreement of the parties thereto or by acts which show an intention to give it new force and effect. *Graham v. Holloway*, 44 Ill. 385 (392); *Wilkinson v. Blount Manufacturing Co.*, 169 Mass. 374,

47 N. E. 1020. A notice from a landlord to a tenant to quit for non-payment of rent is a rescission of the contract of leasing. In principle it can hardly be distinguished from the contract in question. The breach and notice in the matter of lease are waived by the payment and receipt of rent accruing after the expiration of the notice. *Collins v. Canty*, 6 Cush. (Mass.) 415; *Prindle v. Anderson*, 19 Wend. 391 (N. Y.)."



## CHAPTER CXXV.

### CONTRACTS—BUILDING.

See Approved Instructions, Chapter XXXVIII, Vol. I.

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|---|--|
| § 3490. Express contract excludes implied.  | work will not bar the recovery of penalties for delay in finishing the building. |
| § 3491. To recover, the contractor must not only be ready and willing to perform, but financially able as well. | § 3493. Action for labor and material furnished defendants.                      |
| § 3492. The mere ordering of extra  | § 3494. Extra work must be ordered.  |

§ 3490. **Express Contract Excludes Implied.** The court instructs the jury that if you find from the evidence in this case, and under the instructions of the court, that the building at number — C. Avenue was built for the joint account of the defendants, A. S. and K. S., then each of the said defendants became liable for any obligation incurred in building said building. And if you find from the evidence, and under the instructions of the court, that the plaintiff is entitled to recover herein, and if you further find that said building was built for the joint account of the defendants, then you will find for the plaintiff a verdict against both defendants for whatever amount is shown by the evidence to be due to the plaintiff.<sup>1</sup>

§ 3491. **To Recover, the Contractor Must Not Only Be Ready and Willing to Perform but Financially Able as Well.** (a) If the jury believe from the evidence that D., plaintiff, and the L. Milling Co., defendant, entered into the contract as set out in the declaration, and that plaintiff was ready and willing to perform, and did make preparation to perform said contract or his part thereof, but that he was prevented from performing his part by the said L. Milling Co., said plaintiff can recover all damages suffered by him by reason of the default of said L. Milling Co., including all necessary expenses incurred in making such preparations.

(b) The court instructs the jury that if they believe that plaintiff contracted with the L. Milling Co. for the purpose of manufacturing shingles, and that plaintiff did perform and was at all times ready and willing to do and perform his part of said contract, but that defendant refused so to do, defendant is liable for such damages as have been proven to their satisfaction from the evidence.<sup>2</sup>

1—Schiml v. Edgeworth, 118 Ill. App. 333. The court said in effect that when the only contract sued on and in evidence is an express contract between A. as builder and B. as owner, there can be no recovery on an implied contract between A. as builder and B. and B.'s wife as owners covering the same subject matter, citing Ford v. McVay, 55 Ill. 119.

2—Leek Milling Co. v. Langford, 81 Miss. 128, 33 So. 492 (493).

The court said: "There is very much in the evidence to suggest that the fact that the machinery bought by the appellee was levied upon and taken from him from time to time because he failed to pay the purchase money, was itself the reason of the contract's going to pieces. He must have been financially able to perform his covenants. The covenants in this contract were mutual and inter-dependent. Appellee could only hold defendant to

**§ 3492. The Mere Ordering of Extra Work Will Not Bar the Recovery of Penalties for Delay in Finishing the Building.** The jury are instructed that if they shall find from the evidence in the case that the completion of the work was delayed by the ordering of extra work or alterations, no claim to penalties can be recovered.<sup>3</sup>

**§ 3493. Action for Labor and Material Furnished Defendants.** If you find by a fair preponderance of the evidence that the plaintiff furnished certain material and performed certain labor on other chimneys and flues than the one over A.'s store under a contract, either expressed or implied, as defined in these instructions, or that such labor was performed and material furnished with the consent and knowledge of defendants, your verdict should be for the plaintiff, and you should allow him the reasonable value of the labor performed and material furnished.<sup>4</sup>

**§ 3494. Extra Work Must Be Ordered.** The court instructs the jury that if they find that A. made any alterations or changes, and thereby did extra work and furnished extra material, in the building and construction of the house, the defendant would be liable to A. for the reasonable value of said extra work and material, in addition to the contract price for said building.<sup>5</sup>

compliance by showing that he had himself fulfilled the covenants on his part. This he was not in a condition to do, if it be the fact that as fast as he got the machinery it was taken from him by the vendors because of his failure to pay."

3—Harrison v. Trickett, 57 Ill. App. 515 (517).

The court said: "The mere ordering of extra work which it would not take more than a day to do, would not absolve a builder from the consequences of a delay of six weeks in completing work he had undertaken. For such delay as was reasonable, that is, for such time as was reasonably required in which to do the extra work, and such delay as on account thereof, was caused, appellee was, by the extra work, excused. Emden on Building Leases

and Contracts, 167; Thomhill v. Neats, 8 Common Bench, New Series, 831; Jones v. St. Johns College, Law Rep. Journal Chy. 620; Holner v. Guppy, 3 Messon & Welsby, 387."

4—Anderson v. Roberts, 112 Ia. 749, 84 N. W. 928. The above was held erroneous because there was no evidence and no averment in the pleadings that the work was done at defendant's request.

5—Williamson v. D. M. Smith & Co., — Tex. Civ. App. —, 79 S. W. 51 (52).

"Appellant testified that he had not authorized such extra work or the use of extra material, and had not agreed to pay for the same. The charge destroyed the effect of that testimony, and was erroneous."

## CHAPTER CXXVI.

### CONTRACTS OF MARRIAGE, BREACH OF—MARRIAGE, PROOF OF.

See Approved Instructions, Chapter XXXIX, Vol. I.

§ 3495. Discovery that woman is not  
virtuous after promise is  
made.

§ 3496. Common law marriage—In-  
capacity to contract other  
marriage.

§ 3495. **Discovery that Woman Is Not Virtuous After Promise Is Made.** You are instructed that though you may believe, from the evidence, that the defendant did promise to marry the plaintiff, believing at the time she was a chaste and virtuous woman, yet, if the defendant afterwards discovered from the plaintiff's acts, that she was not a virtuous woman, then and in that event of the proof the defendant would have a right to refuse to marry the plaintiff, and you should find your verdict for the defendant.<sup>1</sup>

§ 3496. **Common Law Marriage—Incapacity to Contract Other Marriage.** The court instructs the jury that the testimony in this case fully establishes the fact that the defendant and his reputed wife entertained such relations to each other by matrimonial cohabitation, by holding each other out to the community as man and wife, and by the general recognition of the neighborhood in which they lived, as to constitute them man and wife, and that, by reason of such relations existing between the defendant and his reputed wife, he was at the time of the injury complained of in this case incapacitated on his part from contracting a marriage alliance with another woman.<sup>2</sup>

<sup>1</sup>—Dunn v. Trout, 87 Ill. App. 432 (433).

"The court rightly refused to give the instruction. If appellant after engaging to marry appellee had sexual intercourse with her, he could not for that reason break off the engagement, and thereby take advantage of his own wrong."

<sup>2</sup>—Davis v. Pryor, 3 Ind. Ter. 396, 58 S. W. 660 (664).

"We think this instruction was

erroneous. In our judgment, the facts should all have been admitted to the jury, as they were, but with proper instructions as to what constituted a marriage at common law, and what presumptions obtain from certain acts of parties living and cohabiting together, and have left it for the jury to say whether the defendant was a married man or not. Allen v. Hall, 10 Am. Dec. 573; Fenton v. Reed, 4 Am. Dec. 244."



## CHAPTER CXXVII.

### CONTRACTS—OF SERVICE.

See Approved Instructions, Chapter XL, Vol. I.

§ 3497. Implied contract for services.

§ 3498. Inattention to business — Numerous callers during business hours.

§ 3499. Suit between members of family.

§ 3500. Presumption that services of

a child are gratuitous—Relationship of grandparent and grandchild not similar.

§ 3501. Plaintiff working for defendant—Suing defendant for services of minor daughter in assisting plaintiff.

§ 3497. **Implied Contract for Services.** You are instructed that although you may believe from the evidence that plaintiff, in the course of his correspondence with the officers and shareholders of defendant, casually used expressions to them which implied that he was not receiving any compensation for his services, yet, if you believe that the officers of the defendant knew that such services were not being performed gratuitously, you will, under these instructions, find on this item for the plaintiff, unless you further believe that the defendant relied and acted upon these expressions of the plaintiff, to its injury.<sup>1</sup>

§ 3498. **Inattention to Business—Numerous Callers During Business Hours.** If the jury believe from the evidence that the plaintiff had a number of persons coming in to see him during business hours on his own private business, and was otherwise inattentive to business of the defendants during the months of April and May, 1896, then I charge the jury that the plaintiff committed a breach of contract, and the defendants had a right to discharge the plaintiff, and the jury must return a verdict in favor of the defendants.<sup>2</sup>

§ 3499. **Suit Between Members of Family.** (a) The court instructs the jury as a matter of law, that if one person does work for, or renders services to another person, at his or her request, the benefits of which work or services are accepted by the person for whom such work is done, or to whom such services are rendered, then the law

1—Sidway v. Missouri Land & Live-Stock Co., 163 Mo. 342, 63 S. W. 705.

The court said: "This instruction was assuredly misleading, and, it would seem, intentionally so, because no such statements as above employed by plaintiff could be deemed by any rational human being,—'casually used expressions.'"

2—Drennen v. Satterfield, 119 Ala. 84, 24 So. 723 (724).

The court said: "It is argumentative and misleading, in that it

singles out and gives undue prominence to the facts stated. It is erroneous, in that the evidence showed that defendants paid the plaintiff for his services after the time during which the neglect or inattention therein predicated may have occurred, and continued him in their employment, without leaving it to the jury to determine whether or not the defendants had not waived and lost the right to take advantage of such neglect; thus ignoring important evidence in the case."

implies a promise on the part of the person for whom such work is done or to whom such services are rendered, to pay unto the person doing such work, or rendering such services, such an amount as such work or services are reasonably worth; and the jury are instructed that if they find from a preponderance of the evidence in this case that the plaintiff, M. L., did work for and rendered services to the defendant, J. McC., at his request, or at the request of his wife, and that the defendant accepted such work or services, and received the benefits thereof, they, the jury, should find the issues for the plaintiff, and assess the plaintiff's damages at such a sum as the jury may find from the preponderance of the evidence, such work or services are reasonably worth.<sup>3</sup>

(b) If you believe from the evidence that the plaintiff, at the request of X., performed for him labor and service, the law implied a promise on his part to pay for the same what it was reasonably worth.<sup>4</sup>

(c) The court instructs you that if you find, by a preponderance of the evidence, that the plaintiff worked as a farm hand for the defendant during the spring and summer of — and from the spring of — to the 1st of April, —, and you further find, by a preponderance of the evidence, that there was no agreement or understanding between the plaintiff and defendant, and that such work was not to be paid for, then, if you find the facts as last hereinbefore stated, your verdict shall be for the plaintiff for whatever amount you shall by the evidence believe the plaintiff would be entitled to recover.<sup>5</sup>

(d) The jury are instructed that if you believe from the evidence, that the plaintiff performed labor and services for the defendants at their request, and that no price was fixed or agreed upon by them, then the law will imply a promise from the defendants to pay the plaintiff for such work and labor what the same are reasonably worth.<sup>6</sup>

3—McClory v. Lancaster, 44 Ill. App. 212 (214). The instruction was held bad because it ignores evidence that plaintiff stayed with defendant as a member of his family without expectation of pay.

4—In Knight v. Knight, 6 Ind. App. 268, 33 N. E. 256, this instruction was held bad though it states a correct proposition of law. The court said: "As the evidence shows that the appellee was the daughter-in-law of the decedent, and lived with him and was a member of his family for a period of nearly 20 years before his death, the appellant could justly complain of this instruction if it stood alone and was not corrected by other instructions."

5—Dolbeare v. Coultas, 94 Ill. App. 55.

"The instruction entirely ignores the main question in issue. Where one enters the family of a relative and is treated as a member of the family, the relationship between the parties is so intimate that the law does not imply a contract requiring one to pay money for the support

and the other to pay money for services rendered; a recovery for either support or services cannot be had by one of the parties against the other in the absence of an express contract. In the absence of an express agreement, the law indulges the generous presumption that what is furnished upon the one hand and what is done upon the other is gratuitous and is done from the promptings of affection. Harris v. McIntyre et al., 118 Ill. 275; Switzer v. Kee, 146 Ill. 577; Hefron v. Brown, 155 Ill. 322. The instruction lays down a contrary rule, and tells the jury that if there was no agreement or understanding between the plaintiff and the defendant that such work was not to be paid for, they shall find a verdict for the plaintiff."

6—Miller v. Davis & McKinney, 49 Ill. App. 377 (378).

The court said "it was abundantly proven and not denied, the parents directed the defendant in error at divers times to engage in different kinds of work about the farm,

**§ 3500. Presumption that Services of a Child Are Gratuitous—Relationship of Grandparent and Grandchild Not Similar.** (a)

There is a legal and moral obligation resting upon the parent to provide for, educate and take care of his minor children until they arrive at the age of majority. That being so, the law imposes a correlative duty or entitles the parent to the benefit of the earnings of the child during his minority. Out of that existing state of things arises this presumption: That, where a child performs labor for its parents without an express or implied contract that the child shall receive compensation therefor, it must be presumed that the services were gratuitous, and that the child cannot recover therefor. Of course this presumption grows less and less as the distance from the parent tree increases. But I am of the opinion, and so charge you, that the law is that a grandson working for a grandfather,—that the same presumption exists there, in the absence of any proof of an express or implied agreement by the parties that the grandson shall receive wages for what he did. If you believe from all the evidence in this case that the defendant was taken into the family of the grandfather, and treated as one of the family, and that there was no contract either express or implied, and that neither party, the defendant or the plaintiff, understood or expected that there was any remuneration for the services rendered, then I say to you, gentlemen of the jury, if you find this state of facts to exist from all the evidence in the case, the defendant cannot recover in this action upon his counter-claim.

(b) You are to determine from all the evidence in the case, the facts testified to and surrounding this employment, its origination, and its termination, and determine from that evidence whether or not there was any contract express or implied between these parties which would authorize you to find that the services were to be paid for. I am of the opinion, and so charge you, that the law is that a grandson working for a grandfather—that the same presumption exists there, in the absence of an express or implied agreement by the parties that the grandson shall receive wages for what he did.<sup>7</sup>

**§ 3501. Plaintiff Working for Defendant—Suing Defendant for Services of Minor Daughter in Assisting Plaintiff.** (a) The court instructs the jury that in this case the plaintiff seeks to recover from the defendant insurance company for services of a minor daughter of the plaintiff alleged to have been performed by her for the defendant. If you shall find from the evidence that the plaintiff was, at the time such alleged services were performed, employed by the defendant as its secretary at a fixed salary, and that it was his custom to have his children with him in the office of the company, rendering him assistance in various ways, in such case the law does not, in the

and in that sense he did such work at their request. But such is always true in cases where a child has his home with a parent after his majority and renders services about the affairs of the parent. The well settled rule is, the law does not, in such instances, imply a promise to pay from a request."

7—*Murphy v. Murphy*, 1 S. D. 316, 47 N. W. 142 (145). 9 L. R. A. 820.

The court said that "if the court had left the determination of this relationship to the jury, instead of having absolutely declared what it was, then, presumptively, we might have inferred that they did not stand as parent and child towards each other; and, if so, a quantum meruit action could have been maintained. For this error the case must be reversed."



absence of an express agreement to pay for such help, raise any presumption of a promise on the part of the defendant to pay for such services; and the plaintiff cannot recover in this case.

(b) If you shall find from the evidence that there was no express contract of hiring in this case, and by the application of the foregoing instructions to the evidence that there was no implied contract of hiring, and shall further find from the evidence that the money which the plaintiff claims was paid for such hiring was by him, while he was acting as secretary to the defendant, secretly so applied by him without the knowledge or consent of the board of directors of the defendant, then such use of the money was unwarranted, and you should find for the defendant to the full amount of the money which the evidence shows to have been so taken and used by the plaintiff, unless you shall further find from the evidence that the defendant by its officers has since ratified such taking and use.

(c) It is true that the law is such that if one sees another performing labor for him which is beneficial to him, and does not object, but allows the work to go on, and avails himself of the benefits, the person for whom the labor is performed is bound to pay for such labor as it was reasonably worth, but no more. Hence in this issue, if you shall find from the evidence, with the foregoing instruction applied thereto, that the plaintiff is entitled to any pay for the services rendered by his daughter to the defendant, you will find the value of the services as shown by the evidence; and if the amount received by the plaintiff, as shown by the plaintiff's petition, is less than the amount so found, you will find for the plaintiff for the balance. But if you shall find it to be less, then under the pleadings in the case, you will find for the defendant for such an amount as the money claimed to have been paid exceeds the value of the services so rendered.<sup>8</sup>

8—Crete Mut. Fire Ins. Co. v. Patz, 64 Neb. 676, 90 N. W. 546 (547).

The court said that as to "the first it does not state the law. It is visited by the closing clause. It says, in effect, that, if it was the custom of the plaintiff to have his children assist him at his work for the defendant, there can be no implied contract to pay for the services of any one of the children, no matter under what circumstances they may have been rendered. As to the second, the court on its own motion instructed the jury that no

evidence had been introduced, and no claim made, by the defendant, as to the money paid by the plaintiff for the services of his daughter. No exception was taken to such instruction. Hence we must assume it was a fair statement of the facts in that behalf. If it was, there was no evidence on which to base the instruction tendered by the defendant on that point. As to the third, the same ground is covered by the instructions given by the court on its own motion. Consequently it was not error to refuse it."

## CHAPTER CXXVIII.

### DAMAGES—MEASURE OF.

See Approved Instructions, Chapter XLI, Vol. I.

#### ALIENATION OF AFFECTION.

- § 3502. Action for maliciously alienating affections of plaintiff's wife.

#### ATTACHMENT—SEQUESTRATION.

- § 3503. Unlawful attachment—Damages should be limited to the evidence.  
 § 3504. Writ of sequestration—Damages, actual and punitive.

#### CONTRACTS AND SALES.

- § 3505. Failure of railway company to build station as agreed to—Measure of damages.  
 § 3506. Whether interest should be allowed for breach of contract.  
 § 3507. Account for goods sold—No deduction for storage, etc.  
 § 3508. Damages for sale of goods—Special purpose must have been brought home to other party to justify special damages.  
 § 3509. Action by seller for breach of contract to accept, notice to stop manufacturing having been given by buyer.  
 § 3510. Contract for resale—Breach.  
 § 3511. Time lost in making inquiries about lost goods.  
 § 3512. Irrigation company failure to supply water—Damages.  
 § 3513. The measure of damages on a breach of warranty for failure to furnish repairs is the cost of such needed repairs only.  
 § 3514. Damages for breach of warranty of title.  
 § 3515. Where performance of a building contract for a stipulated price is prevented by the owner, it is error to charge that the measure of damages is the full contract price.  
 § 3516. Building contract—Cannot recover upon quantum meruit under special contract.  
 § 3517. Omitting element of damage—Extra work—Delay.

- § 3518. Contract for services—Considering results accomplished.

- § 3519. Employed at two different places doing different work.

#### CONVERSION.

- § 3520. Wrongful conversion—Measure of damages.  
 § 3521. Measure of damages for goods taken—Value at the time of conversion with interest.

#### FRAUD—DECEIT—MISREPRESENTATION.

- § 3522. Deceit—Measure of damages.  
 § 3523. Misrepresentation—Measure of damages.  
 § 3524. Vindictive damages cannot be assessed without proof of actual damages—Rank and influence of defendants—Attorneys' fees.

#### INJUNCTIONS.

- § 3525. Measure of damages for wrongful issuance of injunction

#### INSURANCE.

- § 3526. Market value of goods destroyed by fire.  
 § 3527. Maximum amount specified in certificate.

#### INTOXICATING LIQUORS.

- § 3528. Dram shop act—Damages.  
 LIVE STOCK, INJURIES TO.  
 § 3529. Injury to live stock—Duty to sell to avoid loss.  
 § 3530. Damages for injury to cattle—Including too much law in one instruction.

#### MALICIOUS PROSECUTION—FALSE IMPRISONMENT.

- § 3531. What to consider in assessing damages—Malicious prosecution.  
 § 3532. Measure of damages in false imprisonment.

#### INJURIES TO PROPERTY.

- § 3533. Damages to personal property in putting tenant out of possession.

- § 3534. Measure of damages to personal property where the same can be repaired.
- § 3535. Destruction by fire—Negligence assumed.
- § 3536. Difference in market value before and after the fire.
- § 3537. Injuries to business—Damages, rule of—Elements involved.

SHERIFFS.

- § 3538. Action against sheriff for taking insufficient replevin

bond — Damages — Should sue in case instead of trespass.

SLANDER AND LIBEL.

- § 3539. Exemplary damages.
- § 3540. What plaintiff ought to receive, not what defendant ought to pay.

TRESPASS.

- § 3541. Value of crops in the condition they were in at the time of injury.
- § 3542. Difference in market value.

ALIENATION OF AFFECTION.

§ 3502. **Action for Maliciously Alienating Affections of Plaintiff's Wife.** If the jury believe from the evidence that the defendant did have carnal intercourse with the wife of the plaintiff, as alleged in the complaint herein, your verdict should be for the plaintiff in such sum as you believe from the evidence will compensate him for the injury and damage he has suffered by reason of being deprived of the society, services and comfort of his wife, if he was so deprived of any of them, and the distress and anxiety of mind occasioned thereby, including the mental suffering from the dishonor of the marriage bed, and the loss of the affection of the wife, in such an amount as you shall think, from all the evidence, the plaintiff is entitled to, to compensate him for such matters, to which you may add such amount for exemplary damages or punitive damages as you may think right.<sup>1</sup>

ATTACHMENT—SEQUESTRATION.

§ 3503. **Unlawful Attachment—Damages Should Be Limited to the Evidence.** You are further instructed that if you find that the

<sup>1</sup>—Lindblom v. Sonsteli, 10 N. D. 140, 86 N. W. 357 (358).

"This instruction was excepted to for the reason that it assumed that the defendant was liable for exemplary damages. In other words, it is claimed that the jury should have been instructed in terms that if the defendant was actuated by fraud or malice, then they might, in their discretion, assess exemplary damages. The instruction does not state to the jury the purpose of assessing such damages, nor does the charge elsewhere do so. They were simply told that exemplary damages might be added in such an amount as they deemed right, without giving the jury any rules to guide them in view of the evidence as given. Exemplary damages may be assessed when the defendant has been guilty of oppression, fraud or malice, actual or presumed. Section 4977, Rev. Codes. The amount of such exemplary damages in cases of this kind would necessarily vary

according to the facts proven. Such damages would not be the same in cases where the offense is flagrant as in cases where the offense is shown to have been committed under circumstances of mitigation. The jury should have been instructed in terms that exemplary damages are to be assessed only when fraud or malice, actual or presumed, exists in the case, and that the amount of such damages should be assessed after weighing all the evidence, incriminating or mitigatory, in order to determine the amount. The jury should not have been left to construe the meaning of the words 'malice' and 'exemplary damages' as they saw fit, without any guidance from the court."

It is error for the court to speak of the evidence about damages resulting from an attachment as being vague and uncertain, especially when it is not so. *Mobile Furniture Co. v. Little*, 106 Ala. 399, 19 So. 443.



plaintiff sustained any damages in this action, and that the defendants are liable therefor, she would not be limited to the damages which she sustained for the time that the business was actually closed, but is entitled to a verdict for all damages by the reason of the unlawful act of the defendant, which arose from the acts complained of.<sup>2</sup>

§ 3504. **Writ of Sequestration—Damages, Actual and Punitive.** If the jury should find that the writ of sequestration was wrongfully sued out, and that the defendant sustained damages by reason thereof, and plaintiff did not think he had a legal right to the issuance of said writ, in addition to actual damages, defendants would be entitled to such exemplary damages as the jury may see fit to give.<sup>3</sup>

## CONTRACTS AND SALES.

§ 3505. **Failure of Railway Company to Build Station as Agreed to—Measure of Damages.** If the jury shall find their verdict for the plaintiff, they shall find for the plaintiff in such sum of money as they may believe, from the evidence, represents the fair and reasonable value of the land conveyed by the plaintiff to the defendant for the right of way at the time said conveyance was made, and in addition thereto such a further sum as they may believe from the evidence would represent the difference, if any, between what would have been the market value of the residue of plaintiff's land, out of which said right of way was conveyed, if such stopping place had been established at the location mentioned in instruction No. 1, and the market value of said residue of land without said stopping place; the whole award not to exceed the sum of \$—, the amount claimed in the petition. In determining the difference in value referred to herein, if there be such difference, the jury will not consider the profits, if any, which might have been made by the plaintiff in any business the plaintiff might have established at or near said stopping place, but the jury may consider the adaptation, if any, which the location of said stopping place, as in instruction No. —, would have given plaintiff's land for business or other useful purposes, and

2—*Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711 (712).

The court said: "It is not safe to say to a jury that an injured party is entitled to all 'damages' which arise from unlawful acts, leaving each juror to determine what are damages, and in his discretion to award 'all damages,' whether they be remote or proximate, fanciful or reasonable, as he may determine, without any limitation by the court in its charge to the jury."

3—*Lynch v. Burns*, — Tex. Civ. App. —, 79 S. W. 1084 (1085).

"This charge is clearly erroneous. To authorize a verdict and judgment for exemplary damages under *Benfield* or *Alford's* pleading in this case, the writ under which the

property was seized, must have been sued out by the party applying therefor, wrongfully, maliciously, and without probable cause for believing that he was entitled thereto. In the case of *Culbertson v. Cabeen*, 29 Tex. 256, both actual and exemplary damages were sought to be recovered for the wrongful and malicious suing out of a writ of attachment, and it was there said: 'Malice and the want of probable cause must both concur, to support the charges of malicious prosecution. Neither is alone sufficient. If it were malicious and unfounded, but there was probable cause for suing out the attachment, nothing more than the actual damages sustained can be recovered.'"

thereby have enhanced their market value. If the jury find their verdict for the defendant, they shall so state, and no more.<sup>4</sup>

§ 3506. **Whether Interest Should be Allowed for Breach of Contract.** The jury should ascertain the amount of such damages at the time of the breach of contract, and add thereto the interest upon such amount from the time of such breach of contract down to the date of the verdict.<sup>5</sup>

4—*Louisville A. & P. V. Electric Ry. Co. v. Whipps*, 25 Ky. L. 231, 80 S. W. 507 (508).

"This instruction was evidently patterned after that approved by this court in the case of *L. & N. R. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. 1030. But after a careful examination of the authorities bearing upon the question, we have come to the conclusion that the measure of damages in that case, as well as in the one at bar, was not correctly announced. In *Sutherland on Damages*, Vol. 2 para. 576, we find what we regard as the correct rule on this subject thus stated: 'A covenant by a railroad company, in consideration of the grant of the right of way through land, to erect a flag station convenient to the grantor's house, and to permit him to cultivate all the land granted which was not needed by the grantee, runs with the land, and binds the grantee's assignee, who has notice. The measure of damages for its breach is the difference between the value of the lands when suit is brought, and what their value would have been had all the stipulations in the contract been substantially performed, or, in other words, the additional value which would have accrued to the lands but for the breach. The covenant inured to the benefit of the grantor's adjoining land, and, if performed, would have increased its market value. This appreciation was within the legal, if not the actual, contemplation of the parties. Its loss was the natural and proximate result of the breach of the contract.' Continuing the discussion, the learned author refers to a Pennsylvania case in which there was a breach of the contract to erect a depot, the erection of which was the principal consideration for the release of the right of way through the plaintiff's land. The trial court announced the damages to be the same as would have been awarded the owner if the land had been condemned. When the case reached the Supreme Court of the state, that court, in an opinion by Agnew, J., which is approved by *Sutherland*, said: 'Instead, then, of the question being the difference in value of the land before and after the building of the road, considering all advantages and disadvantages to the owner, the question would be upon the additional value which would accrue to the plaintiff's land in the event of

erecting such a depot as the contract called for. Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business cannot be added to his damages, for those are speculative and uncertain, the business advantages which constitute the characteristics of the land and give it value are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and therefore fall within the scope of the contract.' In *Sedgwick on Damages*, vol. 2, para. 630, it is said: 'Where a railroad company breaks an agreement to build a station at any given place, the measure of damages is the enhanced value of the land, had the depot been erected.' The rule announced in these two admirable works on Damages is in conflict with that stated in *L. & N. R. R. Co. v. Neafus*, supra, yet we think it both just and reasonable.

"We are further of opinion that the only reversible error appearing in the record is that committed by the lower court in the instruction as to the measure of damages. And to the extent that they conflict with the views herein expressed, the cases of *L. & N. R. R. Co. v. Neafus*, supra, and *L. & N. R. R. Co. v. Taylor*, 96 Ky. 241, 28 S. W. 666, are hereby overruled."

5—*Harvey v. Hamilton*, 54 Ill. App. 507 (512), aff'd 155 Ill. 377, 140 N. E. 592.

The court said: "A recovery of interest in this State can not be sustained unless authorized by our statutes. *Illinois Central R. R. Co. v. Cobb*, 72 Ill. 148; *Cooper v. Johnson*, 27 Ill. App. 504. The statute relating to interest, does not authorize the recovery of interest on liquidated damages for a failure to turn out property. The demand here is neither for money due or to become due on any instrument in writing; for money lent or advanced or due on account stated, or had and received and retained, or withheld vexatiously."

**§ 3507. Account for Goods Sold—No Deduction for Storage, Etc.**

The court instructs the jury for the plaintiff that the defendants are not entitled in this suit to have anything deducted from the plaintiff's claim on account of storage or insurance or interest thereon, or for labor in taking care of the goods.<sup>6</sup>

**§ 3508. Damages for Sale of Goods—Special Purpose Must Have Been Brought Home to Other Party to Justify Special Damages.**

The court instructs you that if you believe from the evidence that the defendant and the plaintiff entered into a contract with each other in \_\_\_\_\_, whereby plaintiff agreed and promised to sell to defendant all the amount of clothing which he, the defendant might order at various times in said year, and to give defendant a credit on the same until the \_\_\_\_\_ of \_\_\_\_\_, \_\_\_\_\_; and shall further believe that in compliance with said contract plaintiff did sell and ship to the defendant the goods sued for in the petition, and that afterwards the defendant made another order on plaintiff in \_\_\_\_\_ for certain summer and fall clothing, amounting in the aggregate to the sum of \$\_\_\_\_\_; and shall further believe from the evidence that plaintiff refused and failed to ship to defendant any of the goods so ordered, if any; and shall further believe from the evidence that the defendant in anticipation of receiving said goods had made a contract with \_\_\_\_\_ persons, separately, to sell to each of them certain suits which he had ordered from the plaintiff, and shall further believe that said persons had agreed to take, and would have taken the goods they had contracted for, if you find they had made any contract, provided the defendant had the goods to furnish them; and shall further believe from the evidence that the net profits of the defendant, if any, would have amounted to the sum of \$\_\_\_\_\_ on each suit, then you will find for the defendant as damages the net profit, if any, he would have realized on the sale of said \_\_\_\_\_ suits.<sup>7</sup>

6—*Strauss v. Nat'l Parlor Furniture Co.*, 76 Miss. 343, 24 So. 703 (704, 706).

"The jury should be instructed to allow only such storage and other expenses as were reasonable in themselves as charges, and incurred within a period of time within which the jury believe defendants, under the circumstances, of the case, might reasonably have waited before selling. But they are not to allow the whole time for which defendants here charge. Plaintiffs are not to have the value of their goods eaten up by an unreasonable expense account. *Benj. Sales*, p. 176; *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 7 Am. St. 631. The insurance premium should not be allowed for three years, or for one. The insurance was annual. Such part of the premium as secured insurance for the reasonable time defendants might have waited before sale is all that is chargeable to plaintiffs. Manifestly, a year was too long to wait, under the attitude of the parties, as disclosed by the correspondence. This instruction given for the plaintiff, should not have been given."

7—*Voorheis et al. v. Fry*, — Tex. Civ. App. —, 52 S. W. 580.

The court said in comment that "we are of opinion that this charge did not submit the true measure of damages. It is well settled that the damages recoverable for breach of contract include no more than may be fairly presumed to have been contemplated by the parties at the time of making the contract; and where it is claimed as in this instance that the circumstances show that a special purpose was intended to be accomplished by one of the parties, the failure to accomplish which would and did entail greater loss than would ordinarily flow from the breach complained of, knowledge of such a special purpose must have been brought home to the other party at the time of making the contract, or such special damages cannot be recovered. 'This rule' as said by the Supreme Court of California in *Mitchell v. Clarke*, 71 Cal. 164, 11 Pac. 883, where the question is discussed 'has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time.' Numerous Texas cases are to the same effect."



**§ 3509. Action By Seller for Breach of Contract to Accept, Notice to Stop Manufacturing Having Been Given By Buyer.** (a) The jury are instructed that, if they find the issues for the plaintiff, they should allow the plaintiff as damages such sum or sums as will amount to the difference between the value of the undelivered glass called for by the said contract between the plaintiff and the defendant at the price fixed by said contract, and the value of such glass at the current prices at the time or times when such glass should have been accepted by the defendant according to the terms of said contract, provided said current prices were less at such time or times than the prices fixed by the contract. This is the rule to be applied, unless you, from the evidence, believe that it was in the power of the plaintiff by reasonable diligence to reduce or mitigate such damages, and the burden of showing it was in the power of the plaintiff by reasonable diligence to reduce its damage is upon the defendant.

(b) The jury are instructed that the rule of law is that when a purchaser of personal property which, by the terms of the purchase, is to be delivered at specific times and at a specific place, and at agreed prices, refuses to receive and pay for the property so purchased, or any part thereof, and if the current price has in the meantime declined, then in an action by the seller against the purchaser for refusing to comply with the contract, the proper measure of damages is the difference between the contract price or prices, and the current price or prices at the time and place for delivery as fixed by the contract of sale and purchase. This is the rule, except in cases where the evidence shows that the seller might by reasonable effort and diligence have reduced or mitigated his damages, and the burden of showing ability on the part of the seller to mitigate his damages is upon the seller.<sup>8</sup>

**§ 3510. Contract for Re-Sale—Breach.** The court instructs the jury that when it appears that the purchaser knew that the vendor had an existing contract for the purchase of merchandise, and the vendor is making a re-sale to him at an advanced price, the profits on such re-sale are the damages contemplated by the parties in case of the breach of the contract of purchase.<sup>9</sup>

<sup>8</sup>—James H. Rice Co. v. Penn. Plate Glass Co., 88 Ill. App. 407 (418).

"The first sentence of each of the above instructions is erroneous in stating an incorrect rule of damages. The position of appellee's counsel that appellee, after receiving the notice not to manufacture any more glass under the contract, was obliged to go on manufacturing is untenable, so far as appellant is concerned. . . . It would seem absurd to suppose that appellee would have ceased to do business if the contract with appellee had not been made, but even if such were the case, it would have no right to manufacture glass under the contract to appellant's detriment after receipt of notice not to do so."

<sup>9</sup>—This instruction was clearly erroneous the court held in Saveland v. Wisconsin Western R. Co., 118 Wis. 267, 95 N. W. 130 (132).

The court said that the "basis

of damages in the action is the breach of the executory contract of sale. It sufficiently appears by the evidence that brick—the article of sale covered in plaintiff's cause of action—is a commodity of purchase and sale in the open market. The case comes within the established rule of damages where a vendee breaches the contract by refusal to accept the article sold. The measure of damages in such cases is the difference between the market value of the property at the time of the breach and the contract price at the place of delivery. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513; Pratt v. Mfg. Co., 115 Wis. 648, 92 N. W. 368; Gehl v. Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26."

See also Roebling Sons Co. v. Lock Stitch Fence Co., 130 Ill. 660 (669), 22 N. E. 518, where the court erroneously instructed the jury on

**§ 3511. Time Lost in Making Inquiries About Lost Goods.** The court instructs you that in estimating plaintiff's damages, they should be governed by the fair rental value of the machinery that was shut down, and, in determining the fair rental value, they may take into consideration the season of the year, that the machinery was located in a cotton country, and all the facts and circumstances surrounding the parties, and may also take into consideration any time lost by plaintiff in going to the depot or office of the defendant and making inquiry about the machinery lost.<sup>10</sup>

**§ 3512. Irrigation Company—Failure to Supply Water—Damages.** If you believe from the evidence in this case that by the failure, if any, to supply water, the defendant irrigation company injured plaintiff's crop, then the proper rule by which you will determine plaintiff's damages, if any, is the difference between what the crop damaged made in 1904—and what it would have probably made in 1904—if it had been properly watered, and from that difference, if any, you may deduct the cost of horses, plows, feed, ginning the cotton, the difference between the water rent on 290 acres for 1904, and the amount paid the company for water rent for 1904, but in no event will you find for plaintiff, C., more than one-half the damages, if any may be found, on the 210 acres cultivated or more than one-fourth the damages found on the eighty acres cultivated.<sup>11</sup>

**§ 3513. The Measure of Damages on a Breach of Warranty for Failure to Furnish Repairs Is the Cost of Such Needed Repairs Only.**

(a) The jury are instructed that if they find from the evidence that plaintiff agreed when it sold said machine that it would furnish repairs for said machine free of charge for a period of two years from the date of the sale thereof, and if you further find from the evidence that plaintiff failed to furnish such repairs as were needed by defendants, you will find for defendants, provided you find from the evidence that plaintiff was advised by defendants of any needed repairs, and the same were requested by defendants.<sup>12</sup>

a resale and removed from their consideration all evidence on that point.

10—*American Express Co. v. Jennings*, 86 Miss. 329, 38 So. 374.

"The instruction is erroneous, in that it authorizes the jury, in determining the rental value of his machinery, to take into consideration any time lost by plaintiff in going to the depot or office of the defendant and making inquiry about the machinery lost. The time so lost could have no relation whatever to the rental value of the machinery, and is not properly an element of damage in this case."

11—*Cleghorn v. Barstow Irr. Co.*, — Tex. Civ. App. —, 93 S. W. 1020-3.

"The word 'may' in this charge should be substituted with 'will' to the end that the jury may not be misled as to their duty to deduct, in their computation of appellee's damages, the cost of horses, plows, feed, etc. This paragraph of the charge is otherwise objectionable in defining the measure of damages of appellee. The effect of it is to de-

duct from the difference between what the crop made and what it ought to have made if properly irrigated, the expenses to which appellee would have been put, and to allow to him as his damages one-half or one-fourth the remainder, according to the terms of his rental contracts. Whereas the expenses of horses, plows, feed, etc., which were properly chargeable to appellee's and in nowise to his tenants, should have been deducted from appellee's share of the crops after the division with his tenants. We have no means of determining that the jury was not misled by this charge."

12—*Esterly Harvesting-Mach. Co. v. Frolkey*, 34 Neb. 110, 51 N. W. 594 (695).

The court said this "instruction was clearly erroneous. It, in effect, told the jury that, if the needed repairs were not furnished by the plaintiff, the measure of the defendant's damages was the full amount of the notes. Such is not the law. The failure of the plaintiff to furnish the repairs would

(b) If the jury believe from the evidence that the defendant was damaged by the plaintiff's fraud or breach of warranty, as set up in its pleas, then the defendant is entitled to recoup the damages that the evidence shows it has sustained by reason of such fraud or breach of warranty, and if the damages so sustained exceed the claim of the plaintiff, the defendant is entitled to a judgment against the plaintiff for the excess.<sup>13</sup>

§ 3514. **Damages for Breach of Warranty of Title.** (a) The court instructs the jury that it is admitted and shown that the defendant contracted to the plaintiffs — acres of land for the sum of \$—— and that the title to the s. e. q. of the s. e. q. of sec. —, t. —, r. —, which was included in said contract was not at said time in defendant. You will find the issues for the plaintiff and assess their damages at what you find from the evidence to be the proportionate value of said — of said section — upon the basis of a value of \$—— for the whole tract, with interest on said sum at the rate of — per cent per annum from — —, —, to the present time.

(b) The court however further instructs that if you find from the evidence that the value of the whole tract sold was at the time of such sale less than the contract price to wit, \$—, then in such case you will find for the plaintiffs the proportionate value of said — of said section —, upon the basis of the value you find from the evidence to be the value of the whole tract at the time of the sale, which shall in no case exceed the actual value of said — section — at the time of the contract with interest thereon at — per cent from — to this date.<sup>14</sup>

not prevent the recovery upon the notes, for the measure of damages for the breach of the contract by the plaintiff in such case would be the cost of the repairs. In this case, however, no evidence was offered to prove their value. *Birdsall v. Carter*, 11 Neb. 146, 7 N. W. 751."

13—*Anniston Lime & Coal Co. v. Lewis*, 106 Ala. 535, 18 So. 326 (327).

Obviously this was erroneous in allowing a judgment in recoupment for breach of warranty in excess of the value of the property.

14—*Krepp et al v. St. Louis & S. F. R. Co.*, 99 Mo. 94, 72 S. W. 479 (480).

"In actions for breach of warranty of title, the measure of damages is the purchase price with interest. *Lambert v. Estes* 99 Mo. 604, 13 S. W. 284; *Hutchins v. Roundtree*, 77 Mo. 500; *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048. The same rule does not apply where the action is for a breach of contract to convey land, but the rule adjusts itself to the varying conditions of each case, to afford compensation to the wronged vendee. In *Kirkpartick v. Downing*, 58 Mo. 32, 17 Am. Rep. 678, *Wagner, J.*, reviewed the conflicting authorities as to the measure of damages

in such cases, and approved the following rules as sustained by the best considered cases. First, that when the vendor is able to comply with the contract but for any reason refuses to do so, the vendee should recover not only the deposit, or the purchase price paid and expense of investigating title, but damages for loss of his bargain, and that the measure of damages was the profits which it was shown he could have made on a resale; second, that where a party contracts to sell and he has no title, the vendee is entitled to recover his expense, and beyond this, damages for the loss of his bargain; third, when the vendee has not actually tendered performance or made an available tender, but in consequence of the acts of the vendor or otherwise, is still entitled to maintain a suit for breach of contract on the part of the vendor in not conveying, the measure of damages would be the difference between the contract price and the value of the land at the time of the breach; fourth, where there is no evidence given showing any change in the situation, the consideration paid and interest will be taken as the correct value of the land, but where there is evidence given, showing a change in the value of the land, the value at the



**§ 3515. Where Performance of a Building Contract for a Stipulated Price Is Prevented By the Owner It Is Error to Charge that the Measure of Damages Is the Full Contract Price.** If you believe from the evidence that the instrument declared upon by plaintiff [a note for the price of the work,] is the instrument executed by defendants herein, and delivered to W. R., and you further find that the plaintiff or the original contractor, W. R., were willing and ready to do the work upon said church, and so held themselves out, and are still ready to do said work, and that they were prevented from doing said work by the failure of parties in charge of the building of the church to furnish material to finish said work, then you will find for plaintiff for the amount due on said note, with interest at — from date, less the amount of payments thereon.<sup>15</sup>

**§ 3516. Building Contract—Cannot Recover Upon Quantum Meruit Under Special Contract.** If the jury believe from the evidence that the defendant willfully and wrongfully violated the contract between it and the plaintiff and prevented plaintiff from finish-

time the breach occurred, and when the conveyance ought to have been made, shall furnish the standard of damages. In *Hartzell v. Crumb*, 96 Mo. 629, 3 S. W. 59, following the *Kirkpatrick* case and the case of *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218, it was held that it makes no difference, in principle, whether the contract be for real or personal property. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld the owner ought to make good to him the difference. The court further held that the good or bad faith of the vendor should be excluded from consideration in estimating the damages; refusing to follow *Flureau v. Thornhill*, 2 W. Black. 1078, and other cases following the doctrine of that case. In *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014, the cases of *Hartzell* and *Kirkpatrick* were followed and approved. In *McGhee et al v. Bell et al.*, 70 Mo. 121, 70 S. W. 493, Missouri Supreme Court in banc, held, that where a grantor fraudulently represented to the vendee that the tract of land sold contained 80 acres, whereas it contained but 61 acres, the grantee might retain the land purchased and recover for the discrepancy, and that it was not error to estimate the measure of his recovery at the amount per acre for which the whole tract sold; that in the absence of proof to the contrary, the measure of recovery was such a portion of the entire price as the amount lost is to the entire tract. Whatever may be the rule elsewhere, we think the cases above cited from this state establish the same rule here for the measure of damages for the breach of contract to convey land where the vendor

had no title as is applied for the measure of damages for a breach of contract to convey personal property, and that the plaintiffs were entitled to the benefit of their bargain; that is, if the *Nesbit* 40 acres, which plaintiff bought at \$1.50 per acre and paid for, was actually worth \$175, then they were entitled to recover its actual value at the time it should have been conveyed, irrespective of the good or bad faith of the defendant in making the sale. Neither of the instructions given or refused announce the correct rule for the measure of plaintiff's damages."

15—*Duncan v. Johnson*, — Tex. Civ. App. —, 59 S. W. 46.

"Where a contract can be performed in a single act, the rule as stated in the court's charge is correct; but it is not the rule in mechanical work, or in hiring by the month or for a certain time. The rule is that the party who performs in part the contract, and is prevented from completing it by the default of the other party, is entitled to the contract price for the work done, and damages for the failure of the other party to comply. This has been frequently decided in this state. *Mead v. Rutledge*, 11 Tex. 44; *Hood v. Rains*, 19 Tex. 404; *Hearne v. Garrett*, 59 Tex. 619; The case of *Kocher v. Mayberry*, 15 Tex. Civ. App. 342, 39 S. W. 604, cited by appellee, is not in conflict with the rule established by the cases cited. That case decides that 'the rule of recovery in such cases (the erection of improvements) would be the contract price, less the cost of completion.' The rule is just. The completion of the work would assuredly not be without expense and labor, and this should be taken into the account in ascertaining the amount due on the partly performed contract."

ing his contract, and that plaintiff has suffered loss and damage by reason of said acts of the defendant, then the jury should find the issues for the plaintiff and assess his damages at such sum as they find from the evidence was the reasonable value of the work, labor and material furnished by the plaintiff to and for the building in question.<sup>16</sup>

§ 3517. **Omitting Element of Damage—Extra Work—Delay.** The court instructs the jury, as a matter of law, that if they believe, from the evidence in this case, that during the progress of the work in question, the parties to the contract offered in evidence in this case agreed to submit matters of dispute to arbitration, and waived that clause in the contract making the architect sole arbitrator and umpire, then the jury may disregard such portion of the contract, and the plaintiff is entitled to have and recover in this case for the balance of the contract price and the cost of the extra material and labor, and damages for delay, as the evidence in this case shows such balance on said contract, extra labor and material and delay was fairly and reasonably worth, less damages, if any, caused by plaintiff's delay, if, from the evidence, they believe he has caused any delay.<sup>17</sup>

§ 3518. **Contract for Services—Considering Results Accomplished.** Unless you find that the plaintiff and defendants arranged for a particular price for the plaintiff's services, the plaintiff became entitled to only such sum as his services were reasonably worth, and in determining this, you may consider the results accomplished, and the work required to accomplish it, not merely the time which he expended.<sup>18</sup>

§ 3519. **Employed at Two Different Places Doing Different Work.** You are instructed that if you should find that there was no contract between the plaintiff and the defendant fixing the amount of compensation that plaintiff should receive, and if you find that plaintiff was employed by defendant as manager of defendant's ice business, and that as such employe he entered upon the third year's business, then the law would presume an agreement on the part of defendant to pay the plaintiff what would be a reasonable and fair compensation as manager of the ice business, even though a part of the said year was employed upon defendant's farm.<sup>19</sup>

16—Chicago Training School v. Davies, 64 Ill. App. 503 (504).

The court said: "In this State when a party seeks to recover for work done or materials furnished under a special contract, the contract must govern as to the value of the work and materials supplied. The contractor can not, in such case, recover upon a quantum meruit or quantum valebat, disregarding the prices fixed by the contract, although he may, by the wrongful act of the other party to the contract, have been prevented from completing the same. City of Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; Clark v. Scanlan, 33 Ill. App. 48; see also Watrous v. Davies, 35 Ill. App. 542."

17—Gilmore v. Courtney, 158 Ill.

432 (440), 54 Ill. App. 417, 41 N. E. 1023.

This instruction was held erroneous for omitting an element of damage claimed for, to wit: The failure of defendant to fully complete his contract.

18—Wyman v. Whicher, 179 Mass. 276, 60 N. E. 612 (613).

The court said: "This sounds plausible, but really was an argument no doubt sufficiently urged to the jury, for a particular mode of estimating the sum to be recovered."

19—Leidigh v. Keever, 5 Neb. (Unof) 207, 97 N. W. 801 (803).

"What would be a reasonable compensation in managing the plaintiff's ice business could not be presumed to be a reasonable compen-

## CONVERSION.

§ 3520. **Wrongful Conversion—Measure of Damages.** And if you find that the defendants converted said wheat, or any portion of the same, to their own use, as alleged, the measure of damages will be the highest market value for the wheat so converted, at the place of conversion, at any time from the said conversion to the present date.<sup>20</sup>

§ 3521. **Measure of Damages for Goods Taken—Value at the Time of Conversion With Interest.** The jury are instructed that, if they find the issues in this case in favor of the plaintiff, they should not assess his damages to exceed the value of the goods in this case at the time mentioned in the declaration.<sup>21</sup>

## FRAUD—DECEIT—MISREPRESENTATION.

§ 3522. **Deceit—Measure of Damages.** (a) The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been if as represented. You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the extent that the plaintiffs have been injured by one of several misrepresentations, they are entitled to recover for that; that is if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs.<sup>22</sup>

sation for his work upon the farm. The question of the reasonableness of the compensation in both cases would be one of fact for the jury, and without doubt the court erred in giving this instruction."

20—*McCrea v. McGrew*, 9 Idaho 382, 75 Pac. 67 (68).

"There is some diversity of opinion as to the correctness of said instruction. In *Page v. Fowler et al.*, 39 Cal. 412, 2 Am. Rep. 462, it is held that the correct measure of damages in cases like that at bar, where exemplary damages are not allowed, is the highest market value of such property within a reasonable time after the property was taken, with interest thereon from the time such value was estimated. That is a very instructive case, and many of the authorities pro and con on the question involved are cited and commented upon therein. In *Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97, it was held that the true measure of damages in that case was the highest proven value of the property taken at any time between the date of conversion and the trial, or its value at the date of the conversion, with interest from that date. *Fish v. Nethercutt et al.*, 14 Wash. 582, 45 Pac. 44, 53 Am. St. 892. The counsel for appellants contend that the proper rule in such cases is the value of the property at the date of conversion, with

legal interest thereon from that date. Conceding that to be correct, and as appellants admit that said 1067 bushels of wheat were worth \$400, there is only a difference of less than \$24 between the \$400, with legal interest, and the amount of judgment entered. Under the peculiar facts in this case, we would not be justified in reversing the judgment for so small a discrepancy, even though we should determine the correct rule to be otherwise than as stated by the trial judge. We therefore express no opinion as to the rule for measure of damages in such cases."

21—*Janeway v. Burton*, 201 Ill. 78, aff'g 102 Ill. App. 403, 66 N. E. 237.

"This instruction was not correct, as the measure of damages in cases of this character is the value of the goods at the time of the conversion with legal interest. *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *McLean County Coal Co. v. Long*, 81 Ill. 359."

22—*Sigafus v. Porter*, 179 U. S. 116 (125), 21 S. Ct. 34.

"We adhere to the doctrine of *Smith v. Bolles*, 132 U. S. 125, 10 S. Ct. 39, upon the assumption that the property was not worth what the plaintiffs agreed to give for it, they were entitled to have—if the evidence sustained the allegation of false and fraudulent representations upon which they



(b) In addition to the value of the goods, the plaintiff would also be entitled to interest upon their value from that time, also damages for the detention, and such damages as the jury may reasonably think he deserves; and that is a matter entirely for the jury.<sup>23</sup>

§ 3523. **Misrepresentation—Measure of Damages.** The court instructs the jury that plaintiff if entitled to recover at all, is entitled to recover from defendant the difference if any, between the value of the land, as it was so stated and represented to be, and its actual value at that time.<sup>24</sup>

§ 3524. **Vindictive Damages Cannot Be Assessed Without Proof of Actual Damages—Rank and Influence of Defendants—Attorneys' Fees.** (a) The jury are instructed that vindictive damages are assessed to punish defendants in civil cases and where vindictive damages are allowed by law they should be commensurate with the offense and not with the ability of the defendants to pay, but that the jury may, if they find the defendants or any one or more of them guilty, in assessing such damages, take into consideration such defendants' rank and station in order to arrive at a conclusion as to the extent the injuries are increased thereby.<sup>25</sup>

were entitled to rely, and upon which they in fact relied—a verdict and judgment representing in damages the difference between the real value of the property at the date of its sale to plaintiffs and the price paid for it, with interest from that date, and in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering 'the expected fruits of an unrealized speculation'. If the plaintiffs were inveigled by the fraud of the defendant into purchasing this mining property, a judgment of the character just indicated would make them whole on account of the loss they sustained. More they are not entitled to have at the hands of the law in this action."

23—*Cole v. High*, 173 Penn. 590, 34 Atl. 292 (293, 294).

"We think the part of the charge complained of in this instruction gave the jury too much license in the matter of damages. We regard it as contrary to our rule in this class of cases. *Iron Works v. Barber*, 102 Pa. St. 156."

24—*Mountain v. Day*, 191 Minn. 249, 97 N. W. 883.

The court held this instruction to be "technically incorrect, the true measure of damages being the difference between the actual value of the land and the purchase price; but we are unable to see wherein appellant was prejudiced."

25—*Martin v. Leslie*, 93 Ill. App. 44 (53-4-5).

"This instruction is, in our opinion, erroneous, in that it tells the jury that when vindictive damages are allowed they should be commensurate with the offense. We think it was well calculated to mislead the jury into the belief that

they could assess vindictive damages without any proof of actual damages. The jury should have been left entirely free to determine the question under proper instructions as to whether or not vindictive damages were proper under the evidence. (3 Sedg. on Damages, sec. 1318; *Hawk v. Ridgway*, 33 Ill. 475; *Holmes v. Holmes*, 64 Ill. 294-7; *Wabash, St. L. & Pac. Ry. Co. v. Rector*, 104 Ill. 303; *Consolidated Coal Co. v. Haenni*, 146 Ill. 615, aff'd 48 Ill. App. 115, 35 N. E. 162. It should have been made plain also that no vindictive damages should be allowed without proof of actual damages. *Hackett v. Smelsmley*, 77 Ill. 112-21; *Meidel v. Anthis*, 71 Ill. 242; 1 Sedg. on Damages, secs. 360-361, and cases cited. We think also the instruction was erroneous in that it told the jury that in assessing damages if they found the defendants or some of them guilty, they should take into consideration such defendants' rank and influence. There is no evidence in the record that the defendants or either of them had any rank or influence, unless it be said that because three of the defendants were shown to be attorneys at law that this gives them rank and influence beyond that of any other citizen. \* \* \* It would certainly be the grossest injustice to assess punitive damages against a poor laboring man or any citizen without wealth or standing in the community for a malicious wrong upon the same basis as for the same wrong done by his co-defendant who was a millionaire. *Smith v. Wunderlich*, 70 Ill. 426-37; *Toledo, W. & W. Ry. Co. v. Smith*, 57 Ill. 518; *Lister v. McKee*, 79 Ill. App. 210-4; *Douglas v. Hoffman*, 72 Ill. App. 110."

(b) The jury are instructed that if, from the evidence, they find the defendant guilty of the acts charged in the plaintiff's declaration, they will assess the damages, and in so doing if, from the evidence, they find the defendants acted maliciously, they are not confined to the actual damages, if any are shown by the evidence, but may go beyond and award the plaintiff such a sum as, from all the facts and circumstances in evidence, the jury believe proper, not exceeding the amount claimed in plaintiff's declaration.<sup>26</sup>

### INJUNCTIONS.

#### § 3525. Measure of Damages for Wrongful Issuance of Injunction.

(a) It will be noticed that the issuance of the injunction, the execution of the bond, and the dissolution of the injunction are undisputed, and as a result it remains for the plaintiff only to show in the first instance that he has been damaged as a result of the granting and serving of the injunction upon him, and this fact he must establish by a preponderance or greater weight of the evidence. If he fails to meet this burden which the law lays upon him, your verdict must be for the defendant.

(b) In other words, plaintiff is not entitled to recover in this action unless it appears from the evidence that he was prevented by the injunction from the enjoyment of some right, the exercise of which was of some value to him, and the deprivation of which caused him loss. In this case plaintiff claims he was prevented by the injunction from interfering with certain telephone poles, and as a result could not mow his grass upon the roadside, and it is for you to say, from all the evidence bearing on the question, whether or not he was prevented from mowing his grass by the injunction and the erection of an anchor or post during the existence of the injunction, and what, if any, loss he sustained as a result thereof.

(c) If you find plaintiff was not so deprived of the enjoyment of some substantial right, your verdict must be for the defendant and you need proceed no further in the case.<sup>27</sup>

26—*Martin v. Leslie*, 93 Ill. App. 44.

"It is complained by the learned counsel for appellant that under the instructions of the court the jury might award punitive damages irrespective of any finding that actual damages were sustained. We are of opinion that the error in this behalf is well assigned. Unless the jury find that actual damages had been sustained, no award of punitive damages or smart money could be made."

In the same case the following instruction on allowing attorney's fees was criticised:

In estimating the damages the plaintiff has suffered, if any, you may consider \* \* \* any sums the plaintiff has paid or become liable to pay for attorneys' fees, in so far as any such \* \* \* liability for attorneys' fees, shall be the direct consequence of wrongful or unlawful acts of the defendants. \* \* \*"

The court said that "this instruc-

tion allows the jury to include in the damages they might assess attorneys' fees for which plaintiff was liable as a consequence of defendants' wrongful acts, whereas there is no evidence of any such liability. We think it calculated to mislead the jury in failing to make clear that they should not allow vindictive damages in the absence of actual proof."

27—*Weierhauser v. Cole et al.*, — Ia. —, 109 N. W. 301.

"These instructions are excepted to by the appellant because they are based upon the idea that to enable him to recover damages upon the bond the jury must find that he suffered some material or substantial pecuniary injury by reason of the issuance of the writ. After considerable reflection we are constrained to the opinion that this exception is well taken. It is true that we have held that the dissolution of an injunction against the exercise of a technical right which

# INSURANCE.

§ 3526. **Market Value of Goods Destroyed By Fire.** Certain invoices and proof of loss have been introduced in evidence. You are instructed that the same should not be taken by you as conclusive evidence of the fair market value at Ft. Dodge, Iowa, of the property described in said invoices and proof of loss, but the same is allowed in evidence before you only as a memoranda to assist you in determining such fair and reasonable market value of such property under the evidence in the case.<sup>28</sup>

the defendant had no desire or intention to exercise gives rise to no cause of action on the bond. *Bank of Monroe v. Gifford*, 70 Ia. 580, 31 N. W. 881. The case of *Hibbs v. Western Land Co.*, 81 Ia. 285, 46 N. W. 1119, also cited by the appellee herein, decides nothing in point. It appears in that case that the party had been enjoined from trespassing on certain land, and the injunction had been dissolved. It does not appear whether the person so enjoined was the owner of the land, nor upon what grounds the writ was sued out, nor was it shown what was in issue touching the land, nor whether he was deprived of a substantial right by virtue of the injunction. For these reasons expressly stated in the opinion, a demurrer to the petition claiming damages was sustained. In the present case an injunction, temporary and permanent, was the sole relief sought in the original action. It involved a substantial right of the plaintiff herein, i. e., the right to object to and prevent the burdening of the highway bordering his premises by the poles and wires of the telephone line until the right of way therefor had been condemned and the damages paid or secured. True, the damage may have been small, but the right to insist on having a clear and unencumbered highway was none the less complete, and plaintiff's title to protection of such right by the courts none the less perfect or imperative than it would have been had the damage been many times greater. The appellant, as the court found, was the owner of the land affected, and as such had the right to prevent the erection of the telephone line, or to remove it if already erected. This right was disputed and he was by the injunction prevented from exercising the same. He was not required to submit to this assumption of dominion over his property, and, to vindicate his right and relieve his property of the burden wrongfully imposed upon it, he properly appeared to the proceedings, and denied the authority of the plaintiffs therein to proceed further without condemnation of the right of way, and sought a dissolution of the injunction. Under the circumstances, where injunction is the sole relief sought, we have often

held that its dissolution, either by interlocutory order or upon the final hearing, entitles the party enjoined to recover his attorneys' fees in resisting the writ. We think, therefore, that the right of the plaintiff herein to recover does not depend upon the simple fact whether he sustained substantial injury by being prevented from mowing his grass along the roadside (as the instruction seems to suggest), but upon whether he was enjoined from the exercise of the lawful and substantial right to prevent the erection of the telephone line and to remove the materials from his premises. *Langworthy v. McKelvey*, 25 Ia. 49; *Thomas v. McDonald*, 77 Ia. 299, 42 N. W. 301; *Colby v. Meserve*, 85 Ia. 555, 52 N. W. 499; *Williams v. Ballinger*, 125 Ia. 410, 101 N. W. 139."

28—*Lundvick v. Westchester Fire Ins. Co.*, 128 Ia. 376, 104 N. W. 429.

The court in comment said that "the proof of loss was not competent to prove the facts connected with the loss or the value of the property destroyed or injured. *Neese v. The Farmers Ins. Co.*, 35 Ia. 604, 8 N. W. 450; *Lewis v. The Burlington Ins. Co.*, 80 Ia. 259, 45 N. W. 749; *Edgerly v. The Farmers Ins. Co.*, 48 Ia. 644; yet the instruction clearly directed the jury that it might so consider it. The appellees contend, however, that, as the proof of loss was competent for other purposes of the trial, the appellant should have asked an instruction limiting its effect as evidence if it apprehended that the jury might consider it in finding the amount of the plaintiff's loss. This was held to be the rule in *Edgerly v. The Ins. Co.*, supra; but in that case the jury was not instructed to consider the proof of loss in determining the plaintiff's damage, as it was in the instant case. The paper being competent for certain purposes, the court was not bound to limit its effect, unless called upon to do so. But the rule does not go further, and warrant an instruction erroneous in itself, for a party has the right to presume, and to reply upon the presumption, that the instructions given will correctly state the law, and if they do not do so he may justly complain, although he made no request covering the subject."



§ 3527. **Maximum Amount Specified In Certificate.** If you find, from the evidence, and under the instructions of the court, that the plaintiff is entitled to recover, your verdict will be for the maximum amount specified in the certificate, less three assessments payable in June, July and August, —, and interest at five per cent from November 1, —.<sup>29</sup>

## INTOXICATING LIQUORS.

§ 3528. **Dram Shop Act—Damages.** The court instructs the jury that if they believe from the evidence that the plaintiff was injured in person or property or means of support by reason of the intoxication of H., as charged in plaintiff's declaration, and that such intoxication was caused in whole or in part by the defendant P., then they should find for the plaintiff and assess her damages at whatever amount may have been shown by the evidence, and if the jury find from the evidence that the plaintiff received actual damages by reason of such intoxication, then they may assess plaintiff's damages at any amount not exceeding ten thousand dollars.<sup>30</sup>

29—Conductors' Benefit Association v. Tucker, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286.

"Judgment was given for \$3,000. The constitution of the association fixed the maximum of recovery at \$2,500. We have held that the contract embodied in such a certificate of membership as is set out in the declaration in this case, taken in connection with the constitution and by-laws of the association and such oral evidence as is necessary to link together the written and unwritten matter, is an unwritten contract. Conductors' Benefit Association v. Loomis, 142 Ill. 560, 32 N. E. 424. We have held that interest is not liable on such a contract under the Illinois statute. West Chicago Alcohol Works v. Sheer, 104 Ill. 586. This suit is not brought upon any such instrument in writing as is contemplated by the act in regard to interest, and it cannot be claimed that here money has been withheld by an unreasonable and vexatious delay of payment. (Rev. Stat. chap. 74, sec. 2.)"

30—Piza v. Holey, 114 Ill. App. 7.

"The Dram-Shop Act makes the defendant liable 'for all damages sustained, and for exemplary damages;' but in Kadgin v. Miller, 13 Brad. 474, and in Holmes v. Nooe, 15 Brad. 164, the Appellate Court for the Third District held that the exemplary damages contemplated by the statute are only to be given when the act of selling intoxicating liquors is willful, wanton, or of such a reckless character as to deserve punishment. In Murphy v. Curran, 24 Ill. App. 475, it was held by the Appellate Court for the Second District that to warrant exemplary damages there must be something beyond the mere fact of

the sale of intoxicating liquors, and resulting damages. Kellerman v. Arnold, 71 Ill. 632, holds that the wife, to entitle herself to exemplary, beyond actual damages, must show 'some aggravating circumstances accompanying the transaction on the part of the person selling the liquor.' Albrecht v. Walker, 73 Ill. 69; Brantigan v. White, 73 Ill. 561; Bates v. Davis, 76 Ill. 222. While the Supreme Court in the matter of instructions on the subject of exemplary damages in this class of cases has not gone as far as Kadgin v. Miller and Holmes v. Nooe, supra (see Hackett v. Smelsley, 77 Ill. 109; Hanewacker v. Ferman, 152 Ill. 321; Kennedy v. Sullivan, 136 Ill. 94), still the foregoing instruction is not authorized by any decided case nor the language of the statute. It gives the jury full scope and freedom, if they find actual damages, to 'assess plaintiff's damages at any amount not exceeding \$10,000,' thus permitting an award of the exemplary damages without furnishing them with any rule or guide for so doing. In justification of the instruction, appellee relies upon Kennedy v. Sullivan, supra; but the instruction there approved was based upon and referred the jury to the evidence, which the one before us does not. There they were told to 'assess her damages at such sum as they think from the evidence she ought to recover.' Under the instruction at bar the jury, however slight the actual injury, might in substance and effect fine appellant any sum of money not exceeding \$10,000 without any reference to or consideration of the proof. This was error. Brink's Chicago City Express Co. v. Herron, 104 Ill. App. 269."

## LIVE STOCK—INJURIES TO.

§ 3529. **Injury to Live Stock—Duty to Sell to Avoid Loss.** (a) If you find for the plaintiff any damages, you will assess such damages for the cattle lost and dying, if any, at the market value, if any, of the same at X., at the time and in the condition said cattle should have arrived there, had they not been roughly handled and delayed, if they were roughly handled and delayed to which you will add the difference between the market value of the surviving cattle at X., at the time and in the condition they arrived there, and their market value at said place at the time and in the condition they should have arrived there, had they not been injured by the negligence of the defendants or any of them.<sup>31</sup>

(b) If you find that plaintiff's fat or beef cattle were in reasonably good and proper condition for market at the time of the overflow, then it was his duty to market said cattle, or such of them as were in condition to market, providing he could with reasonable expenditure of labor and money have marketed them, and the defendant in that case would not be liable for subsequent loss or depreciation in the value thereof.<sup>32</sup>

§ 3530. **Damages for Injury to Cattle—Including too Much Law In One Instruction.** Should you believe from the evidence that the remainder of said 113 head of cattle (the two head being provided for in an antecedent portion of the charge) were in course of shipment on defendant's and connecting lines of railway under the alleged contract, limited to the end of defendant's line at Purcell and no further, injured or depreciated in value by a delay, rough handling or any other such acts of neglect, as are charged by the plaintiff that said cattle were intended for and being shipped to market, for sale and were delivered at such market, then if you should so believe from the evidence you should find for plaintiff the difference, if any, in the weight and condition and from these their market value

31—Texas & P. Ry. Co. et al v. Felker, — Tex. Civ. App. —, 93 S. W. 477.

"This charge is clearly erroneous. It is upon the weight of the evidence and in effect assumes that rough handling constituted negligence. M. K. & T. Ry. Co. v. Garrett, — Tex. Civ. App. —, 87 S. W. 172, where a similar charge was condemned."

32—M'Cleneghan v. Omaha & R. V. R. Co., 25 Neb. 523, 41 N. W. 350 (352), 13 Am. St. 508.

"The giving of this instruction is assigned for error. It was, no doubt, suggested by the well-established rule that, where a loss is impending, it is the duty of the person upon whom the loss may fall to exercise care in order that the injury may not be unnecessarily increased, and, perhaps, upon the suggestion of contributory negligence on the part of plaintiff in not selling the cattle, and realizing as much out of them as the market would afford. We doubt this instruction being correct,

when applied to this kind of a case. Plaintiff had the right to select his own time in which to sell. Had he placed the cattle upon the market at that time in consequence of the overflow, we know of no rule by which he could recover whatever damage he might have sustained by selling upon a poor market, had the market become better. It was his duty to take such care of his stock as would make the loss as light as possible, perhaps, upon whomever it might fall. But it cannot be said that it was his duty to place his cattle upon a poor market, when, in his judgment, the market would be better in a short time. He had a right to exercise his own judgment and discretion in that matter; but he would have no right to allow his cattle to depreciate, starve, be drowned, or perish from any other cause, which he could have avoided. This, we think, is the full extent of the rule. In our opinion, the instruction should not have been given."

of said cattle, at the place and at the time they were delivered in their injured condition, if they were injured, and their weight and condition, and from these their market value, at said point of delivery or destination when they were delivered, had they been carried, shipped and delivered in such reasonable good condition, weight and market value as, by proper care upon the part of the defendant and its servants in the carriage and shipment of said cattle, they should have been delivered, had defendant, acting by its servants or agents in charge of said shipment, exercised such care in their shipment and delivery as a prudent person would have exercised in the shipment and care of his own property.<sup>33</sup>

### MALICIOUS PROSECUTION—FALSE IMPRISONMENT.

**§ 3531. What to Consider in Assessing Damages—Malicious Prosecution.** The jury are further instructed that if they find the defendant guilty of malicious prosecution, as charged in the plaintiff's declaration, they will, in assessing the plaintiff's damages, allow him such amount as they think from the evidence will compensate him for his loss of time, his expenses in defending against the malicious prosecution, and any other damages he may have actually suffered, if any, and in addition thereto, they may also allow such further sum as damages, as they may think is right, from the proof, as smart money, or exemplary damages, not exceeding altogether the sum of \$—; and in estimating the damages, the jury may take into consideration the standing of the parties in the community, the physical and mental anguish that he suffered on account of such arrest, imprisonment and prosecution, if any, and the financial condition of the defendant herein, and fix the plaintiff's damages at such sum as will not only compensate the plaintiff for all his loss and suffering, but will be a sufficient punishment to the defendant for his malicious act.<sup>34</sup>

**§ 3532. Measure of Damages in False Imprisonment.** The court instructs the jury that the measure of damages for the legal injury in this cause is compensation to the plaintiff for all time lost, if any, and money, if any, expended in the necessary defense of said arrest, and that the jury may, in addition to such legal damages, in case they believe from the evidence that the defendant acted wantonly or maliciously, add such further sum as exemplary or punitive damages, as the jury believe from all the evidence is just and reasonable, keeping in mind the nature of the wrong, and all the circumstances as shown by the evidence.<sup>35</sup>

33—Gulf C. & S. F. Ry. Co. v. Millar, 24 Tex. Civ. App. 430, 59 S. W. 550.

"The court's charge on the measure of damages is confused by attempting to include in it, in one paragraph, so much of the law of the case. It was not as clear and definite as it should have been."

34—Wilmerton v. Sample, 39 Ill. App. 60 (64, 65).

The court said that "this instruction allows appellee to recover for all his expenses connected with the transaction without reference as to whether or not they were necessary

in his defense or otherwise. This was too broad. It should have been limited to his necessary and reasonable expenses, incurred by reason of the alleged wrongful acts. The last clause of the instruction seems to be a direct declaration by the court that the act of the defendant was malicious."

35—Smith v. Hall, 37 Ill. App. 28 (30).

"It authorizes an assessment of damages if defendant acted wantonly or maliciously and ignores the requirement of want of probable cause. It is therefore bad. More-



## INJURIES TO PROPERTY.

§ 3533. **Damage to Personal Property in Putting Tenant Out of Possession.** The court instructs the jury that where a person is in peaceable possession of the premises either rightfully or wrongfully, he can only be dispossessed or put out of possession by a due process of law, and not by force, and if you believe, from the evidence, that the plaintiff was in peaceable possession of the premises described in the declaration, and that the defendant forcibly kicked, pushed or broke open the outside door of said premises or caused or procured the same to be done, then the jury should find the defendant guilty, and find for the plaintiff in such sum for damages as you may believe, from the evidence, he has sustained.<sup>36</sup>

§ 3534. **Measure of Damages to Personal Property Where the Same Can Be Repaired**—The court instructs the jury that the measure of damages in this case is the difference between the fair cash market value of the buggy before it was injured or impaired as shown by a preponderance of the evidence, and the fair cash market value of the buggy after it was so injured or impaired; and if you believe from a preponderance of the evidence in this case that the defendant did injure or impair the buggy of the plaintiff, as complained by him, then it is your duty to find for the plaintiff, and to assess his damages at such an amount as you believe from a preponderance of the evidence, is the difference between the fair cash market value of the buggy before it was so injured or impaired, and the fair cash market value of the buggy after it was so injured or impaired.<sup>37</sup>

§ 3535. **Destruction by Fire—Negligence Assumed.** Now, if you should believe from the evidence that the plaintiff's cord wood was destroyed by the fire which was caused by the carelessness or negligence of the employes of said defendant, you will ascertain what was the reasonable market value of the cord wood at the time it was destroyed, and say so by your verdict.<sup>38</sup>

§ 3536. **Difference in Market Value Before and After the Fire.** If you find for the plaintiff, you will allow him such amount of money

over, such an instruction with relation to exemplary damages has no proper office to perform in an action, where, in order to recover at all, malice must be found as a necessary ingredient."

36—Scherrer v. Baltzer, 84 Ill. App. 126 (128).

"This instruction authorized the jury to find for appellee against appellant for such sum for damages as they believed from the evidence he had sustained. It leaves entirely out of the question appellee's own want of care of his property after it was put out of the building, makes appellant responsible for the act of putting it out, with which he had no kind of connection."

37—Berry v. Campbell, 118 Ill. App. 646.

"The correct measure of damages for an injury to personal property

where the same can be repaired is the cost of making the repair and the value of the use while the owner is necessarily deprived of it while it is undergoing repair. Travis v. Pierson, 43 Ill. App. 579; Fitzsimons v. Braun, 199 Ill. 390, 65 N. E. 249.

38—St. Louis Southwestern Ry. Co. of Texas v. Gentry, — Tex. Civ. App. —, 74 S. W. 607.

"This charge is subject to the criticism that it assumes the fire which destroyed the wood of appellee was caused by the negligence of the railway company. It was for the jury to determine whether the fire was caused by the negligence of the railway company, and the court ought not, in its charge, to have used language in any way tending to withdraw the issue from the jury."

as will reasonably compensate him for the injury he has sustained. The difference between the market value of the real estate just before and just after the fire would be the measure of damages to the real estate (if any). If the real estate has no market value, then the reasonable cash value of the property destroyed at the time it was destroyed would be the measure of damages. The reasonable cash value of personal property at the time it was destroyed would be the measure of damages for the personal property.<sup>39</sup>

§ 3537. **Injuries to Business—Damages, Rule of—Elements Involved.** (a) The jury are instructed that in determining the amount of damages you should allow, if any, you are called upon to exercise your judgment upon the evidence in the case, and to exercise

39—Tyler, S. E. Ry. Co. v. Hitchins, 26 Tex. Civ. App. 400, 63 S. W. 1069.

"If the realty had a market value, the true measure of damages would be the difference between its market value just before and just after the fire, and this rule was given to the jury in the charge of the court. *Pacific Exp. Co. v. Lasker Real Estate Assn.*, 81 Tex. 81, 16 S. W. 792. But, as has been shown, it was questionable, under the evidence, whether it had a market value at the time. A wrongdoer will not be permitted to escape all liability for the destruction of valuable property, merely because its value cannot be fixed with mathematical certainty. The court should therefore have instructed the jury as to the measure of damages to the realty on the basis of its intrinsic or reasonable cash value as affected by the consequences of the fire. By a reference to the portion of the charge above set out, it will be seen that this was not done. Under the charge as it stands, the jury were compelled to treat the improvements (which were in fact a part of the realty and specifically alleged so to be) as personalty and they could not have done otherwise than assess the damage on that theory. We do not mean to be understood as holding that this cannot be done under appropriate pleading, notwithstanding the improvements are technically a part of the realty. *Houston & T. C. R. Co. v. Smith*, —Tex. Civ. App.—, 46 S. W. 1046.

"In the case before us, the appellee alleged that the houses, fences, trees, shrubbery, etc., were attached to, and were a part of, the realty; that they were destroyed by fire, and that the lot, premises and property were thereby damaged in the sum of \$2,000. The value of the house, the outhouses, the fences, shrubbery, etc., is nowhere specifically alleged. Its destruction is alleged, and consequent damage in a gross sum is averred to have resulted to the realty. The personal property alleged to have been lost by the fire is set out item by item, the value of each item being averred. It will not

do to say that appellant should have interposed an exception as to the allegations with reference to the realty, if it desired the value of each item of improvements more specifically set out; for, treating the petition as a suit for damages to the realty, it is subject neither to general nor specific exception. The purpose of pleading is to apprise the opposite party of the nature and character of plaintiff's demands, so that it may be known what evidence should be produced to meet and combat it. *Texas & Pac. Ry. Co. v. Bayliss*, 62 Tex. 572.

"One cannot be permitted to sue for damages to the realty alleged in a gross sum, and be permitted to recover under a measure of damages involving an inquiry as to the value of each item of improvement destroyed, without reference to its effect on the value of the real estate considered as a whole. The converse of this proposition was distinctly decided in *Railroad Co. v. Smith*, supra. In that case the plaintiff sued for the value of certain buildings, fences, fruit trees, and shrubbery belonging to plaintiff. The value of the improvements was alleged, and judgment was prayed therefor. It was said in the opinion delivered by Justice Williams: 'The action is clearly one for the recovery of the value of the property destroyed, and not for recovery of damages done to the freehold.' A charge that the measure of damages was the difference between the value of the realty just before and just after the fire was therefore held error. The correct rule to be applied to cases such as this is announced in *Pacific Exp. Co. v. Lasker Real Estate Assn.*, supra, and we do not see that the propriety of its application is affected by the fact that because there is no market value its intrinsic or reasonable value must be shown. The measure of damages will be the difference between its value just before and just after the fire, whether that value be made to appear by showing its price in the market, or, in the absence of a market, its reasonable value."

your common sense and common observation and experience in the affairs of life, and from all the evidence in the case to draw a reasonable and safe conclusion, and that, in considering the evidence upon the loss to plaintiff by reason of the deterioration of the value of his property and business, the loss to his financial standing and credit as a merchant, and the amount of probable profits which would have accrued to him but for the acts of the defendants, if you find such acts to have been wrongful, the measure of damages to the plaintiff must be left to your sound discretion and good judgment, uninfluenced by bias or prejudice and uncontrolled by mere conjecture, and that the time during which it is permissible to consider the probable loss of future profits by reason of the injury to the plaintiff's business and financial standing and credit must be determined in this case according to your best judgment under all of the circumstances in evidence, and upon your own common knowledge and sense of justice, and that the rule which should govern the assessment of damages, as to the length of time during which the plaintiff has and will in the future suffer injury from said acts of the defendants, is such length of time as you can feel that, acting under your oaths and the obligations you have assumed and from the evidence, you can say would be reasonably safe and prudent.

(b) The jury are instructed that the inability, if there be any, to compute with accuracy the amount of damages, if there be any, to the plaintiff, by reason of the injury to his business credit and financial standing, or deterioration in value of his property, is no reason why all of these facts should not be considered by the jury as the best evidence obtainable upon which to base their verdict, and that, if you find that the injury to the plaintiff was accomplished through malice, or said acts of defendants amounted to oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give other and further damages for the sake of example or by way of punishing the defendants, as the jury shall deem just and proper, and that in such case the jury are instructed that the defendants guilty of such oppression, fraud or malice must bear the risk, if there be any, in reaching an exact result in the computation of actual damages, or in the reasonable assessment of exemplary damages, because in such case it is not plaintiff's fault that the inquiry as to damages has become necessary.<sup>40</sup>

40—*Tootle v. Kent*, 12 Okl. 674, 73 Pac. 310 (316).

The court said that "these two instructions, in our opinion, are erroneous and misleading. They misstate the rule as to the true measure of damages. The latter portion of instruction No. 2, which reads as follows, is especially objectionable: 'and that the rule which should govern the assessment of damages, as to the length of time during which the plaintiff has and will in the future suffer injury from said acts of the defendants, is such length of time as you can feel that, acting under your oaths and the obligations you have assumed, and from the evidence you can say would be reasonably safe and prudent.' In this

case there are four elements of damages that may be considered by the jury. The elements of actual damages are as follows: (1) Depreciation in value of the stock of goods; (2) loss of probable profits; (3) loss of financial standing and credit; and (4) if malice is shown, exemplary or punitive damages. The court should have instructed the jury that the measure of damages for the deterioration in the value of the property was the difference between the reasonable market value of the stock of goods at the time it was taken under the chattel mortgage by —, and the market value of the same goods at the time they were taken possession of by the receiver. The court should have charged on



## SHERIFFS.

§ 3538. **Action Against Sheriff for Taking Insufficient Replevin Bond—Damages—Should Sue in Case Instead of Trespass.** If the jury believe from the evidence that ———, sheriff, acting through ———, his deputy, at the direction or in company with the other defendants, under a writ of replevin running against a person or persons other than the plaintiff in this suit, entered on land then in possession of plaintiff or its agent, and took the personal property of plaintiff situated on such land, and converted such property to their own use, then their verdict should be for the plaintiff for the fair cash market value of such personal property with interest at five per cent from that date.<sup>41</sup>

## SLANDER AND LIBEL.

§ 3539. **Exemplary Damages.** Exemplary damages are such as not only compensate the wrong done, but also tend to protect all good citizens of the state from like wrongs from the reckless and malicious tongue of such lawless persons as have no regard for the good name of their fellows, or for the fair name and virtue of the women of the land, but turn themselves loose, like ravenous wolves, to destroy that which money cannot buy, and that which, when lost, the powers of earth cannot restore.<sup>42</sup>

the question of the probable profits, that the measure of damages was the loss of probable profits from the time that ——— took charge of the goods under the chattel mortgage until they passed into the hands of the receiver. And the jury should have been further instructed that the plaintiff could not recover for deterioration in the value of the goods or for probable profits while the stock of goods was in the hands of the receiver. The jury should have been further instructed that the plaintiff could not recover for damages to financial standing and credit, for any remote, speculative or conjectural damages; that the only damages that could be recovered in that respect were for the direct and proximate result of the wrongful acts and conduct of the defendants or their authorized agents."

41—*Gilbert v. Buffalo Bill's Wild West Co.*, 70 Ill. App. 326 (330-1).

"The appellee relies upon the alleged fact that the sheriff took an insufficient replevin bond and is therefore liable in trespass, and the court so instructed the jury. That there is a dictum in *Morris v. Van Voast*, 19 Wend. 283 (N. Y.); *Milliken v. Selye*, 6 Hill 623 (N. Y.); and *Whitney v. Jenkinson*, 3 Wis. 363 (side page 407), to that effect is not to be denied; but there is no hint that such an action was ever thought of in the country from which we derive our common law. There the

action has always been in case against the sheriff for taking insufficient sureties.

"Here it may be case, or upon the official bond of the sheriff; Sec. 12, Ch. 119, R. S.; and the latter remedy was pursued in *People v. Core*, 85 Ill. 248."

42—*Hayes v. Todd*, 34 Fla. 233, 15 So. 752 (755).

In commenting on this, the Supreme Court said that "the language of the instruction complained of was somewhat intemperate, and that it seems to indicate feeling on the part of the judge, and is not suited to a grave judicial charge. However, when we take into consideration that there could not have been any verdict and judgment in the case otherwise than in favor of the plaintiff, whatever might have been the charge of the court, and that the evidence was ample to sustain the verdict, and the defendant offered not a syllable of evidence to maintain his plea of not guilty or to mitigate the damages, that there is no allegation or showing that the verdict is excessive in amount, however much we may disapprove of such language, we cannot reverse the judgment on that account."

The court in *Winer v. Allbaugh*, 78 Ia. 79, 42 N. W. 587, 16 Am. St. 422, criticised an instruction defining compensatory and punitive damages as not specific enough.

"Damages in cases of this sort," the court said, "are of two classes,—

§ 3540. **What Plaintiff Ought to Receive, Not What Defendant Ought to Pay.** The jury are further instructed that if they find the defendant guilty they should award the plaintiff in this suit such an amount, by way of damages, as the jury find from the evidence will be an adequate compensation to him for the injury inflicted upon his reputation, and that they may award the plaintiff such further damages, by way of punishment to the defendant and as an example to others, as in their sound judgment, under all the evidence of the case, they believe the defendant ought to pay.<sup>43</sup>

### TRESPASS.

§ 3541. **Value of Crops in the Condition They Were in at the Time of Injury.** The plaintiffs in this case are entitled to recover only such damages to their crops sued for as they were worth at the time they were destroyed or injured, and at the place where injured or destroyed. In other words if they were injured or destroyed at or before the time of harvest in the different years respectively, then in arriving at the damages you must take the market value of such products and crops not later than the prices prevailing at the time of such harvest or during the market season.<sup>44</sup>

§ 3542. **Difference in Market Value.** If you find from the evidence that plaintiff is entitled to recover, then, and in that event, the measure of plaintiff's damages is the amount of the difference between the market value of the lands in question at the time defendant's mules began to go on the lands, and their market value when the mules stopped going on them, if they depreciated in value during said term.<sup>45</sup>

compensatory and punitive. The former are such as are awarded to compensate the injured party for the injury caused by the wrong, and must be only such as make just and fair compensation, and are due when the wrong is established, whether it was committed maliciously—that is, with an evil intention—or not. Punitive damages are such as may be awarded only when the wrong is shown to be malicious, and are to be assessed by the jury in their sound discretion, without bias or feeling, according to the malignity shown, and in such reasonable sum as will tend to prevent future evils of a like kind and degree.”

43—*Geringer v. Novak*, 117 Ill. App. 161 (166).

The court said that “this instruction, while it may not be reversibly erroneous, is technically defective. After the word ‘guilty’ in the second line, there should have been inserted the phrase, ‘from the evidence and under the instructions of the court.’ The instruction tells the jury to award such damages as ‘they believe the defendant ought to pay.’ The jury are to inquire, not what appellant can pay, but what appellee ought to receive. *Holmes v. Holmes*, 64 Ill. 293, 299; *Smith v. Wunderlich*, 70 Ill. 426, 437.”

44—*Gulf, C. & S. F. Ry. Co. v. Carter*, 5 Tex. Civ. App. 675, 24 S. W. 1083.

The court said that “the true

measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction, and not the market value at the time of maturity or during the market season. ‘For destroying or carrying away growing crops, the measure of compensation,’ says Judge Sutherland, ‘is their value in the condition in which they were at the time of the trespass.’ 3 *Suth. Damages*, § 1023; *Colorado C. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 30 Pac. 62; *Lomeland v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 412, 29 N. W. 119.”

45—*Abercrombie v. Windham*, 127 Ala. 179, 28 So. 387.

“There was no proof of any permanent injury done to the land or freehold by the trespass; the evidence by the plaintiff being only to the extent that the defendants turned their mules in upon plaintiff's land, which at the time was an uncultivated enclosure, with a growth of grass and herbage upon it. Under this state of the evidence the difference in the market value of the land in May before the trespass and in July after the trespass is an improper measurement of damages. The market value of the land between the dates mentioned could have been affected by various causes, and for that reason could not be a fair and safe measure of damages, where merely an act of trespass is shown without more.”

## CHAPTER CXXIX.

### DAMAGES, MEASURE OF—EMINENT DOMAIN.

See Approved Instructions, Chapter XLII, Vol. I.

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| <p>§ 3543. Damages to be assessed as to the day of filing petition.</p> <p>§ 3544. Taking property of railroad company for public use—Must make just compensation.</p> <p>§ 3545. Best use to which the property was reasonably susceptible—Damages should be based on evidence.</p> <p>§ 3546. Public safety—Increased cost of doing business.</p> <p>§ 3547. Rule as to compensation and benefits conferred.</p> <p>§ 3548. Difference in market value of land as affected by the running of cars—Noise made by passing trains.</p> <p>§ 3549. Inconvenience of access—Increased danger from fires.</p> <p>§ 3550. Creating irregular fields—Damages are assessed once for all; present and prospective.</p> <p>§ 3551. Benefits to be considered in estimating damages—General benefits not to be considered.</p> <p>§ 3552. Market value enhanced by improvement.</p> <p>§ 3553. Damages—Allowance for benefits—Public utility—Expense of adjusting land after part is taken.</p> <p>§ 3554. Inspection of premises by jury—Value of as evidence.</p> | <p>§ 3555. Common benefits not to be considered.</p> <p>§ 3556. Improvements—Leasehold interest.</p> <p>§ 3557. Benefits of drainage—Singular out facts—Argumentative.</p> <p>§ 3558. Conjectural damages—Annoyances causing inconvenience or interruption—Argumentative instructions.</p> <p>§ 3559. Cutting farm into inconvenient pieces—Remote damages.</p> <p>§ 3560. Cutting timber—Fair market value.</p> <p>§ 3561. Construction of embankment by railroad—Borrowing earth; interfering with drainage.</p> <p>§ 3562. Damages to property not taken—Benefits in common with other owners—Special benefits.</p> <p>§ 3563. Damages—Where part is taken, what should be considered or excluded as to remainder.</p> <p>§ 3564. Measure of damages estimated from the evidence and observation—Damage to residue.</p> <p>§ 3565. Waiver of damages—Owner of property can bring separate action for damages—Statute accumulative.</p> <p>§ 3566. No presumption of damage—Burden of proof.</p> |
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**§ 3543. Damages to Be Assessed as of Day of Filing Petition.**  
 The court instructs the jury that if they find, from the evidence, that any of the farms in question, in consequence of their character and in view of their situation with reference to the villages of L. B. and N. C. and the cities of L. F. and C. possess a greater value for the purposes of a country home than they do for the purposes for which they have been heretofore used, then each of the owners of such farms are entitled to full and adequate compensation for their lands taken, respectively, estimated at the highest cash market price the same was worth on the — day of — last or as it might reasonably be expected to be worth in the near future.



And you are further instructed that in determining the fair cash market value of said farms so adapted to the purpose of country homes, if any, it will be proper for you to consider whether the quantity of land and number of farms so situated as to be available for country homes, if any, it will be proper for you to consider whether the quantity of land and number of farms so situated as to be available for country homes, and not already used for that purpose, is limited, and whether or not there is not an increasing demand for such farms.<sup>1</sup>

**§ 3544. Taking Property of Railroad Company for Public Use—Must Make Just Compensation.** (a) The jury are instructed that the issue in this case is as to the compensation, if any, which the petitioner should pay for the extension of Park avenue across that part of the right of way of the respondent railway company, described as follows: (here follows the description). And in determining this question as to the property first above described and called right of way, you must take into consideration the fact that the use by the public of said strip of land will be subject and subordinate to the use of said strip of land by the railroad company for its tracks and the running of its trains.<sup>2</sup>

(b) The jury are instructed that the city does not propose to condemn the fee of the land of the railroad company nor to prevent the use of the tracks and right of way for crossing purposes by it. The value of the land where the street will cross it is not the measure of compensation for property taken. The value of the use for railroad purposes is not the measure of such compensation. So far as the taking of the strip of land is concerned, the measure of compensation is the amount of decrease, if any, in the value of the use for railway purposes which will be caused by the use for the purposes of a street, such uses for the purpose of a street being subject to

1—Chicago & State Line Ry. Co. v. Mines, 221 Ill. 448 (457), 77 N. E. 898.

"The railway company filed its petition on May 9, 1905. The value of the land taken, and the value of the land damaged but not taken, must be considered as they existed upon that day. South Park Comr. v. Dunlevy, 91 Ill. 49; Calumet River Railway Co. v. Moore, 124 Ill. 329, 15 N. E. 764; Lieberman v. Chicago Rapid Transit Railroad Co., 141 Ill. 140, 30 N. E. 544; Dowie v. Chicago, W. & N. S. Ry. Co., 214 Ill. 49, 73 N. E. 354. The words in the instruction, 'or as it might reasonably be expected to be worth in the near future,' add an erroneous element. Their harmful effect may be realized best when they are considered in connection with the testimony of Delavan Smith, showing the rapid increase in the demand for lands for country homes and the remarkable advance in the values of lands desired for that purpose, and when considered in connection with the improper suggestions of counsel showing to the jury the high prices

realized for such lands in a fashionable locality."

2—C. & N. W. Ry. Co. v. Town of Cicero, 154 Ill. 656 (662), 39 N. E. 574.

"In this case, the jury should have been told by the court that they should ascertain the just compensation for the property taken by the proceeding. Instead of this they were told to fix the compensation, if any, for this property. The instruction was a direction to the jury that they might take the property of the railroad company for public use without making any compensation therefor. It left them perfectly free to do that. They, however, compromised the matter, and allowed the nominal compensation of \$1. The objection we have noted is apparently somewhat technical. It may be that of itself it should not be held good ground for reversing an otherwise unobjectionable judgment. It is based, however, on fundamental principles, and in respect to its practical effect it was well calculated to prejudice and belittle the rights of the property owner, and mislead the jury to its detriment.

the use of the railroad company for its tracks and right of way for crossing purposes.<sup>3</sup>

§ 3545. **Best Use to Which the Property Was Reasonably Susceptible—Damages Should Be Based on Evidence.** The jury are instructed that in estimating the fair cash market value of the plaintiff's property both before and after the construction of the viaduct, they should do so upon the basis of the highest and best use to which the property was reasonably susceptible as shown by the evidence in this case.<sup>4</sup>

§ 3546. **Public Safety—Increased Cost of Doing Business.** The railroad company is not entitled to recover as compensation the expense of constructing and maintaining the crossing and its approaches, or because the street may increase the cost of transacting the company's business at that point, or because the business of the company may be interrupted at and in consequence of the use of the street, or because the company may be obligated to adopt and observe measures for the preservation of the public safety, or because the company will be subject to any other police regulations or powers.<sup>5</sup>

§ 3547. **Rule as to Compensation and Benefits Conferred.** (a) You are instructed that the advantage that is to be considered and offset against disadvantage is that which belongs to the property affected by the injury, and which does not belong to any other property in the vicinity. \* \* \* You are to inquire whether or not the property of Mr. M. has special facilities or special advantages afforded it by the construction of the road, which no other property has in that community.

(b) If this property is increased in value above the value of all other property there, then you are not at liberty to consider that the railroad will be of no benefit. Provided that you find that it is

3—C. B. & Q. R. R. Co. v. Naperville, 166 Ill. 87 (94), 47 N. E. 734.

"An instruction of this character was condemned by this court in I. C. R. R. Co. v. Commissioners of Highways, 161 Ill. 247, 43 N. E. 1100. It is there said (p. 251): 'The use of a railroad right of way is exclusive, and is properly within the mandate and protection of this constitutional provision, and entry upon this right of way and use of it for another public purpose is the taking of property for which there must be just compensation. (Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co., 100 Ill. 21). The extension of the public highway by the public authorities across the right of way of a railroad company deprives it in part of its property rights in respect to the portions of the right of way within the lines of such highway, so as to entitle the railroad company to just compensation (I. C. R. R. Co. v. City of Chicago, 156 Ill. 98, 41 N. E. 45), and in C. & N. W. Ry. Co. v. Town of Cicero, 154 Ill. 656, 39 N. E. 574, we said (p. 662): 'It is the mandate both of the constitution and of the statute that appellant should be paid

just compensation for its property taken—not compensation, if any, for its property taken. Property is a right of way and interest which one has in lands and chattels to the exclusion of others.'"

4—Cram v. City of Chicago, 94 Ill. App. 199 (205).

"The instruction seems to leave to the jury to determine for themselves the values before and after the construction, regardless of the evidence of witnesses as to such values, and based solely on the evidence as to the uses of which the property was susceptible. \* \* \* We think the instruction erroneous."

5—C. B. & Q. R. R. v. Naperville, 166 Ill. 87 (92), 47 N. E. 734.

The instruction, so far as it relates to the obligation of the company to adopt and observe measures for the preservation of the public safety, or because the company may be subject to police regulations, may be regarded as correct, but that portion relating to the increase of the cost of transacting the company's business or in relation to the interruption of the same, was erroneous and calculated to mislead the jury.

an actual advantage over and above that which it is to any other property," etc.<sup>6</sup>

§ 3548. **Difference in Market Value of Land as Affected by the Running of Cars—Noise Made by Passing Trains.** (a) The jury are instructed that the measure of damages in this case is the excess (if the jury find from the evidence that there was such excess) in the market value of the land at the time that the defendant ceased entirely to run its cars upon that part of its line which extended to and through the plaintiff's land, with the cars running in accordance with the terms of the contract of the parties in evidence, and the expectation of their continuing to so run in the future, over the market value of the same land at the same time without any cars running on said part of said line and without any expectation that they would ever run thereon.<sup>7</sup>

(b) You are instructed that in this proceeding you cannot allow any damages on account of noise made by passing trains.<sup>8</sup>

§ 3549. **Inconvenience of Access—Increased Danger from Fires.** The jury are instructed that they may take into consideration the injury to the property, if any, naturally resulting from building the switch, in rendering the same inconvenient of access, if it was so rendered, or in any manner causing the same to be less suitable for use, together with the increased danger from fire emitted from the locomotives, and the decreased rental value of the property, together

6—Mahaffey v. Beach Creek R. Co., 163 Pa. 158, 29 Atl. 881 (882).

"This limitation of the rule," said the court, "finds no sanction in either principle or authority. It was the right of the defendant to have the jury consider the advantages to the plaintiff's property which were special to it, and they should not have been confined to the advantage which it received 'over and above that to any other property.' The plaintiff's property was not the only property taken, and presumably not the only property which received special advantages. Against the demand of each claimant, it was for the jury to consider the advantages special to his property; but, according to the instruction given, this could be done only as to the claimant whose property had been most increased in value and as to his property the allowance to the defendant would be limited to the increase over the general advance in values. The general instruction on this subject, both in the charge of the learned judge and in his answer to the points, was correct and full, and the case was carefully tried, but we cannot know that the language excepted to did no harm. It was an incorrect statement of the rule."

7—Eckington & Ry. Co. v. McDevitt, 191 U. S. 103 (106, 112), 24 S. Ct. 36.

"The instruction was addressed to differences in market value as affected by the running of the cars,

with the element added of expectation of continuance or cessation for all time. As thus put the supposed difference in market values amounted to anticipated profits, and these were not recoverable if dependent on uncertain and changing contingencies and not in contemplation of both parties as a probable consequence of breach. Howard v. Stillwell and Bierce Manufacturing Co., 139 U. S. 199, 11 S. Ct. 500; Globe Refining Co. v. Landa Cotton Co., 190 U. S. 540, 23 S. Ct. 754. Whether prevented gains or prospective profits are or are not too uncertain and contingent to be regarded as probable and contemplated consequences is always a question of difficulty, and as in such cases juries are permitted to exercise a wide discretion in the allowance of damages, great care is required in advising them as to the elements proper to be considered in making up their verdicts."

8—Chicago, P. & St. L. Ry. Co. v. Nix, 137 Ill. 141 (145), 27 N. E. 81.

"The noises made by passing trains is a necessary incident to the proper operation of a railway, and in so far as such noises will have a tendency to render such farm less desirable as a place of residence, and therefore less valuable in the market, it was an element of damage which the jury might properly take into consideration. It follows that the instruction was properly refused."



with all the facts proven which show a natural and necessary decrease in the value of the property.<sup>9</sup>

§ 3550. **Creating Irregular Fields—Damages Are Assessed Once for All—Present and Prospective.** In estimating the damages suffered by Peter Dunn, the owner of the real estate in controversy, you may take into consideration the manner in which the land is divided by the line of the traction company as affecting the size and shape of the fields, as affecting the access to the woods pasture, and as affecting the passage from one part of the farm to another, to which may be added any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises. The rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, not including such as may arise from negligence, or unskillfulness or from wrongful acts of those engaged

9—Pittsburg, C. C. & St. L. Ry. Co. v. Noftsgcr, 148 Ind. 101, 47 N. E. 332 (334).

"It was the duty of the jury to assess the damages upon the theory that the switch was constructed upon the public highway, and that appellee was not the owner in fee simple of any part of said highway. This charge invited the jury into the broadest field of inquiry, and to the consideration of all possible elements affecting the value of the property, and ignored entirely the settled rule that as appellee has only the right of abutting owner, and has no right growing out of the ownership of the fee in the highway, she cannot recover any damages for injuries common to the community in general, but she is confined to damages for such injuries as are substantially different in kind from those suffered by the community in general. In *I. B. & W. Ry. Co. v. Eberle*, 110 Ind. 547, 552, 11 N. E. 467, this court said: 'The community in general does not, of course, mean that persons who use the street and highway, and yet reside at such a distance from the railroad as to suffer none of the annoyances or inconveniences incident to its construction and operation. The interest in the street which is peculiar and personal to abutting lot owners, and which is distinct and different from that of the general public, is the right to have free access over it to his lot and building, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damages actually incurred. In this respect, and in this only, is the interest of the abutting property owner different in the street in front of and beyond the line of his lot from that of the pub-

lic. The location and operation of a railroad upon a public highway may occasion incidental embarrassment and inconvenience to an abutting lot owner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on the soil, his injury and damages, while different in degree, are the same in kind as are those of the community at large. For such merely incidental damages as result from the careful construction and prudent operation of a railroad on the land of another, even though it be in a public street, the adjacent proprietor cannot recover. These are damages common to all those whose lands are in close proximity to a railroad which happens to be located on the land of another, as to suffer incidental injury therefrom. For such injuries or inconveniences, in the absence of a statute giving him redress therefor, the property owner is not entitled to recover. *Gr. Rpsds. & Ind. R. Co. v. Heisel*, 38 Mich. 62; *Central Branch U. P. R. Co. v. Andrews*, 30 Kan. 590, 2 Pac. 677; *City of Chicago v. Union Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *Rigney v. City of Chicago*, 102 Ill. 64. The law as declared in *I. B. & W. R. Co. v. Eberle*, supra, was approved by this court in *Dantzer v. Railway Co.*, 141 Ind. 604, 39 N. E. 223, 50 Am. St. 503, 34 L. R. A. 769, and *Decker v. Railway Co.*, 133 Ind. 493, 33 N. E. 349.

"It was also error to include in said instruction 'the increased danger from fire emitted from the locomotives,' as an element of damages, for the reason that under the doctrine declared in the case last cited such damages were merely incidental, resulting from the construction and operation of said switch, and, while perhaps different in degree, were the same in kind as 'were common to all those whose lands were in such close proximity' to the switch which happened to be located 'on the land of another.'"

in the work, must be assessed. Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all the injuries resulting from the appropriation.<sup>10</sup>

§ 3551. **Benefits to Be Considered in Estimating Damages—General Benefits Not to Be Considered.** (a) The benefits which you have a right to enquire into or allow are such benefits only as the property directly received, or will receive, from the construction and use of the road, over and above any general benefits or enhancement of value to property generally in that vicinity due to the projecting, commencing, or prospective completion of the railway enterprise. But if you find that by reason of the property fronting on the railroad, and the nature and condition of that district, and portion of the city, and the needs of business, or demands for property there for business enterprises, the plaintiff's property became valuable, or will become valuable and in demand for business uses and purposes, and thereby acquire an additional value, this is such a special benefit as you have a right to or should consider in determining the question of damages.<sup>11</sup>

(b) You are instructed that in determining the amount of damages resulting to plaintiff, if any, by reason of the excavations aforesaid, you shall take into consideration the benefits accruing to plaintiff's property, if any, by reason of the grading aforesaid.<sup>12</sup>

§ 3552. **Market Value Enhanced by Improvement.** (a) The court holds, as matter of law, that the true measure of benefits conferred by the proposed improvement upon any lot or parcel of land objected for herein by the ——— Co., which is restricted by law to use for street railway uses and purposes only, cannot exceed the increase in the value of said lot or parcel of land for the special uses to which it is so by law restricted.

(b) The court holds, as matter of law, that the true measure of

10—Indianapolis N. T. Co. v. Dunn, 37 Ind. App. 248, 76 N. E. 270.

"Objection is made to that part of the instruction 'any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises.' While we do not approve this instruction, yet, in view of the instructions given at appellant's request, we do not think there was reversible error in giving it. At appellant's request the jury were told that in assessing the damages they could not take into consideration remote or fanciful injuries which rest wholly in conjecture, and do not admit of an estimate in damages; and certain particular things were specified which the jury were told they could not consider in estimating the damages."

11—Omaha Belt Ry. Co. v. McDermott, 25 Neb. 714, 41 N. W. 648-9.

"In disposing of this instruction, it must be sufficient to say that it has embodied within it a proposition which the jury had no right to consider, and that is, as to the future probabilities or possibilities of the

property becoming 'valuable and in demand for business uses or purposes, and thereby acquire an additional value.' It seems to have been the contention of plaintiff in error, substantially, that the location of the property with reference to the railroad track was such that it would at some time subsequent to the construction of the road and subsequent to the time of the trial become valuable for warehouse or wholesale locations. There was no such certainty attached to these future prospects at the time of the construction of the road as would remove the question of values from the domain of mere conjecture, and therefore it was not proper to be considered by the jury; the correct rule being, as we have said, the difference in values immediately before the construction of the road and immediately thereafter." Judgment affirmed, there being no prejudicial error.

12—City of South Omaha v. Ruthjen, — Neb. —, 99 N. W. 240.

"Under it the jury would have been warranted in taking into consideration general benefits which cannot be done."

benefits flowing from the proposed improvements to each lot of the property objected for herein by the ——— Co., and used as location for said company's power plant, cannot exceed the increase in value of such lot for use as a location for said power plant.

(c) The court holds, as a proposition of law, that as to any lot or parcel of land objected for herein by the ——— Co. which the evidence shows is so owned or held by said company, that it is restricted by law to use for street railway uses and purposes only, and which the evidence shows has been for many years last past used solely and necessarily as a location of a power plant to furnish power for said company's street railway, is now so used, and, as far as can now be foreseen, will continue to be so used indefinitely in the future, the true measure of benefits from the improvement herein proposed cannot exceed the increase in the value of said lot or parcel of land for such use as the location of such power houses.<sup>13</sup>

§3553. **Damages—Allowance for Benefits—Public Utility—Expense of Adjusting Land After Part Is Taken.** In considering the question of damages, you are instructed that the taking of private property for use as a public road without making compensation therefor is not permitted by law, yet such compensation need not be made in money. The benefits accruing to the land owner remonstrating, if there are such benefits, from the establishment of the proposed highway, proven by the evidence, should be considered in connection with all the other evidence in the case; and upon all the facts and circumstances in evidence, you will determine what amount, if any, the remonstrator, ———, has been damaged by reason of the facts alleged in her remonstrance. After making proper allowance for benefits, if any, accruing to her from the establishment of the highway, and upon all the facts and circumstances proven under the law, she would be allowed such damages as may have been so proven, that she will suffer by reason of the establishment of the proposed highway, if you find that such proposed highway would be, if established, of public utility. In estimating such damages, it is only proper to consider the purposes for which the land is being used at the time of the location of the highway, and not what use the owner may make of the same at some future period. The element of damages may be not only the value of the land actually to be taken for the highway, but may be the additional expense, if any, the land owner may be put to in adjusting his land to the purposes for which it is to be used. If the location of the highway would require the land owner to remove existing fences, or to build and maintain new fences, the cost of the removal of old fences and the building and maintaining of new ones, may be considered in estimating the damages of the land owner who remonstrates; but the value of the material in old fence moved from the

13—U. T. Co. v. City of Chicago, 204 Ill. 363 (366-7-8), 68 N. E. 519.

We have frequently declared it to be a general rule, the inquiry as to benefits is to what extent the market value of the premises will be enhanced by the improvement. The court therefore properly declined to

hold that the measure of the benefits conferred upon the lots in question could not exceed the increase in the value of the lots for the special uses to be made thereof by the appellant company under the terms of the lease by which it held the property.



line of the highway to the side, so as to form a fence at the side of the highway, cannot be allowed as damages.<sup>14</sup>

**§ 3554. Inspection of Premises by Jury—Value of as Evidence.**

(a) The court instructs the jury that the jury has been allowed to go upon the premises in question for the purpose of examining the location, situation and general conditions of the premises, and the situation, location, and physical conditions of other property in the neighborhood referred to in the testimony. In arriving at the verdict, and the amount of damages, you should give plaintiff in this case your view of the premises in evidence in the case, but such view is only admitted for the purpose of throwing light upon the value of the premises in question on the 1st day of August, —, and you should not take into consideration your view for any other purpose except as to the general location, situation, quality and condition of the premises in question, and the situation, quality and condition of other premises testified about, and the bearing of such things upon the market value of the premises in question, August 1st, —.<sup>15</sup>

(b) The jury are instructed that, in arriving at your conclusions from the evidence, including your view of the plaintiff's premises and surroundings, and the law as given you in these instructions, you are not required to surrender your individual opinions arrived

14—*Angell v. Hornbeck et al.*, 31 Ind. App. 59, 67 N. E. 237 (238).

"That part of the instruction between the words 'The benefits accruing to the land owner remonstrating,' and the words 'after making proper allowance for benefits,' inclusive, we think radically wrong, and calculated to prejudice appellant's case with the jury. By this instruction the jury were told to consider all the evidence in determining the benefits that would accrue to appellant by the opening of the proposed highway. The jury ought to have been instructed upon the issue of damages and benefits to consider only such evidence as was properly admitted upon that issue. Evidence which was introduced to show that the proposed road would be of public utility could not properly be considered by the jury in placing an estimate upon appellant's individual benefits. There was evidence admitted over the objection of appellant upon the question of utility, which, in its nature, would have a tendency to prejudice the minds of the jury against her. It was the duty of the court, as was well said in *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98, to so instruct the jury that 'when there are facts given in evidence which ought not to be considered in estimating damages, the instructions of the court should inform the jury what facts should be considered by them in making the estimate, and not leave it to them to take into account facts which have no legitimate bearing on

this branch of the case,' and it is further said in the case cited that, 'The authorities are agreed that when facts are given in evidence upon two issues as in this case, the instructions of the court when instructing on any one issue should confine the jury to the matter as presented in said issue on which the instruction was given.' See also *Elliot on Roads & Streets* (2nd ed.), para. 246; *Vanblaricum v. State*, 7 Blackf. 208; *Burk v. Simonson*, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304. We think the trial court committed reversible error in so instructing the jury."

15—*Dady v. Condit*, 188 Ill. 234, rev. 87 Ill. App. 250, 38 N. E. 900.

Comment by the appellate court: "We think the instruction under discussion simply meant, and could only be understood by the jury as meaning, that in estimating the damages based upon the evidence and their view of the premises, they had a right to take into consideration their location, situation and surroundings as seen by them when viewing the land. If so understood, and we think the jury could not have understood it otherwise, the instruction was not erroneous."

Comment by the supreme court: "This instruction has reference to the view of the premises, and is calculated to lead the jury to understand that their view of other lands testified about might be taken into consideration as throwing light upon the value of the premises in question, and, so understood, should not have been given."

at from the deliberations of the jury upon such evidence and instructions in order to secure an agreement, etc.<sup>16</sup>

§ 3555. **Common Benefits Not to Be Considered.** (a) Before you can allow defendant anything for damages to the property not taken for the proposed new road, you must believe from the evidence and your view of the premises that the market value of his land not taken will be depreciated by reason of the proposed improvement.

(b) You are instructed that, if you believe, from the evidence; and your view of the premises in question, the lands of defendant not actually taken for the proposed new road would be specially benefited to the extent or greater than they would be damaged by the opening of the new road and the vacating or closing of the old road, then the jury should only find a verdict for the compensation for the strip of land actually required to be taken for the opening of the new road at its fair cash market value.

(c) Before you can allow defendant any damages to his land not taken for the proposed new road, you must believe, from the evidence, that the making of the proposed new road will cause him a real damage. It must be of such a character as to depreciate the market value of the property; you cannot allow him for any imaginary or speculative damages.<sup>17</sup>

§ 3556. **Improvements—Leasehold Interest.** (a) The respondent B. makes claim for compensation for the value of his improvements

16—Cram v. City of Chicago, 94 Ill. App. 199 (203).

"This instruction informed the jury in substance that their view of the premises was evidence which, together with other evidence, they were to consider in arriving at conclusions. In view of the decisions in Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901, and Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306, it could not be regarded as law that the view of premises by the jury, in a case at common law, is evidence. In the Rich case, supra, the Supreme Court say: 'It was within the power of the court to permit the jury to view the premises as in cases at common law, if the court, in the exercise of a sound discretion, considered such view necessary or proper to enable the jury better to understand and apply the evidence. But such view, or the facts ascertained by the jury upon such view, could not of itself or themselves be considered as evidence in arriving at the verdict. Vane v. City of Evanston, supra; Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40. The rule is not the same in cases of this character as in condemnation cases where the statute provides for such view. In the Vane case, we said that 'The only purpose in permitting the jury to inspect the locus in quo is to better enable them to understand the matter in controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the case. \* \* \* They

were not authorized to consider any fact bearing upon the merits of the controversy derived from such view.'"

17—Brokaw v. C. of H., 99 Ill. App. 415 (416).

"These instructions ignore the latter part of section 46 of the road and bridge act, which provides: 'That in estimating the damages, except damages to property actually taken for a road, the jury may consider the benefits conferred; but no benefits enjoyed in common with the owners of surrounding property shall be considered in estimating damages.' From the situation of appellant's land, the lands of others and the different roads in question, as shown by the evidence, all land owners in that vicinity may be benefited by the change. Under these instructions, the jury were authorized to consider such common benefits. Court and counsel were evidently led into the error contained in these instructions by having in mind the rule so frequently announced by our Supreme Court that, in proceedings under the eminent domain act, damages to property not taken may be compensated by benefits, and that the true measure is the difference in the value of the land before and after the proposed improvement. The eminent domain act contains no such provision as that quoted above, and the difference in the two acts in that regard is recognized by our Supreme Court in Metropolitan W. S. El. Ry. Co. v. Stickney et al., 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773.

taken and for the value of his leasehold interest in the land taken. He is entitled to the fair cash value of the improvements at the time the petition was filed, and the value of his leasehold interest, if any, for the land taken—that is, the value in cash, if any, which his contract with the railroad company has, so far as it affects the land on which his buildings stand.<sup>18</sup>

(b) The court instructs the jury that there can be but one recovery for the same thing or property. Therefore, if the jury believe, from the evidence, that the leasehold interest of B., in the land on which his coal buildings stand, and which will be taken for a street, has any value, and the same is awarded here, then it is conceded in this case that such amount so awarded must be carved out of and deducted from the amount, if anything, fixed as the total value of the land.<sup>19</sup>

§ 3557. Benefits of Drainage—Singling Out Facts—Argumentative.

(a) The court instructs the jury that, in determining the question of benefits to be conferred, if any, by the right of way in section 19 in question, by the proposed ditches, you have a right to take into consideration the object and purpose for which the right of way is used and required to be used under the law; also whether or not the right of way is sufficient to properly carry on the business of the defendant regardless of the drain proposed to be constructed by the district; also whether or not the right of way is in need of any drainage, and whether or not the grade of the defendant upon which the track is situated will be benefited by additional drainage, and from these and all of the other facts and circumstances in evidence say whether or not the track and right of way will be benefited by the proposed drainage.<sup>20</sup>

(b) The court instructs the jury that it is the duty of a railway

18—Boecker v. City of Naperville, 166 Ill. 151, 48 N. E. 1061.

"In C. & N. W. Ry. Co. v. Town of Cicero, 154 Ill. 656, 39 N. E. 574, an instruction which directed the jury 'that the issue in this case is as to the compensation, if any, which the petitioner should pay was held to be erroneous.'"

19—Boecker v. City of Naperville, supra.

"This instruction was held to be objectionable as intimating that the leasehold interest might be taken without the payment of anything for it, which objection, however, was waived by reason of the fact that the defendant had consented to its being given."

20—Drainage Com. v. I. C. R. R. Co., 158 Ill. 353 (355), 41 N. E. 1073.

"This instruction was calculated to mislead the jury, and make a wrong impression upon their minds. An instruction should not draw the attention of the jury to particular facts (Chapman v. Cowrey, 50 Ill. 512), nor is it proper to inject an argument into an instruction (C. B. & Q. R. R. Co. v. Griffin, 68 Ill. 499). An instruction should not single out for special note particular portions of the evidence, nor should it be argumentative (Holmes v. Hale,

71 Ill. 552). It is objectionable for both of these reasons, that is to say as singling out and giving prominence to special facts, and as being argumentative. A bare reading of this instruction will show that it is obnoxious to the charge of singling out certain phases of the testimony, and ignoring other evidence of equal importance. (Logg v. People, 92 Ill. 598.) It tends to divert the attention of the jury from the consideration of the question whether or not the right of way will be benefited by the drawing off of standing water therefrom, or by the widening or deepening of the creek across the same. This instruction assumes that there is evidence of the matters therein enumerated, without leaving it to the jury to believe, from the evidence, in regard to these matters. \* \* \* It begins by telling the jury that after determining whether the right of way will be benefited, it shall consider certain, specified matters, and closes by telling them they have a right to say from this and all of the other facts and circumstances in evidence whether or not the track and right of way will be benefited. We think the instruction was erroneous and misleading."



company to provide sufficient openings in its grade or embankments to provide for the passage of such waters as may be brought upon the right of way from the lands above, so that the lands lying above will not be injured by reason of such waters being unable to pass through the grade or embankment, and in this case you have a right to take this into consideration with the evidence in the case in determining how large an opening or bridge the defendants should maintain.<sup>21</sup>

(c) The court instructs the jury that it does not follow as a matter of law that because the drainage district propose to widen and deepen Prairie Creek across the right of way that the right of way will thereby be benefited. The question as to whether or not the right of way will be benefited is one of fact for you to determine under the evidence and the instructions of the court as to the law.<sup>22</sup>

§ 3558. **Conjectural Damages—Annoyances Causing Inconvenience or Interruption—Argumentative Instructions.** (a) The jury are instructed that, in estimating the just compensation to be paid to the defendants in this case on account of the use of the lands described in the petition as therein mentioned and described, and the damages, if any, to the residue of the farms in question, you should take into consideration the injuries and inconveniences which are appreciable and which you believe, from the evidence, are reasonable, probable and likely to result from the use of the land as sought in this case, although such injuries or inconveniences may be largely conjectural and not susceptible of definite ascertainment. Such damages are neither imaginary nor speculative, but are legitimate items of damage to be considered, and you, upon the consideration of all such damages as shown by the evidence, should determine what amount will be a just compensation to the owners of the premises in question.<sup>23</sup>

(b) You are instructed that it is your duty in this case to try the case fairly and impartially, and to return your verdict after a

21—*Drainage Com. v. I. C. R. R. Co.*, 158 Ill. 353 (355), 41 N. E. 1073.

"This instruction was calculated to mislead the jury, taken in connection with the other instructions."

22—*Drainage Com. v. I. C. R. R. Co.*, supra.

"This instruction, in connection with the others given, was calculated to mislead the jury, and make a wrong impression on their minds. Whether the widening and deepening of the creek across the right of way would benefit the right of way or not was a question of fact to be determined by the jury. It was immaterial whether a benefit to the right of way from such widening or deepening of the creek followed as a matter of law or not. To tell the jury that it did not follow as a matter of law was virtually to tell them that such deepening and widening of the creek would be of no benefit to the right of way. This was an invasion of the right of the jury to pass upon the question of fact. The rule laid down by this court in many decisions that an instruction

is erroneous which singles out for special comment a particular portion of the evidence and thereby gives it undue prominence, will be substantially abrogated if such instructions are held proper. All that it will be necessary to do will be to preface the statement of a particular fact or a particular portion of the evidence with the words 'It does not follow as matter of law.'"

23—*C. & P. R. R. Co. v. Hildebrand et al.*, 136 Ill. 467 (471), 67 N. E. 69.

"We think the words 'largely conjectural' render this instruction misleading, and that the instruction, therefore, ought not to have been given. We have frequently held that mere possible, speculative or remote damages do not form the proper basis for a recovery in such cases (*C. B. & N. R. Co. v. Bowman*, 122 Ill. 565, 13 N. E. 814; *Kierman v. Chi. S. F. & C. Ry. Co.*, 123 Ill. 188, 14 N. E. 18), and as between these and damages 'largely conjectural,' the common mind will fail to perceive any tangible distinction."

fair and candid consideration of all the evidence, without regard to any sympathy that you may have for the defendant land owner in this case; and even though the manner in which the railway in question may cut through the lands of W. may excite your sympathy, you must see to it that your sympathy does not in any way enter into or control your verdict in this case as against the evidence introduced upon the trial.<sup>24</sup>

(c) You are instructed that the law does not give damages for every inconvenience to or interruption of the rights of another. There are numerous annoyances which, in the nature and condition of society, must inevitably arise and occur to the property of individuals, which cannot in themselves fix a legal liability on the person causing such inconvenience or interruption. The injury for which the law gives damages must be real and not imaginary or whimsical. It must be material and not simply inconvenience or trifling interruption; and unless such injury has been inflicted in this case, the jury should find for the defendant.<sup>25</sup>

(d) You are instructed that witnesses who are engaged in farming in the neighborhood of the land in dispute, and who are farmers by occupation, is a question which you may consider, and whether they have a better opportunity, from their occupation, of estimating the injury and convenience occasioned to his farm by the construction of this road than men engaged in other occupations, is for you to consider.<sup>26</sup>

**§ 3559. Cutting Farm into Inconvenient Pieces—Remote Damages.**

(a) The court instructs you that in assessing the damages in this case you have a right to take into consideration not only the value of the land taken, but all facts and circumstances which tend to show damage to the land not taken, and in this case if it appears from the evidence or from your view of the premises that the farm is cut into inconvenient pieces for the purposes which it is now used or for any purposes for which it may be hereafter lawfully used, or that there is any danger from killing or injuring stock in the

24—*J. & St. L. Ry. Co. v. Wilhite*, 209 Ill. 84 (86), 70 N. E. 583.

"This instruction is open to the objection that it does not state propositions of law, but is in the nature of argument."

25—*Fairbank Co. v. Nicolai*, 167 Ill. 242 (248), rev'g 66 Ill. App. 637, 47 N. E. 360.

"It is true that the damages must be real and not imaginary or whimsical; that the annoyances ordinarily and necessarily incident to the ownership of property in populous cities do not afford a ground for action, and that such inconveniences as only affect people of delicate sensibilities and fastidious habits do not fix a legal liability; but it was not error to refuse an instruction in the argumentative form in which it was drawn."

26—*Simons v. Mason City & Ft. D. R. Co.*, 128 Iowa 139, 103 N. W. 129 (134).

"Unfortunately for this instruction, most, if not all, of plaintiff's

witnesses were farmers living near the land, and few, if any, of the defendants were of that occupation. That it is error for a court to thus single out a class of witnesses or of testimony, and give the jury an opportunity to magnify its or their importance, is fundamental. *Bever v. Sloangler*, 93 Ia. 576, 61 N. W. 1072; *Carroll v. Chi. St. P., M. & O. R. R. Co.* — Iowa —, 84 N. W. 1035. The instruction should not have been given. Thereunder a jury might very well have felt justified in giving more weight to the testimony of a farmer as to values, simply because of his occupation or residence, than to that of another witness not of that occupation, although the latter may have had more or better knowledge of the subject than the former. It is always dangerous to give such instructions, and that in this case it may have been exceedingly prejudicial to the defendant is not open to debate."

future, if the evidence or your view of the premises show such uses, or damages from fire by passing engines, or damage from inconvenience in crossing or re-crossing the right of way and tracks in going from one part of the farm to another, and the injury, if any, by reason of said farm being thrown open for a possible period of six months after the commencement of the operation of some part of said railway, and all other damages, if any, that may reasonably be expected to flow from and follow the construction and operation of said proposed railroad, as shown by the evidence, if any, or by your view of the premises.<sup>27</sup>

(b) You are instructed that it is competent in this case to take into consideration the value of the land taken in the construction and use of the railroad, as well as damages on account of the unfavorable division of the lands not taken by the construction and use of the railroad, thereby causing inconvenience and danger to the person and property of the defendant, if shown, in the use and occupancy of the balance of the land.<sup>28</sup>

**§ 3560. Cutting Timber—Fair Market Value.** (a) If you find for the plaintiff you are instructed that in arriving at the amount of damages sustained by plaintiff, if any, you may consider the question as to whether or not the row of trees in question was ornamental, furnished shade, or in any manner made the premises more valuable as farm land, and added to the value of the farm in its entirety. You are further instructed that the trees in question are a part of the realty, and their injury may decrease the value of the

27—*C. & A. Ry. Co. v. Staley*, 221 Ill. 405 (407, 409), 77 N. E. 437.

"This instruction is erroneous. It authorizes the jury, in assessing damages, to consider danger of stock being killed or injured in the future, damage from fire by passing engines, and all other damages that the jury may believe may reasonably be expected to ensue from the construction and operation of the railroad, and does not confine the consideration of such matters to their effect upon the market value of land not taken. While it is proper to instruct the jury that they may consider the increased risk of loss from fire, the increased danger to live stock, or other dangers that may arise from the construction and operation of the railroad, if, and in so far as, the market value of land not taken is thereby depreciated, it is not proper to advise the jury that they may anticipate losses of any character which may, but will not certainly, result from the operation of the railroad, and allow anything by their verdict for such anticipated losses. *Chicago Southern Railway Co. v. Nolin*, 221 Ill. 367, and cases there cited.

"It is said by appellee that an instruction similar to the one above set out was approved by this court in the case of *Chicago, Peoria and St. Louis Railway Co. v. Greiney*, 137 Ill. 628. The instruction in that case was materially different from the

one now before us. It told the jury that they might consider all facts which contribute to produce damage to land not taken, such as danger from killing or injuring stock, or damage from fire from passing engines, etc., mentioning those elements merely as examples of matters which might contribute to reduce the value of land not taken. The instruction in the case at bar, although it enumerates certain elements of damage which were mentioned in the instruction in the *Greiney* case, yet does not recite them as illustrations of matters that might contribute to depreciate the value of land not taken, and, as above pointed out, does not confine the jury to the consideration of such elements to the extent, only, that such elements may depreciate the value of land not taken."

28—*C. & M. E. R. R. Co. v. Mawman*, 206 Ill. 182 (183), 69 N. E. 66.

"Damages resulting from danger to the owner of the land from the construction and operation of the road are too remote, uncertain and speculative to be considered by the jury in fixing the amount of the owner's compensation for lands taken and for the depreciation in the value of lands which will be damaged but not actually taken by the construction and operation of the proposed roads. *McReynolds v. B. & O. R. Ry. Co.*, 106 Ill. 152; *Conness v. Ind. & I. R. R. Co.*, 193 Ill. 464, 62 N. E. 221."



farm, and the measure of damages is the difference between the fair market value of the plaintiff's farm of 220 acres, upon which said trees were, immediately before the cutting of said trees, and its fair market value immediately after said trees were cut, as the result of the injury to the trees as shown by the evidence.<sup>29</sup>

(b) The court instructs the jury that if you find for the plaintiffs for the number and value of any pine trees cut and removed by defendant from said land, you should assess the value of such trees, and allow interest thereon from the time the trees were cut and removed.<sup>30</sup>

(c) The court instructs the jury that if you find from the evidence that the defendant by mistake cut timber over the line, and that his men in good faith cut plaintiff's timber and took it away in the belief that it was the timber of the defendant, then you are instructed that the measure of damages in this case is the actual loss sustained by the plaintiff, and the value of the timber cut and taken off must be determined by its price in the vicinity, and not by the net value of the timber or logs at a distant market.<sup>31</sup>

**§ 3561. Construction of Embankment by Railroad—Borrowing Earth—Interfering with Drainage.** The court instructs you that the C. and P. R. Co. desire to have the right to use certain lands belonging to N. and H., for the purpose of borrowing earth therefrom to construct an embankment on their right of way, and in exercising this right to borrow earth, they will be at liberty to borrow therefrom all they desire that will be necessary to construct such embankment. It will not be required to so borrow such earth or drain the land borrowed from, as to prevent water from standing in the place from which the earth will be borrowed, so long as it does not interfere with any existing or natural means of drainage. It will not be required to pay taxes on the lands so used by the company. It will not be required to fence the same, and will not be required to keep the same clear from weeds or brush or any material that may grow thereon.<sup>32</sup>

29—Meyer v. Standard Telephone Co., 122 Ia. 514, 98 N. W. 300 (301).

"Manifestly the above instruction relating to the measure of damages is incorrect. It permits the allowance of damages for the reasonable as well as the unreasonable cutting of the trees."

30—Lowery v. Rowland, 104 Ala. 420, 16 So. 88 (91).

The court said: "This is not a proper instruction. Its vice is not in the instruction to allow interest, for that, under the rule of damages agreed, was not improper. (Burns v. Campbell, 71 Ala. 273); but it consists in giving to a part of the heirs the total damage done to the whole inheritance, whereas, it should have been graduated to the interest of the heirs suing."

31—Knisely v. Hire, 2 Ind. App. 86, 28 N. E. 195 (196).

"We do not think the measure of damages was necessarily confined to the naked value of the timber taken. If the value of the trees, when re-

duced to chattels upon the premises, furnished a greater value for the injury done, the jury had a right to adopt it. If, on the other hand, the depreciation of the land by reason of the taking of the timber was more than the bare value of the trees, we think the jury had a right to adopt this as the measure of damage. It was said in a New York case: 'It is not difficult to see that serious injury may result from the cutting of timber on a wood lot to the whole farm, for which it is used to supply fuel, fencing and timber, and no sound reason exists why damages should not be recovered by reason of such destruction.' Argotsinger v. Vines, 82 N. Y. 308."

32—C. & P. R. Co. v. Hildebrand et al., 136 Ill. 467 (469), 27 N. E. 69.

"It is not true that the appellant will not be required to pay taxes upon these tracts of land. The petition represents that it is necessary that appellant 'shall have and im-

§ 3562. **Damages to Property Not Taken—Benefits in Common with Other Owners—Special Benefits.** (a) The jury are instructed, that if they find, from the evidence, that any of the respondents' property which is not taken will be damaged by reason of taking a part of their property and by the construction, maintenance and operation of the railroad, then the jury have no right to offset against such damages any benefits which may arise from the construction and operation of such railroad, unless the jury find, from the evidence, that such benefits are special to respondents' property, and not shared by it in common with the generality of property in the vicinity of the line of said proposed railroad. Under the laws of this State no benefits or advantages which may accrue to the property not taken, in common with all other property along and near or in the vicinity of the line of the proposed railroad, by reason of the construction and operation of said railroad, can be lawfully set off or deducted from the damages, if any, to the property not taken.

(b) Even though the jury may believe, from the evidence, that some of the property of some of the respondents will be actually benefited by reason of the construction and operation of the petitioner's railroad, yet if the jury further believe, from the evidence, that such benefits are not special to the respondent's property, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be considered in determining whether or not the property of said respondents not taken will be damaged by reason of taking a part of their property, and operating, constructing and maintaining the petitioner's railroad.<sup>33</sup>

mediately possess for use in constructing such additional track and maintenance of said railroad' these tracts of land, and it concludes by praying that 'the compensation to be made to each respectively be ascertained and such proceedings be had therein as by the statute in such case made and provided are required.' The statute provides (Rev. Stat., chap. 47, sec. 10) that in such cases the court 'shall adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of same upon payment of full compensation; \* \* \* and such order with evidence of such payment shall constitute complete justification of the taking of such property.' The judgment here is that: 'The said petitioner, the Chicago and Pacific Railroad Company, do enter upon the following tract of land in said petition described and take therefrom material necessary for the construction of its railway.' This vested an easement in the tracts in the railroad company (Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co., 94 Ill. 83; 1 Redfield on Railways, p. 251, sec. 8, note 11; 6 Am. & Eng. Ency. of Law, p. 142; Huntington v. Asher, 96 N. Y. 601, 48 Am. Rep. 652); and the easement being in gross, it is so far of the

character of an estate or interest in the land that it is treated as such. (6 Am. & Eng. Ency. of Law, Huntington v. Asher, supra). The statute requires the appellant to pay tax on all real estate held for right of way (Rev. Stat. 1874, chap. 120, sec. 41), and on all other real estate belonging to it. (Sec. 46 of the same statute.) Nor is it true, as is to be implied from this instruction, that appellant by this easement acquires the right to create a nuisance thereon by leaving holes therein and grass and other combustible materials thereon, whereby the owner of the dominant estate may be injured in the enjoyment of his legal rights without any right of recovery therefor from appellant. The duty and liability of appellant in respect of such nuisances are precisely the same in respect of the lands not taken as those of any other owners of land adjacent to that of the owner of the dominant estate in these tracts. The instruction was therefore erroneous, and it was calculated to mislead the jury."

33—W. S. E. Ry. Co. v. Stieknev et al., 150 Ill. 362 (368, 369, 384), 37 N. E. 1698, 26 L. R. A. 773.

In discussing the above instructions, the court referred at great length to various authorities and decisions upon the subject of dam-

(c) You are at liberty to take into consideration the benefits, if any, arising from the construction of such bridges, in making your estimate of the damages or benefits upon any tract or tracts of land in said district.<sup>34</sup>

§ 3563. Damages—Where Part Is Taken, What Should Be Considered or Excluded as to Remainder. (a) The jury are instructed as to the leasehold interest of W. that, in estimating the damages, if any, they believe, from the evidence, will be suffered to her leasehold interest in that portion of the premises held by her under her lease and not taken by the petitioner, the jury should not take into consideration any general benefits which may be common to and shared in by the property generally in the vicinity of the proposed railroad by affording convenience of travel to and from heart of the city or otherwise, but in estimating the natural result of damages or benefit, if any, to the part of the property held by her under her lease not taken by the petitioner, the jury should take into consideration only such special benefit, if any, they believe is shown by the evidence as would result to the property of W. over and above such benefits, if any, they believe, from the evidence, have been shown as might occur to the other property in the vicinity generally.

(b) The court instructs the jury as to the leasehold interest of W., that if the jury should believe, from the evidence, that her leasehold interest in that portion of the premises not taken will be damaged by the construction and operation of the road along the east side of said premises, and the casting of smoke and cinders upon the property and danger of fire therefrom, and the escaping of steam, and noise of stopping and starting trains, and the noise of passing trains, and the jarring of the buildings by such trains, if any, and that the construction and operation of the road will confer upon the property any benefits, except such as are common to other property along the line of road and in the vicinity thereof, then and in that case the jury should so find, and they should assess the dam-

ages, and concluded by saying:

"Nor can it be said that the error in giving the instructions indicated, was cured by other instructions in the case. It is true, the jury, by the third instruction, were told that 'just compensation means the payment of such sums of money to the owners of property proposed to be taken or damaged as will make them whole, so that, on receipt by such owners of the compensation and damages awarded, they will not be poorer by reason of their property being so taken or damaged.' That this is an accurate statement of the law is not questioned. But it was immediately followed by the eleventh, twelfth, fourteenth, sixteenth, twenty-first, and other instructions, in which the jury were specifically told that in arriving at the compensation they must exclude from their minds, and had no right to take into consideration, or to offset against any damages which may be sustained, any benefits or advantages which may accrue to said property in common with other property

in the vicinity of the line of the proposed railroad, by reason of its construction and operation. The jury would understand from these instructions, that in determining the compensation to be paid for land not taken, all benefits to the particular property, where like benefits were conferred upon other property in the vicinity by the construction of the railroad, must be excluded from their consideration, although such benefits might materially enhance the value of appellees' lots, even to an extent that would show there was no depreciation therein by reason of the building of the railroad, and would award compensation upon that basis."

34—McCaleb v. Coon Run Drainage District, 190 Ill. 549 (556), 60 N. E. 898.

"This was held erroneous in advising the jury that they might take into consideration the benefits which would or might accrue to any tract or tracts of land in the district from the construction of such bridges."



ages at such sum as the jury may believe, from the evidence, will occur thereto independent of all such benefits which are common to other property, if any.<sup>35</sup>

(c) You are instructed that in estimating the damages to the land not taken, if any have been proven, as to defendant K., the jury has the right, and it is its duty, to take into consideration all the evidence offered and admitted, if any, on the question of the damages caused by the right of way remaining unfenced for six months after the railroad is opened for use; the amount on each side the right of way that cannot be cultivated, if any; the probable injury to the adjoining land by growth of weeds on the right of way, if any; cutting off or separation of part of the land from water supply, if any; the inconvenience of cultivating the land in two tracts instead of one, if any; the inconvenience and danger of teams being frightened, in cultivating the land, by passing steam engines and cars, if any; the danger of fire from the operation of train by steam power, if any; the shape of the tract of land with reference to ease and difficulty in cultivation and egress and ingress, if any.<sup>36</sup>

35—*M. W. S. El. R. R. Co. v. White*, 166 Ill. 375 (379), 46 N. E. 978.

"In *Met. W. S. El. R. R. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, a review of cases theretofore decided by this court was made, and it was said in that case (p. 382). 'By a practically unbroken line of decisions in this state it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect of the improvement on the value of the land. Under the rule, land is said to be damaged only where there is a diminution in value—a depreciation in its price or worth,—and the compensation required to be made is the amount of depreciation or diminution in value occasioned by the construction and operation of the railroad or other improvement. Special benefits are such benefits flowing from the proposed work as appreciably enhance the value of the land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause—that is also specially benefited by the improvement—furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not, and, if it has, the extent of the depreciation in value. (*Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203; *Bohm v. Met. El. Ry. Co.*, 129 N. Y. 576, 14 L. R. A. 344; *Rigney v. City of Chicago*, 102 Ill. 64.) On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land and such as are capable of measurement or computation, hence all imaginary and merely speculative damages or benefits are excluded from consideration. The consideration

of such benefits as tend specifically to enhance the value of the particular property is not the setting of benefits against the damage to the property, but is a simple ascertainment of whether the land has been in fact depreciated in its price or worth,—that is whether loss or damage has resulted to the owner,—for if his property is of the same value after as before the improvement, he has sustained no loss. If he has lost nothing,—if his property has not been depreciated in price or value,—it is not damaged within the meaning of the statute, and there can be no recovery. There can be no damage to property without pecuniary loss or injury which lessens its value.' We adhere to the rule as above stated. Damages cannot exist if there is no loss or injury which lessens the value of the property not taken. By these two instructions, if the property would sell for a greater sum because of the improvement, still that could not be taken into consideration in determining the question of damage or benefits, if other property would generally be likewise increased in value. \* \* \* This principle is disregarded in these two instructions, and in this there was error."

36—*C. & D. Ry. Co. v. Kelly*, 221 Ill. 498 (506), 77 N. E. 916.

"It is insisted that the probable injury to adjoining land by the growth of weeds on the right of way, the inconvenience and danger of teams being frightened by passing engines and cars and the danger of fire from the operation of trains by steam cars are not proper elements of damage to be considered in estimating the damages to lands not taken, and that therefore the giving of this instruction was prejudicial and reversible error. The measure of the damages to the land of the appellees not taken for the use of the

(d) The court instructs the jury, that if they believe, from the evidence in this case, that the fifteen feet of ground sought to be taken by the petitioning railroad, with the restrictions on the nine and one-half feet shown by the evidence the fee of which is in the railroad, is worth more in the market per front foot as part of the whole tract extending east from the present elevated railroad right of way to the alley east of the F. property on — street than said fifteen feet would be worth with the restriction of the nine and one-half feet aforesaid in a separate and distinct owner and not connected with the other F. ground, and if they further believe, from the evidence, that the fair cash market value of said fifteen feet of ground, sought to be taken, with the restrictions on the nine and one-half feet thereof aforesaid, as used in connection with the whole tract of ground as aforesaid, in all there is of value or damage to the whole tract, then they should allow such figure for the fifteen feet sought to be taken, as aforesaid, its fair cash market value as part of the whole tract, and no damages to the remainder in that event by reason of the narrowing of tract of ground.<sup>37</sup>

§ 3564. **Measure of Damages—Estimated from the Evidence and Observation—Damage to Residue.** The court instructs the jury that they alone are required to determine the amount of the compensation which shall be awarded to the respondents in this case for the actual value of the land taken, and for the injury and damage done

railroads, if it is depreciated in value by the construction and operation of the railroad, is the difference in the fair cash market value of the land before and after the construction of the railroad, and this the instruction ignores. (Chicago, B. and N. R. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Chicago and M. Elec. R. R. Co. v. Bowman, 206 Ill. 182, 69 N. E. 66. The instruction was calculated to mislead the jury to believe that the elements of damages therein mentioned were to be considered as independent of and additional to the depreciation in the value of the lands after the construction of the railroad.

37—Freiberg v. South Side El. R. Co., 221 Ill. 508 (516, 517, 518), 77 N. E. 920.

"This instruction is both inaccurate and misleading. By it a very simple proposition is made so confusing that the ordinary juror could not understand it without great difficulty. The only statement of the law covered by that instruction which appellee was entitled to have given to the jury is this: The owners are entitled to the fair cash value of the property taken, estimating its value in connection with adjoining realty owned by them, or estimating its value separately if its value is greater separately, and if the realty not taken is not depreciated in value by reason of the property owned by respondents being narrowed, then no damages should be allowed to property not taken on account of the narrowing of respondents' property. That proposition, however, is lost in

the waste of words contained in the instruction. In addition to the value of the part taken, appellants are entitled to obtain any depreciation in the fair cash market value of the real estate not taken which is occasioned by the taking of the fifteen-foot strip and the consequent narrowing of their property, or any other injury to the remainder of their property occasioned by the taking of the fifteen-foot strip and the construction of appellee's additional structure and the operation of additional trains, if any. For instance, upon the basis of Mr. R.'s testimony, as to the correctness of which we express no opinion, appellants would be entitled to recover for the taken \$9,000 per front foot, or \$13,500, less the deduction of one-third for the east nine and one-half feet, which would be \$2,850, and leave for property taken \$10,650, and in addition thirty per cent of \$900 per front foot for damages to the property not taken. The jury found no damages to property not taken, notwithstanding the fact that the taking of the fifteen-foot strip, and the consequent narrowing of the property owned by appellants, will leave a strip one foot and three inches in width between the railroad right of way and the old building which will be practically useless so long as the old building stands. There was no pretense that any special benefit would be conferred upon any of the property not taken. We are constrained to believe that the jury were misled by the instruction which is above set out."

to the residue of the farms or lands of each, by the use of that part which shall be taken from each for the location and operation of a railroad. The jury must estimate and ascertain from the evidence as well as from their own observation, judgment and experience, what are the usual and natural effects of a railroad upon the adjoining lands. And the damages and injury to each of the defendants is the sum of the actual value of the land taken from them respectively, and the injury which the location and use of the railroad through the several farms or tracts may cause the remainder, and the jury must report such full compensation to the respondents as will make them whole for the lands taken respectively, and for all such injury and damage to the remainder of their lands or farms respectively, as the jury may believe from the evidence, or from your own observation, judgment and experience, actually affect the value of said farms for use if retained by the defendants, or which affect the market value thereof if said defendants, or either of them, shall choose to sell said lands.<sup>38</sup>

**§ 3565. Waiver of Damages—Owner of Property Can Bring Separate Action for Damages—Statute Accumulative.** If the appellee appeared fully to the appropriation proceedings, and excepted to the award for two certain reasons, she thereby waived all other irregularity or objection that there might have been to, in or about said appropriation proceedings; that, having so appeared thereto and therein, she had made her election of remedies, and could not, after such appearance to such proceedings, withdraw therefrom, and resort to any other action; and that if she dismissed her said exceptions, she ratified the award, and the only remedy left to her would be by an application for an order against the appellant to pay the award, if it should not be otherwise paid or tendered.<sup>39</sup>

38—I. I. & M. Ry Co. v. Easterbrook, 211 Ill. 624 (626), 71 N. E. 1116.

"The objections to this instruction are two-fold: First, it assumes there was damage to the land not taken; second, by the last clause of the instruction the jury are told that damage to the land not taken may be estimated by the injury to the land for use if retained by the defendants; while the true measure is the diminution, if any, in the market value of the land not taken, by reason of the construction and operation of the road. We think both of these objections are well taken. Appellant was insisting vigorously that the lands not taken were not damaged at all, and this instruction assumes that they were damaged. That is a question the jury should have been permitted to determine for themselves without any intimation from the court that their verdict should include compensation for such damages.

"As to the second objection, the law is that if lands not taken will be depreciated in value by the construction and operation of a railroad, the measure of damages is the difference in their market value be-

fore and after the construction of the road. I. C. R. R. Co. v. Turner, 194 Ill. 575, 62 N. E. 798, and cases there cited.

"It does not meet the difficulty to say that the measure of damages was correctly given to the jury in other instructions. By this instruction they were authorized to apply an improper measure. They could not tell which instruction to follow. This is not an instance where an element lacking in one instruction is supplied by another, so that the two when read together state the law correctly."

39—Am. Furniture Co. v. Town of Batesville, 139 Ind 77, 38 N. E. 408; C. I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295, 59 N. E. 688 (690).

"Appellee was not bound to proceed under the statute for the assessment of damages. She might seek redress in an independent action for the injury sustained. The acquiescence of a land owner, while amounting to a waiver of his right to maintain ejectment is not a waiver of his right to damages, such as would have been recovered in a regular condemnation proceeding. Ind. B. & W. Ry. Co. v. Allen, 113 Ind. 308, 15 N. E. 451; Pittsburgh



§ 3566. **No Presumption of Damage—Burden of Proof.** You are instructed that the presumption of law is that there is no damage to the adjacent land by reason of the construction of a railroad on the right of way taken, and before you are justified in giving any such damages the party claiming the same must first establish and prove the same by a preponderance of the evidence.<sup>40</sup>

C. C. & St. L. Ry. Co. v. Harper, 11 Ind. App. 481, 37 N. E. 41; Chicago & I. Coal Ry. Co. v. Hall, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231. In the case last cited at p. 103, 135 Ind., p. 708, 34 N. E. and p. 238, 23 L. R. A., the court say: "Taking the language employed in section 3953, Rev. St. 1881 'It shall be lawful for the company owning such road or for the party owning such lands . . . to apply to the proper court for the right of assessment' etc., excludes the idea that the common law right of action for damages is abridged and supports the theory that the statute furnishes him this remedy in addition to the one with which he is vested under the common law.' At p. 114, 135 Ind., p. 708, 34 N. E. and p. 238, 23 L. R. A., the court further say: 'To be denied by statute a remedy pos-

sessed before its enactment, its terms should be express or so clearly repugnant to the exercise of it as to imply a negative.' Appellee had the right of action independent of the statute. The remedy given by the statute was cumulative."

40—Prather v. Chicago South. R. Co., 221 Ill. 180 (198, 199), 77 N. E. 430.

"The burden of proving that lands not taken have been damaged is on the landowner, and the statement in the instruction that 'the presumption of law is that there is no damage to the adjacent land' is not accurate. But this error is harmless in character. It is clear it did not affect the verdict of the jury, even if they considered that portion of the instruction, they necessarily came to the conclusion that the supposed presumption of law was overcome."

## CHAPTER CXXX.

### DAMAGES—MEASURE OF—PERSONAL INJURY.

See Approved Instructions, Chapter XLIII, Vol. I.

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| <p>§ 3567. What to consider in assessing damages — Omitting "under the instructions of the Court" if finding defendant guilty.</p> <p>§ 3568. Diminished capacity to labor—Method of computing.</p> <p>§ 3569. Ability of injured to earn money—Mitigation of damages.</p> <p>§ 3570. Damages should be confined to expense of cure, value of time lost, etc.</p> <p>§ 3571. Where future payments are to be anticipated in a verdict, their present worth is the measure of damage.</p> <p>§ 3572. Bodily and mental suffering —Terms explained.</p> <p>§ 3573. Should not conjecture as to future suffering.</p> <p>§ 3574. Grief resulting from a contemplation of a maimed or disfigured body, is not an element in the ascertainment of pecuniary damages.</p> <p>§ 3575. Future sufferings, which are reasonably certain, element of damages.</p> <p>§ 3576. Only damages for what is reasonably certain, not what may be likely to occur.</p> <p>§ 3577. Mental suffering without physical injury.</p> <p>§ 3578. Omitting mental suffering.</p> <p>§ 3579. Plaintiff's present physical condition—Loss of time endeavoring to be cured—Pain and suffering.</p> <p>§ 3580. Expectancy of life—Mortuary tables.</p> <p>§ 3581. Computing present worth of future earnings at 6% of sum to be awarded for injuries sustained, erroneous.</p> <p>§ 3582. Duty to employ proper medical assistance — Abstract and misleading.</p> <p>§ 3583. Contributory negligence in treating injuries sustained.</p> <p>§ 3584. Money expended attempting to be cured.</p> <p>§ 3585. When punitive damages should not be given.</p> | <p>§ 3586. When punitive damages should be given.</p> <p>§ 3587. Action by husband for injuries to wife—Society of wife.</p> <p>§ 3588. Action by husband and wife for personal injuries to wife —Action by wife.</p> <p>§ 3589. Pregnancy preventing proper medical treatment of injuries.</p> <p>§ 3590. Injury to minor—Elements of damage—Double damage—Earnings of minor.</p> <p>§ 3591. Injury to passenger—Future injury which is reasonably certain to accrue.</p> <p>§ 3592. Master and servant—Injury to employe, a child.</p> <p>§ 3593. Fault about half and half, one about as much at fault as the other.</p> <p>§ 3594. Contributory negligence — Compensatory damages.</p> <p>§ 3595. Ordinary care of plaintiff should not be limited to the time of the accident—Damages.</p> <p>§ 3596. An instruction on the measure of damages should not assume liability.</p> <p>§ 3597. Instructions open to construction of double damages.</p> <p>§ 3598. Instructions should not assume any damage on which there is no proof.</p> <p>§ 3599. Damages must be found from the evidence.</p> <p>§ 3600. Form of verdict—Damages must be based on evidence.</p> <p>§ 3601. Negligence — Comment of court as to absence of evidence.</p> <p>§ 3602. Measure of damages—Instructions should not be argumentative.</p> <p>§ 3603. Damages must be restricted to allegations in the declaration.</p> <p>§ 3604. Plaintiff having made out her case as laid in the declaration, held error, where jury took, against objection, the declaration to the jury room—Damages.</p> <p>§ 3605. Instructions for damages should not be too general.</p> |
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## CIVIL ASSAULT.

§ 3606. Reference to defendant's ability to pay.

§ 3607. Assessing damages without proof.

§ 3608. Assuming facts in issue.

**§ 3567. What to Consider in Assessing Damages—Omitting "Under the Instructions of the Court" if Finding Defendant Guilty.**

(a) The jury are instructed that if under the evidence in this case they find the defendant guilty as alleged in the declaration, then in estimating or assessing the plaintiff's damages, the jury should take into consideration the personal injury sustained by the plaintiff to her leg and body, if any is proven, in consequence of the injury in question; also the pain and suffering undergone by her in consequence of her injuries, if any are proved and any permanent injury sustained by the plaintiff, if the jury believe from the evidence that the plaintiff has sustained such permanent injury in consequence of the accident in question, and all damages present and future, which, from the evidence, can be treated as the necessary and direct result of the injury complained of, except such loss of time, if any, as occurred before the plaintiff became eighteen years of age.<sup>1</sup>

(b) If you find a verdict for the plaintiff, you will, in assessing his damages, consider all personal injuries, physical pain and mental anguish, anxiety of mind, and distress suffered by his wife which you may find from the evidence to have been the direct result of the negligence of the defendant (if you believe from the evidence that the defendant was negligent) in failing to stop a sufficient length of time at M. to enable the wife of plaintiff to get on the cars with her children, and the value of the tickets unused, and any extra expense occasioned by reason of having to stop over at M., and only assess as actual damages such amount as will, in your judgment, reasonably compensate plaintiff therefor. The amount, so found, if any, you will state in your verdict.<sup>2</sup>

1—Chicago & Alton R. R. Co. v. McDonnell, 91 Ill. App. 488 (492).

"Complaint is made that the words 'and under the instructions of the court' should have been added to the hypothesis 'if under the evidence in this case they find the defendant guilty as alleged in the declaration.' It has been held error to include in an instruction to the jury the hypothesis 'if the jury believe (any fact) from the evidence and the instructions of the court,' because the jury should find facts from the evidence and not from the instructions of the court. Kranz v. Thieben, 15 Ill. App. 482. But where the hypothesis presents not alone the finding of facts but as well the determination of the issue of guilty or not guilty, then it should include not only the evidence as the basis of findings of fact but also the instructions of the court as the guide for applying such findings of fact to a determination of the issues. Harvey v. Hamilton, 54 Ill. App. 507, aff'd. 155 Ill. 377, 40 N. E. 592. The decisions in Kranz v. Thieben and Harvey v. Hamilton, supra, are in no way conflicting, for in the former

it was a finding of fact only and in the latter a determination of the issues which was dealt with in the instruction. We are of opinion that in this case the direction being in effect that if the jury found the defendant guilty, it should have been qualified by 'under the instructions of the court' as well as 'from the evidence'. We are not, however, of the opinion that the error of this instruction should cause a reversal."

2—International & G. N. R. Co. v. Anchonda, — Tex. Civ. App. —, 68 S. W. 743 (744).

"The jury might have found for plaintiff for physical, and not for mental, injuries. In other portions of the charge, they were directed not to find for mental suffering of plaintiff's wife by reason of the separation, unless they believed that defendant had notice of the relationship between her and the children. But the charge quoted bore directly on the measure of damages, and told the jury, without qualification, if they found a verdict for plaintiff, to take into consideration mental suffering as well as personal injury and pain, to assess as damages such



(c) The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of his damages.

In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and in mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, he has sustained or will sustain by reason of such injuries; any loss of time and inability to work and earn a livelihood for himself after he attains the age of twenty-one years, if any, which the jury may believe, from the evidence, he will sustain on account of such injuries, and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration.<sup>3</sup>

### § 3568. Diminished Capacity to Labor—Method of Computing.

(a) If you find for the plaintiff, you will allow him such sum as you believe from the evidence will reasonably compensate him for the injury sustained by him (if any); and if you believe from the evidence that the injuries (if any) suffered by plaintiff are permanent, and will to any degree disable him for labor in the future, you should in addition to the above find such sum as will be a fair compensation for his diminished capacity (if any) to labor and earn money in the future.<sup>4</sup>

(b) The court instructs the jury: (1) That, if you find from the evidence that defendant is liable to plaintiff for diminished capacity to earn money in the future, it will not be liable to him for such a sum as put at interest would draw interest annually equal to his

amount as would reasonably compensate plaintiff therefor, and the amount so found to state in their verdict. This charge would naturally be of influence with the jury, being their guide as to what they should assess as damages. This charge should have been qualified in terms, or should have referred in some manner to the other portions of the charge which qualified it, so that the jury could not have been misled by it. *Gonzales v. Adoue*, 94 Tex. 120, 58 S. W. 951; *International & G. N. R. R. Co. v. Lehman*, 66 S. W. 214, 3 Tex. Ct. Rep. 866; *St. Louis, S. W. Ry. Co. v. McCullough*, — Tex. Civ. App. —, 33 S. W. 285."

3—*Ill. Iron & Metal Co. v. Weber*, 196 Ill. 526 (531), 63 N. E. 1008, reversing 89 Ill. App. 368.

"The above instruction was the only one given on the question of damages, and it directed the jury, in determining the amount of plaintiff's damages, to take into consideration any loss of time and inability to work and earn a liveli-

hood for himself after he attains the age of twenty-one years (if any) which the jury may believe from the evidence he will sustain on account of such injuries. There was no evidence on which to base that part of the instruction. . . . To invite the jury by instruction to speculate on the bare possibility of permanent disability, without any evidence whatever that such a result was probable, was wrong."

4—*St. L. S. W. Ry. Co. of Texas v. Smith*, — Tex. Civ. App. —, 63 S. W. 1064 (1067).

"The first paragraph of the charge quoted permits the jury to award full compensation for the injury suffered. Diminished capacity to labor and earn money in the future is necessarily a part of the injury suffered. To allow a sum in addition, for the latter element of damage, subjects the charge to the criticism urged against it. *M. K. & T. Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Texas Central Railway Co. v. Brock*, 88 Tex. 310, 31 S. W. 500."

diminished capacity to earn money in the future. (2) He would, under such circumstances, be entitled to recover only such a sum as would represent the present worth of his future earnings. (3) Such present worth is arrived at by dividing the amount you may conclude he will earn for any given year by one dollar plus six cents added for each year for the given time. Example: In order to ascertain the present worth of a given sum for two years at 6 per cent, you would divide such given sum by one plus twelve, and the result would be the present worth of such sum for two years; and, to find the present worth of such a sum for three years, you would divide such sum by one plus eighteen, and the result would be the present worth of such sum for three years.<sup>5</sup>

(c) The court instructs the jury to find for the plaintiff such a sum in money as will be an adequate and fair compensation for her suffering of body and mind, resulting directly from said injury.<sup>6</sup>

**§ 3569. Ability of Injured to Earn Money—Mitigation of Damages.** If under the charge of the court you should find for the plaintiff, yet if, under the evidence, you believe that the plaintiff is able to work and earn money, it is his duty to do so, and thereby lessen and avoid, so far as he can do so, the consequences resulting from the loss of his eye.<sup>7</sup>

**§ 3570. Damages Should Be Confined to Expense of Cure, Value of Time Lost, Etc.** If you shall believe from the evidence that the plaintiff came upon the premises of the defendant at the request of his father, and at his request engaged in loading a car with lumber that had been engaged by his father from the defendant for the

5—Galveston H. & S. A. Ry. Co. v. Kief, — Tex. Civ. App. —, 53 S. W. 625 (627).

"This charge was properly refused, because it attempted to limit the recovery to such a sum as would represent the present worth of appellee's future earnings; such present worth being calculated upon a basis of 6 per cent per annum. See Galveston, H. & S. A. Ry. Co. v. Dehnisch, — Tex. Civ. App. —, 57 S. W. 64, and Galveston, H. & S. A. Ry. Co. v. Johnson 24 Tex. Civ. App. 180, 58 S. W. 622, each recently decided by this court; also F. W. & D. C. Railway Co. v. Morrison, 93 Tex. 527, 56 S. W. 745."

6—Reliance Textile & Dye Works v. Mitchell, 24 Ky. L. 1286, 71 S. W. 425.

"This was erroneous, and may have produced the small verdict rendered by the jury. The plaintiff was not only entitled to compensation for her physical and mental suffering, but also compensation for the distorted and weakened condition in which she was left by the injury, reducing her power to earn money. In Shear. & R. Neg. para. 758, the rule is thus stated: 'In an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure, the value of the time lost by him during his disabilities, and a fair compensation for the physical and mental suffer-

ing caused by the injury, as well as for any permanent reduction of his power to earn money.' To the same effect, see 8 Am. & Eng. Enc. Law (2d Ed.) 643-651."

7—Mo., K. & T. Ry. Co. v. Flood, — Tex. Civ. App. —, 70 S. W. 331 (333).

"The requested charge seeks to apply the doctrine of mitigation of damages to this character of cases. We are of opinion that the principle has no application here, and that the charge was properly refused. The appellee was entitled to recover compensation for the injuries sustained. If appellee's injuries did not wholly prevent him from earning money, then he could only recover to the extent they, under all the facts, prevented him from earning money. The requested charge is to the effect that appellee owed appellant the duty to work and earn money. We do not think this statement announces a correct principle of law. The appellee was only entitled to recover to the extent of the injuries sustained by him. If he was wholly incapacitated from performing the duties of a locomotive engineer, and yet was capacitated to earn money at some other available occupation, the jury would be authorized to take this fact into consideration in determining how far his injuries incapacitated him from earning money."

shipment of his lumber over the road of the defendant, and that while plaintiff was so there and so engaged the defendant, its agents or employes, in control and management of its engine and cars, did negligently push, shove or throw one of its said cars against the one which had been let to his father, and in which plaintiff was located in loading said car, if he was so located, and thereby catch and injure him in said lumber and car you should find for the plaintiff the damages which he has sustained thereby, taking into your consideration the time he has lost or may hereafter lose, if any, the pain and suffering he has endured or may hereafter endure, if any, the disability to labor, move about and enjoy life which he has suffered or may hereafter suffer, if any, directly resulting to him from said injuries, and the expense he has incurred or may hereafter necessarily incur, if any, in the treatment of his said injuries not to exceed in all the amount sued for herein which is \$20,000.<sup>8</sup>

**§ 3571. Where Future Payments Are to Be Anticipated in a Verdict, Their Present Worth is the Measure of Damage.** In arriving at the amount which she would be entitled to recover, if she is entitled to recover, at all, she is entitled to recover, if at all, for her loss of earning power, dating from the time when this injury occurred, down to a time (if there is any time under the evidence) when she would fully recover. In determining the length of time for which she would be entitled to recover damages for loss of earning power you will be governed entirely by the evidence. Will she recover eventually, and if so during what time? The evidence as to the amount of earning power, the only witness was the witness herself, who testified that she could average \$—— a day, and that since the injury she had only earned \$—— in any one year. The question is whether she could earn more than the \$—— a year or not. In arriving at this amount you would find what her earning power was prior to the accident and deduct from that her earning power since the accident, and then take the period of time you think she will be deprived of her earning power and compute it accordingly,

8—Louisville & N. R. Co. v. Logsdon, 24 Ky. Law R. 1566, 71 S. W. 905 (906).

"This instruction did not correctly define the measure of damages. In *L. C. & L. Railroad v. Case's Admr.*, 72 Ky. 736, this court said: 'The term 'compensation' when applied to damages has a fixed legal significance, much more restricted than its common or general acceptance. In actions for personal injuries where death does not ensue, it is confined to the expense of cure, the value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money.' This was followed in *L. & N. R. Co. v. Fox*, 74 Ky. 509; *Muldraugh's Hill*, etc., Turnpike Co. v. Maupin, 79 Ky. 101; *Ky. C. R. R. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. 480; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. 595, and many subsequent

cases. The authorities elsewhere are uniform to the same effect. 2 *Shearman & Redfield on Negligence* 758. The case of *L. & N. Rd. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, does not conflict with this rule as the question was not considered there by the court, or so far as it appears, made by counsel. The case went off on other grounds. The court here should have told the jury that, if they found for the plaintiff the measure of damages was the reasonable expenses of his cure, including any expense that it was reasonably certain he would thereafter necessarily incur; the fair value of the time lost by him or which it was reasonably certain he would thereafter lose; and a fair compensation for the physical and mental suffering endured by him, or which it was reasonably certain he would endure; as well as for any permanent reduction of his power to earn money by reason of his injuries."



if you find for her. In addition to that she is entitled to recover for her expenses attendant upon this injury, if entitled to recover at all. You have the testimony of the physician that his bill was something like \$——. Her testimony of what she paid this girl, \$—— a week and board, and that the board was worth \$—— a week. In addition to loss of earning power she is entitled to recover for her pain and suffering—for the suffering endured by her in the past, since this injury, by reason of the injury, and for future pain and suffering.<sup>9</sup>

**§ 3572. Bodily and Mental Suffering—Terms Explained.** If you find the defendant guilty, you will be required to determine the amount of her damages. In determining the amount of the damages the plaintiff is entitled to recover in this case, if any, the jury have a right, and they should take into consideration all the facts and circumstances in evidence before them, the nature and extent of plaintiff's injury, if any, testified to in this case, her suffering in mind and body, if any, resulting from such injury, her loss of wages resulting from such injury, if any, and also such prospective suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injury, and may find for her such sum as in the judgment of the jury under the evidence and instructions as heretofore given, the jury believe she is entitled to recover.<sup>10</sup>

9—*Wilkinson v. Northeast Borough*, 215 Pa. St. 486, 64 Atl. 734.

"Did the court commit reversible error in instructing the jury as to the proper measure of damages? We think it did. Indeed, counsel for appellee does not seriously contend that the instructions of the learned court in this respect were correct, but it is argued that inasmuch as neither plaintiff nor defendant asked for specific instructions as to the measure of damages, it is too late to raise the question now. A number of cases are cited in support of this position. *Baker v. Irish*, 172 Pa. 528, 33 Atl. 558, is particularly relied on. It is there said the court will not reverse for inadequacy of the charge on the question of the measure of damages, where the verdict is reasonable and moderate. To the same effect is *Lewis v. Springfield Water Co.*, 176 Pa. 237, 35 Atl. 187. We agree that the judgment of the court below should not be reversed for inadequacy in the charge if no injury resulted to the complaining party, and the cases above cited announced this rule. The rule, however, does not apply where the charge of the court is clearly erroneous. Under such circumstances, it is not a question of inadequacy, but of error. In every case of negligence it is the duty of the court of its own motion, to instruct the jury as to the proper measure of damages. Without such instruction a jury has no legal guide for intelligent consideration and correct conclusion. The learned trial judge

instructed the jury that 'in arriving at the amount, you would find what her earning power was prior to the accident, and deduct from that her earning power since the accident, and then take the period of time she will be deprived of her earning power and compute it accordingly.' This instruction is in plain violation of the rule laid down in *Goodhart v. Ry. Co.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. 705, wherein it is said: 'Where future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled to only their present worth. This is the exact amount of the equivalent of the anticipated sum.' In the hurry of the trial we have no doubt the instruction complained of was inadvertently given, but it was clear error, and the judgment must be reversed on that ground."

10—*Chicago v. Gilfoil*, 99 Ill. App. 88.

"Strictly speaking, all pain is mental. The body may be severely injured, lacerated, broken or bruised, and yet the mind not be conscious thereof. It not infrequently happens that an injury to the body produces a comatose condition. While this unconsciousness lasts, there is no pain.

"There is what is commonly understood and spoken of as bodily pain or suffering; by this we mean pain proceeding from hurt or disorder of the body of which the mind is conscious and is therefore felt.

"We also recognize, speak of and feel pain that does not have its origin in, neither is connected with,

§ 3573. **Should Not Conjecture as to Future Suffering.** If you shall find that plaintiff is entitled to recover, it will be necessary for you to determine the amount of such recovery. She can in no event recover more than compensatory damages, by which is meant such sum as will fairly compensate her for the injury sustained. What is a just compensation is not susceptible of proof by direct evidence, but must, of necessity, be left largely to the sound judgment and discretion of the jury, guided by the circumstances of the case as shown in evidence. The damages for which she is entitled to recover, if you find that she is entitled to recover, are such as are caused by bodily pain and suffering, distress and mental anguish, and inconvenience, the impairment of the enjoyment of life, by reason of the injury, and for such pain and inconvenience and impairment of enjoyment for such time as the same has or may continue as shown by the evidence. But you can in no event allow her more than \$3,000. Nor can you allow for pain or suffering not caused by the biting of the dog.<sup>11</sup>

§ 3574. **Grief Resulting from a Contemplation of a Maimed or Disfigured Body, is not an Element in the Ascertainment of Pecuniary Damages.** (a) The jury are instructed that in determining the amount of damages they may take into consideration any future bodily and mental pain or suffering, or future inability to labor or transact business, if any, that the jury believe from the evidence the plaintiff will sustain by reason of injuries received.<sup>12</sup>

our body—as pain at the loss or sorrow of a friend; humiliation because of our own conduct or infirmity; this strictly speaking is sentimental pain, and is commonly spoken of as anguish of the mind. Damages for pain are given in actions predicated upon negligence only for the bodily or physical pain of which the mind is conscious.

"In the present case the jury, having determined that the plaintiff was entitled to recover damages, in ascertaining their amount, should have considered only the evidence bearing upon the question of the amount of damage the plaintiff had sustained and not, as they were instructed, have then taken 'into consideration all the facts and circumstances in evidence before them.'

"She might have been hurt under circumstances of peculiar annoyance and humiliation, without this having added in the least to the injury she sustained.

"Nor were the jury to give her such sum as in its judgment 'under the evidence and instructions heretofore given' it believed she was entitled to recover.

"The jury could properly award only such damages as under the evidence and from the instructions of the court they believed she had sustained and was entitled to recover.

"The instruction was misleading and should not have been given. The plaintiff has been injured and should be compensated. The instruction

tended to increase the amount the jury would award."

11—*Sanders v. O'Callaghan*, 111 Ia. 574, 82 N. W. 969 (971).

"An almost identical instruction was disapproved in *Ford v. City of Des Moines*, 106 Ia. 94, 75 N. W. 630. See also *Fry v. Railroad Co.*, 45 Ia. 416. But it is said that this case is distinguishable from that in this; that the jury was told it could not allow anything for pain and suffering not caused by the biting of the dog. We do not see how this can be said to have cured the error contained in the other part of the instruction, permitting the jury to recompense plaintiff for pain, inconvenience and impairment of enjoyment as may continue, as shown by the evidence. The difficulty with the instruction is that it permitted the jury to enter the domain of conjecture as to future suffering. In that respect it is identical with the *Ford* case. In *Bailey v. City of Centerville*, 108 Ia. 20, 78 N. W. 831, the instruction used the word 'probably' instead of 'may', and it was held synonymous with 'reasonably certain.'"

12—*Chicago & G. T. Ry. Co. v. Spurney*, 69 Ill. App. 549 (552), *aff'd* 197 Ill. 471, 64 N. E. 302.

"Future mental pain, that is, mere humiliation and grief resulting from a contemplation of a maimed and disfigured body, is not an element entering into an ascertainment of the pecuniary damage one has sustained as the result of negligence.

(b) The elements of damage which the jury are entitled to take into account consist of all the effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff endured, and the loss of time, all bodily and mental suffering, impairment of capacity to earn money, the pecuniary expenses, and the disfigurement or permanent annoyance which is liable to be caused by the deformity resulting from the injury; and in considering what would be a just sum in compensation for the sufferings or injury, the jury are not only at liberty to consider the bodily pain but the mental suffering, anxiety, suspense and fright may be treated as elements of injury for which damage by way of compensation should be allowed; and as these last mentioned elements of damage are in their very nature not susceptible of any precise or exact computation, the determination of the amount is committed to the judgment and good sense of the jury.<sup>13</sup>

**§ 3575. Future Sufferings, Which Are Reasonably Certain, Element of Damages.** If your verdict is for the plaintiff, you will assess her damages at such sum as, from the evidence, you believe will fairly compensate her for any pain of body or mind which, from the evidence, you believe she has suffered, or may suffer, by reason of said action; for any earnings which, from the evidence, you believe she has lost, or may lose, by reason of the accident; for any expenses for medicines or medical attention which you believe from the evidence have been necessitated or may be required by reason of the said accident, considering the fair and reasonable value thereof.<sup>14</sup>

*I. C. R. R. Co. v. Cole*, 165 Ill. 334, 46 N. E. 275; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235, 71 Am. Dec. 224; *C. B. & Q. R. R. Co. v. Hines*, 45 Ill. App. 299."

13—*Decatur v. Hamilton*, 89 Ill. App. 561 (569).

"Clearly this instruction allows the jury to infer that their verdict might include damages for 'mental suffering' resulting from brooding over his permanent disfigurement. The reflections of a young person that he must go through life with a face burned and scarred and with some of the fingers of his hands grown together and others fastened to the palm, must necessarily bring great mental suffering. The consciousness that his marred personal appearance will throughout life excite the constant enquiry of the curious must, especially to one of a sensitive nature, be a permanent annoyance and the source of great mental anguish. But in this State, such mental suffering is not a proper element of damages. It is the mental suffering which arises necessarily and spontaneously from an injury or shock to the nerves of sensation, or from such pain or anguish as remain during the continuation of the original and exciting cause that is a proper element of damages. Mere humiliation and mental anguish resulting from the contemplation of maimed hands and a disfigured face do not in a legal

sense enter into an ascertainment of pecuniary damages one has sustained as the result of the negligence. *I. C. R. R. Co. v. Cole*, 165 Ill. 334; *C. B. & Q. R. R. Co. v. Hines*, 45 Ill. App. 299; *C. & G. T. Ry. Co. v. Spurney*, 69 Ill. App. 519, aff'd. 197 Ill. 471, 64 N. E. 302. For error in giving the above instruction, the judgment will be reversed." See sec. 918.

14—*McKinstry v. St. L. T. Co.*, 108 Mo. App. 12, 82 S. W. 1108.

"In *Walker v. St. Louis, etc., Ry. Co.*, 106 Mo. App. 321, 80 S. W. 282, the instruction disapproved was as follows: 'If the jury find in favor of the plaintiff, they will assess his damages at such reasonable sum as will fairly compensate him for the injuries which he has sustained, and the mental suffering and physical pain which he has suffered or may hereafter suffer, and directly resulting from his injury' . . . the case of *Schwend v. St. Louis Traction Co.*, 105 Mo. App. 534, 80 S. W. 40, being relied on for such ruling, in which an instruction incorporating the same infirmity was condemned after a lengthy review of the text of commentators upon the measure of damages and cases decided in this state and other jurisdictions. In *McLain v. St. L., etc., Ry. Co.*, 100 Mo. App. 370, 73 S. W. 909, this court went no farther than to decide that in an action for personal injuries the right of re-



§ 3576. **Only Damages for What Is Reasonably Certain, Not What May Be Likely to Occur.** (a) The jury are instructed on the subject of damages that the plaintiff is entitled to compensation for the pain and suffering which she has endured, also for the pain which it may be likely, or that there is a reasonable probability, that she will endure in the future.<sup>15</sup>

(b) You will also assess all such sums as you are satisfied from evidence will recompense him for all future sufferings, both mental and physical.<sup>16</sup>

(c) You may consider as an element of damage the pain he has suffered resulting from such injuries, and also such prospective damages, if any, as the jury may believe he has sustained, or will sustain.<sup>17</sup>

§ 3577. **Mental Suffering Without Physical Injury.** The court instructs you that, in order for the plaintiff to recover herein for mental anguish suffered by his wife in consequence of having been separated from her children, you must believe that she also suffered physical pain in connection therewith, caused by the negligence of the defendant; and the court further instructs you that, if such physical pain was caused by the contributory negligence of plaintiff's wife, then she cannot recover for mental anguish.<sup>18</sup>

§ 3578. **Omitting Mental Suffering.** (a) Although the jury may believe from the evidence that motorman assaulted the plaintiff, yet if they further believe from the evidence that such assault did not injure the plaintiff, then they can only give the plaintiff nominal damages, say one cent or five dollars, unless the jury believe from the evidence that the plaintiff is entitled to recover punitive damages.

covery was not restricted to pain and suffering undergone, but the injured party was also entitled to compensation for such future sufferings as were reasonably certain, in the ordinary course of nature, to ensue from the injury. The right of the jury to weigh such bodily pain and suffering as were reasonably likely to result in the future, and not the precise wording of the instruction, was considered and determined. Adhering to the rule declared in the Walker and Schwend cases as well established in this state, the instruction herein considered is convicted of the vice therein condemned."

15—Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 64 N. W. 1041 (1044), 51 Am. St. 912, 30 L. R. A. 504.

"This was error. The plaintiff is only entitled to recover for such future pain as the evidence shows she is reasonably certain to endure. Block v. Railway Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. 849, 27 L. R. A. 365.

16—Howard v. Beldenville Lumber Co., 129 Wis. 98, 103 N. W. 48 (54).

"That was prejudicially erroneous. The jury should have been limited in assessing damages for future suffering, mental and physical, to such loss, in that regard, as the evidence satisfied them would be reasonably

certain to result from the injury. White v. Milwaukee City Ry. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; Hardy v. Milwaukee St. Ry. Co., 89 Wis. 183-187, 61 N. W. 771; Block v. Milwaukee St. Ry. Co., 89 Wis. 371-380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. 849; Raymond v. Keseberg, 91 Wis. 191, 64 N. W. 861; Groundwater v. Town of Washington, 92 Wis. 56-61, 65 N. W. 871; Kliegel v. Aitkin, 94 Wis. 432-438, 69 N. W. 67, 35 L. R. A. 249, 59 Am. St. 901; Collins v. City of Janesville, 99 Wis. 464, 75 N. W. 88; Boelter v. Ross Lumber Co., 103 Wis. 324-330, 79 N. W. 243."

17—Penn. Co. v. Files, 65 Ohio 403, 62 N. E. 1047.

"This, we think, was too broad. The jury in assessing prospective damages should have been confined to such as were reasonably certain to follow from the injury complained of."

18—International & G. N. R. Co. v. Anchonda, — Tex. Civ. App. —, 68 S. W. 743 (744).

"The charge was properly refused, because mental distress alone without physical injury would constitute a proper element of damages. The doctrine that no recovery can be had for mental suffering unaccompanied by physical injury does not prevail in this state." See Sec. 921.

(b) If the jury believe from the evidence in this case that the confinement of the plaintiff to his home for several weeks, if you believe from the evidence that he was so confined, arose from any sickness or injury not caused by the motorman, then they can only give nominal damages to the plaintiff, say one cent or one dollar, unless they believe from the evidence that the plaintiff is entitled to recover punitive damages.<sup>19</sup>

§ 3579. **Plaintiff's Present Physical Condition—Loss of Time Endeavoring to Be Cured—Pain and Suffering.** (a) You are instructed that if plaintiff's present physical condition is the mere continuation of his former condition, existing prior to the accident, and that it has not been made worse or impaired by the accident, then your verdict will be for defendant.<sup>20</sup>

(b) The court instructs the jury that if from the evidence you find the defendant guilty, then in arriving at your verdict, you have a right to award the plaintiff such an amount as will compensate her for the loss of time endeavoring to be cured of her injury, if any such is shown by the evidence; also for the pain and suffering endured by her, if any such has been shown by the evidence.<sup>21</sup>

§ 3580. **Expectancy of Life—Mortuary Tables.** (a) You are to determine from the evidence the probable period it may reasonably be expected she might have lived in the condition she was at the time of this injury. The plaintiff may not live for any particular period, and you should consider the contingencies of sickness, and you should make a reasonable deduction for such contingency, and for others, if any, that the evidence may disclose might lessen her reasonable prospect of living for the period mentioned in the table of mortality.

(b) She should receive the present worth of such future damages. It is at your discretion to give such an amount as you may think right for mental suffering and physical pain and suffering endured by the plaintiff up to this time, and from this time forward, and for such pain and suffering as you are satisfied from the evidence in the case that she may experience in the future.

(c) In this state, gentlemen, we have what is known as a "table." Of course it does not apply to anyone in particular, but it is a table

19—*Birmingham Ry. & E. Co. v. Ward*, 124 Ala. 409, 27 So. 471 (472).

"These charges ignore any reference to plaintiff's mental suffering counted on, and seeks to eliminate it entirely from the consideration of the jury as an element of actual damage. Both charges were properly refused."

20—*Williams v. Houston El. Co.*, — Tex. Civ. App. —, 85 S. W. 489.

"The objections to the charge are that it affirmatively confined plaintiff's recovery to the effect of the accident as to the hernias, and precluded a recovery for any suffering or impairment which he had suffered between the date of the accident and the date of the trial, thus compelling the jury to find for defendant if they concluded that defendant was in the same condition at the time of the trial as he was prior to the accident; that it had the effect to confine their inquiries to

his condition at the time of the accident, and precluded all consideration of anything intervening. We are of opinion that, in the light of the evidence, the objection to the charge is sound, and ought to be sustained. We cannot say that, in the light of the main charge, the jury were not misled thereby."

21—*Village of Westville v. Horn*, 117 Ill. App. 89.

"In *West Chicago St. R. R. Co. v. Carr*, 170 Ill. App. 478, 48 N. E. 992, a somewhat similar instruction was under consideration by the court, and while the giving of the instruction in that case was held not to have been prejudicial error, the instruction was not approved. In the case at bar, no other instruction was given upon the measure of appellee's damages, and the record is barren of any evidence to sustain the one given."

of expectancy that we use in the trial of lawsuits. By the table a person in good health at the age of 25 may reasonably expect to live for 38 years to come. That table is not final. This case of course you will decide having in mind what the evidence discloses regarding the plaintiff's health previous to the accident, and of course that table will be something of a guide to you, but you will decide the case of course, from the evidence regarding her health especially previous to the accident. If she was a person of fairly good health at that time, then it is reasonable to suppose that she may have expected to live 38 years. But as I said in my charge, you must take into consideration the possibility of sickness, that she may not live any considerable length of time, but reach such a conclusion from all the evidence in the case as appears reasonable to you.<sup>22</sup>

(d) If you find for the plaintiff, you will consider the age he would probably have reached if he had remained in good health, as ascertained by the tables of the expectancy of human life which have been introduced in evidence. He was, it appears, 23 years old at the time of the accident; and he would, according to said tables, have lived 40 17-100 years longer, or to the age of about 63 years. You will also consider the extent to which his earning power as a laboring man would be lessened and diminished by the character and nature of his injuries; but, in ascertaining this amount, you will allow him the present worth of such earnings, rather than the gross amount running through the probable duration of his life.<sup>23</sup>

(e) If you find for plaintiffs, as damages you will find that sum of money as will be a fair and just compensation for the injuries received by Mrs. C., the pain and distress of mind she endured, if any, and the expense for medical aid. The damages for injuries to her, you will estimate the value of the service she was capable of

22—Howell v. L. C. El. Co., 136 Mich. 432, 99 N. W. 406 (407).

The last charge (c) was added afterwards in reply to a question by one of the jurors.

"Counsel contend that the jury were permitted to allowed damages on the basis of the expectancy before she was injured. If so, this was manifestly wrong. See *Olivier v. Houghton Co. St. Ry. Co.*, 134 Mich. 367, 96 N. W. 434. A man who must contemplate death may be supposed to have more intense mental suffering than others and may recover accordingly. But he cannot be supposed to be likely to suffer such increased anguish beyond the time that he in his present condition is likely to live. We think the charge is open to such construction."

23—*Trott v. C. R. I. & P. Ry. Co.*, 115 Ia. 80, 86 N. W. 33 (35), 87 N. W. 722.

"Defendant asked an instruction to the effect that this expectancy of life does not necessarily apply to persons engaged in hazardous employments, but is based upon the observed expectancy among persons in ordinary pursuits, 'and you should bear this in mind in any consideration which you may give to said

mortality table.' This instruction was refused. The instruction given makes the life tables conclusive as to 'the age he would probably have reached.' This certainly is not the rule. 'They are not conclusive upon the question of the duration of life, but are competent to be weighed with other evidence. The physical condition of the injured person at the time next preceding the injury, his general health, his avocation in life with respect to danger, his habits, and probably other facts, enter into the question of the probable duration of life.' *Mary Lee Coal Railway Co. v. Chambliss*, 97 Ala. 171, 11 So. 897; *Vicksburg & M. R. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; *Scheffler v. Railway Co.*, 32 Minn. 518, 21 N. W. 711. We think the court also erred in limiting the extent of plaintiff's earning power in the future to that of a laboring man. The instruction, construed according to common acceptance, must be understood to refer to his ability to earn by manual labor. He might be totally disabled from performing manual labor, yet be able to earn in other avocations. See *Laird v. Railway Co.*, 100 Ia. 336, 69 N. W. 414."



performing, and did perform in her relation to her duties before said injury, any impairment of her capacity to perform said services. And if you find these injuries are permanent, then you will estimate the value of such services as she would reasonably perform during the expectancy of her life.<sup>24</sup>

(f) If you desire to use the annuity table, find the age at which plaintiff was at the time he was injured, and look in the columns to the right, and that will give you what one dollar paid annually during his expectancy would be equivalent to in cash paid now. If you use the table, find how much he is injured, find how much he will probably fail to receive during the balance of his life, by reason of his injuries, and then reduce that to the cash value.<sup>25</sup>

(g) On the subject of permanent injury, if you find damages in his favor, you will inquire whether the injury was a permanent one. If you find that it is permanent—that is, lasting his entire life,—then you look to the evidence, and see to what extent it has depreciated his capacity to labor before he received the injury, and find out what the value of that difference is per annum, and his expectancy under the rules of the Carlisle table, which is in evidence before you. That table is before you, and may be used as data by which you may arrive at the present cash value of his injury, if you find that he was permanently injured. Whatever damages you find on that line you will add to the other damages that you may or may not find, and that would be the amount of your verdict.<sup>26</sup>

(h) They are known as the “Mortuary and annuity tables.” I will first explain to the jury how to use them: If you find for the plaintiff, you must then look to the evidence, and see what he is entitled

24—International & G. N. R. Co. v. Clark et ux., 96 Tex. 349, 72 S. W. 584 (585).

“That the latter part of the charge quoted does not correctly state the measure of damages we think clear. That it is misleading we think equally true. Its structure indicates that some words have been inadvertently omitted—the omission being presumably the result of the haste ordinarily incident to preparing such instructions.”

25—Central of Georgia Ry. Co. v. Mosely, 113 Ga. 175, 38 S. E. 350 (351).

“Complaint is made that the court omitted to instruct the jury as to the proper use of the 6 per cent. and 7 per cent. columns in the annuity table, and that nowhere in the charge was attention called to the decreased capacity to earn money which will result from increasing age and the infirmity incident thereto. We think that this point is well taken. It was decided by this court in the case of Florida Cent. & P. R. Railroad Co. v. Burney, 98 Ga. 1, 26 S. E. 730, that, in instructions regarding the use of the ‘6 per cent.’ and ‘7 per cent.’ columns in the annuity table, the jury should be restricted to the use of the latter only, for the reason, as stated in the able opinion of Justice Lumpkin,

that 7 per cent. is the legal rate of interest in this state when none is fixed by contract in writing, and calculations of annuities based upon any other rate would be purely arbitrary. We are also clearly of opinion that the court should have called the attention of the jury to the decrease in earning capacity which naturally results from advancing age—an instruction which is always applicable in suits for damages on account of injuries alleged to be permanent.”

26—East Tennessee V. & G. Ry. Co. v. McClure, 94 Ga. 658, 20 S. E. 93.

“Defendant contends that there was no proof of permanent injury and no testimony upon which to predicate a charge as to permanent injury; that this charge is incomplete and inaccurate, and does not state the correct rule for estimating damages for permanent injury, there being no reference to the decrease of capacity to earn money as plaintiff grows old; and that the charge gives no direction as to how to find the present cash value of plaintiff’s lessened capacity to labor, except by reference to the Carlisle table, which only gives his expectancy, and throws no light upon the mode of determining the cash value of his diminished capacity.”

to recover annually, if anything. You will then take that sum, and multiply it by the figure opposite his age. That would give you the present value of what he would be entitled to recover, if you see proper to find for him.<sup>27</sup>

(i) If you find, from a preponderance of the evidence in the case, under the instructions of the court, that the plaintiff is entitled to recover in this action, you may, in determining the amount of her recovery, take into consideration: First, the pain and suffering, physical or mental, if any, undergone by the said ——— as a result of the injury; second, the money expended or liability incurred necessarily and reasonably, if any, by the said ———, for medical attendance, as a result of the injury; third, the value of the time lost, if any, by the said ———, as a result of the injury; fourth, the disability or diminished earning capacity, whether total or partial, temporary or permanent, incurred by the said ——— as a result of the injury. And from these elements, or so many of them as you find are established by a preponderance of the evidence, assess the amount of plaintiff's recovery at a sum which you believe would fairly and justly have compensated the said ——— for the injury sustained.

(j) You cannot allow plaintiff anything for the loss of the support and sustenance of her husband. If you find for the plaintiff, the question for you to determine is: What would have been a fair and just compensation for said ——— for the injuries sustained? What ought he fairly to have received for each and all the elements of damages mentioned in the above instruction, which you may find sustained by the evidence, including any permanent disability sustained by him; and, in estimating damages for permanent injury, you are not limited to the time said ——— actually lived.<sup>28</sup>

27—*Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 (765).

"The obvious vice of this charge is that the court failed to instruct the jury which of the tables should be used in ascertaining the present value of what the plaintiff would be entitled to recover. It is too manifest to require discussion that it should not have been left uncertain which table should be consulted for that purpose. On the contrary, the jury should have been told that the annuity table alone was applicable. And the court ought also to have put the jury on their guard against overlooking the fact that even in the annuity table there are two columns, one applicable to 6 and the other to 7 per cent. In view of the confusion which must have arisen in the minds of the jury with reference to the use of the tables before them, and in view also of the large verdict rendered, it is more than probable that the charge in question resulted in greater or less injury to the railroad company, and the ends of justice require that the case should be tried again."

28—*A. T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60 (61).

"The first instruction above

quoted, was somewhat vague and uncertain as to the fourth element of damages, and it was this, no doubt, that caused the inquiry of the jury as to whether damages for permanent injury were limited to the actual lifetime of the person injured; and this called forth the further instruction of the court that such damages were not limited to the lifetime of ———. In the answer of the jury to the particular question of fact regarding the length of time taken into consideration as a basis for an estimate, the jury evidently had regard to the expectancy of the life of ———, although no evidence was introduced upon the subject. We think, however, that such evidence would not have been admissible; for expectancy is only to be resorted to in the absence of certainty; and as the life of ——— was terminated before the trial, there was no basis for an estimate of damages extending beyond that period. Damages for the permanent deprivation of health and of the capacity to work and enjoy life should therefore be limited to the period extending from December 1, ———, to October 18, ———. *Busw. Pers. Injur.*, par. 20."

§ 3581. **Computing Present Worth of Future Earnings at 6 Per Cent of Sum to Be Awarded for Injuries Sustained, Erroneous.** You are instructed: (1) That if you find that defendant is liable for diminished capacity to earn money in the future, it would not be liable for such sum as, put at interest at 6 per cent per annum, would draw interest equal to his diminished capacity to earn money in the future. (2) He would, under such circumstances, be entitled to only such sum as would represent the present worth of his future earnings, such present worth being calculated upon the basis of 6 per cent interest per annum.<sup>29</sup>

§ 3582. **Duty to Employ Proper Medical Assistance—Abstract and Misleading.** If the plaintiff was injured by the collision, he was bound by law to use ordinary care to render the injury no greater than necessary. It was further his duty to employ such medical assistance as ordinary prudence in his situation required, and to use ordinary judgment and care in so doing.<sup>30</sup>

§ 3583. **Contributory Negligence in Treating Injuries Sustained.** (a) You are hereby instructed that the plaintiff is confined in the recovery of any damages to which you believe from the evidence he is entitled to such damages as are sustained as the reasonable and probable results of the injuries received. If you believe from the evidence that with proper and customary treatment, the plaintiff would, in the ordinary course, have recovered from the effect of the injuries he is alleged to have received within a few weeks after receiving such injuries you cannot find any damages against the defendant for the loss of plaintiff's leg.

(b) You are hereby instructed that if you believe from the evidence that the loss of plaintiff's leg was caused by improper treatment, or treatment too long delayed, of injuries received by plaintiff ———, you cannot, in estimating the damages in this case, consider the loss of such leg.<sup>31</sup>

(c) The court instructs the jury that if you find and believe from the evidence that any part or all of the injuries or conditions

29—G. H. & S. A. Ry. Co. v. Dehnisch, — Tex. Civ. App. —, 57 S. W. 64.

"This charge was properly refused. It may be correct, in respect to such matter, to charge the jury to give such sum as would represent the present worth of future earnings, all circumstances considered; but this we are not now called upon to decide. It would be arbitrary, upon the weight of evidence and manifestly wrong to charge the jury that the estimate of future earnings should be discounted upon the basis of 6 per cent. interest per annum in arriving at their present worth. This would be taken to mean for them to estimate the future earnings, and to give plaintiff a verdict for a sum which, with 6 per cent. per annum added for the future period, would amount to their estimate of the future earnings at the end of the period. This we know would not afford the estimate arrived at, because an investment of

the present worth, so found, at 6 per cent., would not yield the value of the future earnings. It is judicially known that some of this 6 per cent. must go for taxes and expenses of investment, to say nothing of the vicissitudes attending the loan of money."

30—C. & E. R. R. Co. v. Meech, 163 Ill. 305 (316), 45 N. E. 290, aff'g 59 Ill. App. 69.

"The instruction was likely to mislead the jury. It stated a correct but abstract rule of law, and gave the jury no directions in regard to its proper application to the case in hand. There was no error in refusing to give the instruction as asked." See sec. 931.

31—City of San Antonio v. Tal-erico, — Tex. Civ. App. —, 78 S. W. 28 (30).

"It will be seen that these requests concerned the issue of contributory negligence, and yet they did not leave that question to the jury."



from which plaintiff now claims to suffer was caused by a lack of medical treatment, or improper medical treatment, then as to that part of such injuries or condition entirely due to lack of medical treatment you can award to plaintiff no damages.<sup>32</sup>

§ 3584. **Money Expended Attempting to be Cured—Specific Proof Necessary.** (a) If you find for plaintiff in this case, then in estimating the damages, if any, arising from such accident, you have a right to take into consideration the money expended or for which she is liable, if any, in attempting to be cured of such injury so arising; for the pain and suffering she has endured, if any, arising from such injury; and for any permanent injury arising from such accident, if any, so far as you may believe from the evidence the same is shown, and is justified thereby, not exceeding the amount claimed in the declaration. It is not necessary for plaintiff to make specific proof of the amount of damages, if any, arising from said injury. It is for you to say from all the evidence bearing on the question, what would be compensatory damages.<sup>33</sup>

(b) If you find the defendant guilty from the evidence submitted to you and the instructions of the court, and you believe from the

32—*Elliott v. Kansas City*, 174 Mo. 554, 74 S. W. 617 (618).

"It is difficult to discover the soundings of that principle which requires a party injured without fault on his part to insure not only the surgeon's professional skill, but also his immunity from accident, mistake or error in judgment, and which precludes such party from recovering of the original wrongdoer damages arising from no fault on his part, and from causes beyond his power to control. On the contrary, there seems to be no good reason for holding the party originally in fault responsible for the damages resulting to the innocent party under such circumstances. Indeed, the liability of a competent surgeon to mistake, accident or error in judgment, as well as that of the party complaining to an increase of his injuries from other causes beyond his control, are among the 'mischievous consequences' referred to in *Rigby v. Hewitt*, 5 Exch. 240, that may reasonably be expected to result under ordinary circumstances from defendant's misconduct, and for which they are responsible. The unskillful treatment of the surgeon itself, if any there was, arose as a consequence of the original fault of the defendants. In the present imperfect state of medical science, and amidst the conflicting theories of medical men, as well as the uncertain reliance to be placed upon the different modes of treating injuries and disease, it would not be difficult to make it doubtful, in a given case, if the professional treatment might not have been improved, or was unskillful, and thus a way of escape might be prepared for wrongdoers from the legitimate and legal consequences of their negligence or misconduct. The principle,

therefore, of holding the defendants responsible, is founded in sound reason of public policy. It is also sustained by decided cases of courts of acknowledged authority.' *Stover v. Inhabitants of Bluehill*, 51 Me. 440. . . . In fact, the above instruction eliminates any and all consideration by the jury, in estimating plaintiff's damages, of any part or all of the injuries caused by lack of medical treatment or improper medical treatment, when she was entitled to have such injuries considered by the jury." See sec. 932.

33—*Village of Chatsworth v. Rowe*, 53 Ill. App. 387 (390 & 391), 66 Ill. App. 55, aff'd. 166 Ill. 114, 46 N. E. 763.

"This instruction has two specific faults: 1st, it tells the jury that the appellee may recover damages arising from the accident, consisting of 'money expended and for which she is liable, if any, in attempting to be cured of such injury so arising;' when there is no evidence in the record that she had ever expended or was liable for any such purpose; 2d, in telling the jury that it was not necessary for appellee to make 'specific proof' of 'the amount of damages, if any, arising from such injury,' when, in fact, it was necessary to make such proof as to the services mentioned in the first item. Appellee would be required to authorize recovery therefor to make specific proof of the money expended, and for which she was liable in attempting to be cured from the injury. The jury could not estimate that. The instruction was very misleading and liable to swell the appellee's damages beyond what the jury would have estimated them, but for the erroneous instruction."

evidence that the plaintiff has suffered damages thereby, you should in estimating such damages compensate the plaintiff for any necessary expense incurred by him in furnishing medical attendance, care and nursing on account of his injuries, if any, shown by the evidence; and in addition thereto compensate him for the value of his loss of services he has been rendered incapable of performing and to return your verdict therefor.<sup>34</sup>

§ 3585. **When Punitive Damages Should Not be Given.** (a) I charge you that you cannot allow the plaintiff any punitive or vindictive damages under the evidence in this case.

(b) If the jury should find that the plaintiff was entitled to recover, in estimating his damages they will allow only such sum as will compensate him, and cannot add anything by way of punishment to the defendant.<sup>35</sup>

(c) The court instructs the jury that the plaintiff can only recover such damages as he has shown himself to have suffered, if any, by a preponderance of the evidence, and if the jury believe from the evidence that the plaintiff has not shown himself damaged in any sum, your verdict should be for the defendant.<sup>36</sup>

§ 3586. **When Punitive Damages Should be Given.** (a) If you believe from the evidence that the defendant is liable, and that the wrongful act was done in a reckless or wanton manner, or that there were circumstances of aggravation in the conduct of defendant's servants, you will not be limited in assessing damages to the actual or compensatory damages, but may give the plaintiff a further sum as exemplary damages by way of punishment for the wrongful act, and as an example to others; and for such damages you may assess such sum as you deem just under the circumstances of the case, as shown by the evidence.<sup>37</sup>

34—Himrod Coal Co. v. Clingan, 114 Ill. App. 568 (575).

"This is erroneous for the reason that it assumed that there had been a loss of services and an inability to perform them."

35—Highland Ave. & B. R. Co. v. Robinson, 125 Ala. 483, 28 So. 28 (30).

"The law punishes not only where the act is characterized by a vicious intent, but also where it is committed without specific intent or desire to inflict injury, but with such heedless indifference to the consequences likely to ensue from it as amounts to a wantonness and recklessness as vicious and as justly meriting punishment as an affirmative evil intent. That damages may be recovered from an employer for injuries inflicted wantonly and recklessly or intentionally by his employee while acting within the general scope of the employment is settled by the decisions of this court. Gilliam v. Railroad Co., 70 Ala. 268; So. Railway Co. v. Wildman, 119 Ala. 565, 24 So. 764; Postal-Tel.-Cable Co. v. Brantley, 107 Ala. 683, 18 So. 321; and in such cases there may be recovery of punitive damages, Western U. Telegraph Co. v. Seed, 115 Ala. 670, 22 So. 474;

Western U. Telegraph Co. v. Cunningham, 99 Ala. 314, 14 So. 579; Ala. G. S. Railroad Co. v. Sellers, 93 Ala. 9, 9 So. 375; Ala. G. S. Railroad Co. v. Frazier, 93 Ala. 45, 9 So. 303; Louisville & N. Railroad Co. v. Whitman, 79 Ala. 328."

36—Martin v. Leslie, 93 Ill. App. 44 (53).

"This instruction tells the jury that exemplary damages should not be allowed in the case. That, as we have seen, was a matter to be left to the jury in case there was evidence of actual damage."

37—Patry v. Chicago St. P., M. & O. Ry. Co., 77 Wis. 218, 46 N. W. 56.

The above instruction was given in a case where plaintiff was wrongfully put off passenger train by conductor, whereby she suffered physical injuries. The court said: "The court erred in instructing the jury that in certain contingencies they might award the plaintiff exemplary damages. There is no testimony in the case tending to show that the conductor acted in a reckless, wanton or insulting manner, or that he was influenced by malice or any other improper motive. On the contrary, it conclusively appears that he acted throughout in a considerate and gen-

(b) If the jury believe from the evidence that the said collision was caused by the gross negligence of the defendant railroad company's agents or servants in charge of the engine with which passenger train collided on the occasion in controversy, then and in that event the jury may, in addition to compensatory damages, if any, award the plaintiff punitive damages against said defendant I. C. R. Co., not exceeding, however, in the aggregate \$15,000.00, the amount claimed.<sup>38</sup>

(c) Damages for torts are not weighed in golden scales, and if the jury find from the evidence in this case that the defendant was grossly negligent in assigning plaintiff to work where the danger was latent and known, or from the condition of the machinery, by the exercise of ordinary prudence or care, should have been known by the defendant, then they are warranted in assessing punitive damages in this case.<sup>39</sup>

**§ 3587. Action by Husband for Injuries to Wife—Society of Wife.**

(a) In considering the measure of plaintiff's damage, if any, it is proper to take into consideration the amount, if anything, which the plaintiff has realized and accumulated in the past from the services of his wife, over and above the expenses of her support; and if it be shown by the evidence that he realized and accumulated nothing from her said services in excess of her support, then you may consider that fact also.<sup>40</sup>

temanly manner, and in the belief that he was only discharging his imperative duty to his employer. Such being the facts, as a matter of course this is no case for the infliction of punitive damages, and would not be, even were the action against the conductor instead of the company. But if the conductor so treated the plaintiff as to be liable to punitive damages, were the action against him, still under the rule which prevails in this state, established in *Craker v. Railway Co.*, 36 Wis. 657; *Bass v. Same*, 42 Wis. 654, 24 Am. Rep. 437, and other cases, the defendant company is not so liable, for the reason that there is no testimony tending to show any ratification by it of the acts of the conductor. Under the above cases, had the company retained the conductor in its employ after having been fully informed of his conduct, as the plaintiff claims, and the jury found it to have been, that would have been a ratification of his conduct which would subject the company to liability for punitive damages."

38—*Illinois Central Ry. Co. v. Houchins*, 28 Ky. Law 499, 89 S. W. 530.

"As to whether there was enough in the evidence to warrant the awarding of punitive damages the court is equally divided. But when an instruction is given as to punitive damages the court should clearly tell the jury that the giving of punitive damages is a matter of discretion, and in this case the court should tell the jury that if they be-

lieve, from the evidence, that the collision was caused by the gross negligence of the railroad company or its servants in charge of the engine, then, in addition to compensatory damages, if any, the jury may or may not, in its discretion, award the plaintiff punitive damages in such sum as, under all the evidence, they deem right, not exceeding, however, \$15,000.00, the amount claimed in the petition."

39—*Harris Lumber Co. v. Morris*, 80 Ark. 260, 96 S. W. 1067.

"This instruction was improper and should not have been given. The evidence does not, in the first place, disclose any elements calling for the imposition of punitive damages. In the next place, it was error to say that gross negligence alone is sufficient, without any element of wilfulness, wantonness, or conscious indifference to consequences from which malice may be inferred, to justify the infliction of punitive damages. *Arkansas & La. Ry. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18; *St. Louis, I. M. & S. Railway v. Hall*, 53 Ark. 7, 13 S. W. 138. It was also erroneous, a fortiori, in declaring that the defendant would be liable for punitive damages if it was guilty of negligence in assigning plaintiff to work in a place which by the exercise of ordinary care it could have known was dangerous."

40—*Ind. St. Ry. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936 (938).

"We are referred to no authority in support of this statement of the law, nor have we been able to discover any. The question was not



(b) The court instructs the jury that the husband is entitled to the society, health and usefulness of the wife, unimpaired by injury as the result of the negligence of another, and that the law does not furnish us any exact standard by which to measure the value of the wife's society. Therefore in the case now on trial the matter of the value of the society of Mrs. F. to her husband, the plaintiff, must be left to the enlightened judgment of the jury. By the term "society," as is here used, is meant such capacity for usefulness, aid and comfort as the wife possessed at the time of the injury.<sup>41</sup>

§ 3588. **Action by Husband and Wife for Personal Injuries to Wife—Action by Wife.** (a) If you find for the plaintiffs, then you will determine from the evidence the amount the plaintiffs are entitled to recover, not exceeding, however, the amount demanded in the complaint; and, in estimating the damages, if any are proved, you should take into consideration the injury inflicted upon the plaintiff X.; the pain and suffering undergone by her in consequence of her injuries, if any are proved; and also any permanent injury sustained by her, if the jury believe from the evidence that the said plaintiff has sustained permanent injury from the wrongful acts complained of; and also the expense of medical attendance, if any, and for loss of time occasioned by said injuries, if any is shown by the evidence.<sup>42</sup>

(b) And in assessing the plaintiff's damages, if a permanent injury has been proven from the evidence, the jury may take into consideration the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question which renders the plaintiff less capable of attending to her ordinary duties than she would have been if the injury had not been received.<sup>43</sup>

how much the husband had realized and accumulated in the past from the services of his wife, but what were the services of the wife to the husband reasonably worth? The appellee may not have realized and accumulated anything in the past from the services of his wife, and yet those services may have been most valuable. It was for the jury to determine from the evidence what the value was, irrespective of the actual amount 'realized and accumulated in the past in excess of the cost of her support.'"

41—*Freeman v. Metropolitan St. Ry. Co.*, 95 Mo. 94, 68 S. W. 1057 (1060).

"But instructions of this character are only applicable where the injury complained of is not in dispute. In *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. 516, it was held that, where the evidence as to the injury is conflicting, such an instruction assumes that as true which is in dispute, and therefore is improper."

42—*Ohio & M. Ry. Co. v. Crosby*, 107 Ind. 32, 7 N. E. 373.

"This instruction proceeded upon the erroneous assumption that the jury were authorized to include in

their assessment the damages recoverable by the husband, as well as those which the wife might recover for her separate use. This was a fatal error. Presumptively the husband was entitled to maintain a separate action to recover for medical attendance, loss of service, and of the society of his wife. He could not recover for these in an action in which his wife was suing for injuries to her person, nor could such damages be recovered by them jointly. It was equally impossible, as the complaint was framed, for the wife to recover for medical attendance, or loss of time. Her right was limited to recover for the injuries to her person, including pain, anguish of mind, and all such other damages as were not presumptively injuries to the husband. *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Fuller v. Railroad Co.*, 21 Conn. 557; *Baltimore, etc., Ry. Co. v. Kemp*, 61 Md. 74, 48 Am. Rep. 134; *Cregin v. Railroad Co.*, 75 N. Y. 192, 31 Am. Rep. 459, 2 Woods, Rys. 1245."

43—*Hall v. Manson*, 90 Ia. 585, 58 N. W. 881 (883).

"The evidence is that plaintiff is a married woman; that as such her duties are that of a wife keeping

(c) The court instructs the jury, that if they find a verdict for the plaintiff, in estimating the damages, they are to consider the health and condition of the plaintiff before the injuries complained of, as compared with her present condition, in consequence of said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable her in engaging in those household pursuits and employments for which, in the absence of such injury, she would be qualified, and also the physical and mental suffering to which she was subjected by reason of said injury, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which she has sustained.<sup>44</sup>

§ 3589. **Pregnancy Preventing Proper Medical Treatment of Injuries.** If the jury find from the evidence that the injuries, sufferings, or disability of the plaintiff were increased or rendered permanent by any want of such ordinary care on her part, or by reason of her becoming pregnant after the accident, and such pregnancy prevented proper medical treatment of her injuries, and such want of treatment resulted in increased prolongation or permanency of her injuries, sufferings, or disability, which would not otherwise have resulted, she cannot recover from the defendant for any increased prolongation or permanency of her injuries, suffering or disability resulting from such want of care, if you find there was such want of care, or from such pregnancy, if you find there was such pregnancy.<sup>45</sup>

house for her husband. Being such, and not engaged in business on her own account, recovery for loss of her services could be had only by the husband. It is said in *Van Doran v. Marden*, 48 Iowa 188: 'We know of no legislation which changes the relations of husband and wife so as to give the headship of the family in any case to the wife. He is still bound for her support and entitled to her earnings, when she is not engaged in business on her own account.' In *Tuttle v. Railway Co.*, 42 Ia. 521, the court said: 'The plaintiff in the case before us was engaged in no other than domestic service as the maternal head of the husband's family. Whatever time she lost or would lose would have been devoted to this employment, and the loss was her husband's, for which she had no right to recover. If we admit her right to recover, defendant would be twice liable, for assuredly, under the rules of law, the husband may recover for such losses as were sustained by her.' In *Fleming v. Town of Shenandoah*, 67 Ia. 508, 25 N. W. 752, 56 Am. Rep. 354, it is said: 'She cannot recover for loss of time occasioned by an injury, if her occupation is that of a mere housewife in the family of a husband.' See, also, *Mewhirter v. Hatten*, 42 Ia. 288, 20 Am. Rep. 618; *Grant v. Green*, 41 Ia. 88; *Lyle v. Gray*, 47 Ia. 153; *Nichols v. Railway Co.*, 68 Ia. 736, 28 N. W. 44. Under the rule as laid down in the above cases it is clear that plaintiff could not recover damages by reason of having by the in-

jury been rendered less capable of attending to her ordinary duties as a housewife. As for loss of her services the husband alone could recover, so for a partial loss of such services, resulting from her impaired ability by reason of the injury, he only can recover."

44—*Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311 (315, 316).

"We can not approve of this instruction. The health and physical condition of the plaintiff before her injury, if any; her health and physical condition since the time of the alleged injuries; whether she received injuries as alleged, and, if so, what effect, if any, they had on her; and whether, if she was injured as alleged, she experienced physical and mental suffering as direct results of the injuries, are all questions to be determined by the jury from the evidence; but the instruction seems to assume that her present condition is a consequence of the injury, that the injury is calculated, to some extent at least, to incapacitate her for her ordinary household pursuits and employments, and that she did endure some physical and mental suffering by reason of the injury. The words 'to consider the health and condition of the plaintiff before the injuries complained of, as compared with her present condition in consequence of said injury,' seems to assume that she suffered all the injuries complained of."

45—*Salladay v. Town of Dodgeville*, 85 Wis. 318, 55 N. W. 696 (698, 700). 20 L. R. A. 541.

"The instruction asked by defend-

§ 3590. **Injury to Minor—Elements of Damage—Double Damages—Earnings of Minor.** (a) If you find for the plaintiff, N. A., then you will find for the plaintiff as next friend for the minor child, N. A., for her use and benefit, whatever sum of money in your judgment will compensate her for the physical pain, suffering, mental anguish, discomfort, annoyance, and mortification, if any, already suffered by her by reason of said injuries, if any, and which she may in future suffer, if any, and for general impairment of her ability to follow the interest and pursuits of other girls, if any, together with her general impairment of ability to enjoy life, if any, and for her decreased capacity, if any, to fill the place and perform the services and duties after her majority she would have been competent to perform but for the injuries sustained by her, if any, which sum in no event to exceed the sum of twenty-five thousand dollars.<sup>46</sup>

(b) If the jury believe from the evidence in this cause that the plaintiff is entitled to a verdict under the evidence in this cause, they cannot find a verdict for plaintiff's intestate did not consume all his earnings in his own support.<sup>47</sup>

ant was properly refused. The doing of any act which prevented or retarded her recovery is not of itself a ground for reduction of damages. To have that effect it must have been a negligent act, and whether an act is or is not negligent is a question for the jury, and not of law for the court, if different minds may properly draw different inferences, even from the same established facts. The instructions asked entirely ignored this material consideration, whether the plaintiff was negligent or at fault for what occurred after her injury."

46—*Houston E. & W. T. Ry. Co. v. Adams*, — Tex. Civ. App. —, 98 S. W. 222.

"The point that it is misleading in that it allows double damages is we think well taken. While we think it extremely doubtful whether a jury of average intelligence is ever in fact misled by such charges it seems to be well established that such charges require a reversal where the amount of the verdict is issuable on the record. *Houston City St. Railway v. Reichart*, 87 Tex. 546, 29 S. W. 1040; *International & G. N. Ry. Co. v. Butcher*, 84 S. W. 1052, 12 Tex. Ct. Rep. 115; *Galveston, H. & S. A. Ry. Co. v. Perry*, 82 S. W. 343, 10 Tex. Ct. Rep. 669; *Missouri, K. & T. Ry. Co. v. Nesbit*, 88 S. W. 891, 13 Tex. Ct. Rep. 656; *Missouri, K. & T. Ry. Co. v. Hanning*, 91 Tex. 349, 43 S. W. 508; *St. Louis, S. W. Ry. Co. v. Highnote*, — Tex. Civ. App. —, 74 S. W. 920; *Texas Cent. Ry. Co. v. Brock*, 88 Tex. 310, 31 S. W. 500. We call attention also to the fact that the mention in the charge of the amount claimed in the petition has been generally condemned as tending to impress the jury that in the opinion of the judge such a sum might be awarded under the evidence. *Newman v. Dodson*, 61 Tex.

98; *Brunswick v. White*, 70 Tex. 512, 8 S. W. 85. For reasons given in the cases cited, it is not reversible error in this cause."

47—*Tutwiler Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 336, 30 So. 600 (604).

"The father is entitled to the earnings of his minor child, unless the child has been emancipated by him. There is no evidence to show whether the intestate had a father or not, or that he had ever been emancipated. The presumption, in the absence of proof, is, that an infant has a father; and, because it is in the natural and usual order of things, it is to be presumed that the father supports him, and in turn receives and appropriates his earnings. The recovery under the statute is for the probable value of intestate's estate, had he lived out his expectancy. If the father appropriates his minor child's earnings, and he has the right to do it, it would follow that the earnings of the child during minority could not be considered in estimating the probable value of his estate. *Ala. C. Coal & Coke Co. v. Pitts*, 98 Ala. 285, 13 So. 135. His earning capacity, however, during minority is competent evidence to show what his earnings would have been, had he lived to and beyond maturity. As pertinent to this inquiry, it has been held 'That the jury may have proper data from which a pecuniary compensation may be fixed, it is proper to admit evidence of age, probable duration of life, habits of industry, means, business, earnings and perhaps other facts.' *C. & N. Railroad Co. v. Orr*, 91 Ala. 548, 8 So. 360; *James v. Richmond & D. Railroad Co.*, 92 Ala. 231, 9 So. 335; *McAdory v. L. & N. Railroad Co.*, 94 Ala. 272, 10 So. 507. Moreover, the evidence shows that the intestate left distributees of his



§ 3591. **Injury to Passenger—Future Injury Which is Reasonably Certain to Accrue.** It is admitted by the pleadings that on the — day of —, —, the defendant received plaintiff as a passenger on one of its trains, and agreed to carry him from C., Ky., to P. V., Ky., both of said places being regular stations on the line of defendant's road; and if the jury believe from the evidence that the defendant by its agents and employes, cried out: "All off for P. V.," as said train was slowing up for said station, and that plaintiff then immediately left the car in which he was riding, as soon as the train stopped, and immediately proceeded to go down the steps leading from said car to the place where passengers usually alight at said point, but that before plaintiff had reasonable time to get off said steps, the defendant, by its agents and employes, carelessly and negligently caused said train to start forward with a jerk, and that said forward movement of the train threw plaintiff forward and off of said steps to the ground, whereby he was injured, they ought to find for the plaintiff in damages in such sum as will reasonably compensate him for his physical and mental suffering, if any, and loss of time, if any, and all such further injury, if any, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of said injury; and if the jury further believe from all the evidence that said injury was the result of gross carelessness and negligence on the part of the defendant they may in addition to such compensatory damages as above indicated award, in their discretion, punitive damages, not exceeding in all \$——, the amount claimed in plaintiff's petition.<sup>48</sup>

estate. As it has been said, it was not shown that he had no father, and it is shown that his mother was alive, each of whom on death was entitled to equal distribution in his estate. It is only when the intestate has no distributees that nominal damages could be given. *James v. R. & D. Railroad Co.*, 92 Ala. 231, 9 So. 335. Charge 13 was properly refused, and the same thing may be said of 14. The mother of deceased testified that he sometimes drew his money and sometimes she drew it for him, and that when he drew it he always brought and turned it over to her."

48—*Louisville & N. Co. v. Mason*, 24 Ky. Law 1623, 72 S. W. 27 (28).

"It authorizes the jury to compensate appellee for all such further injury, temporary or permanent, which they may believe, from all the evidence, has accrued, or is reasonably certain to accrue as the direct result of said injury. What other injury? What standard or measure is here given to the jury? No limitation is placed upon their imagination or conjecture. At best, it has been found extremely difficult, if not impossible, to accurately measure damages in such cases, under the most carefully guarded legal limitations. The jury should be limited in assessing damages for personal injuries, not resulting in death, independent of punitive dam-

ages, to compensation, which in its legal signification, consists of remuneration for loss of time; necessary expenditures; for mental and physical suffering resulting from the injury; and for permanent disability, if such be the result, and where proper averments relative thereto are made; and the court should so inform the jury, instead of leaving to them to determine the legal import of the true damages sustained by the plaintiff. *Parker v. Jenkins*, 3 Bush. 591.

"The permanent disability referred to is a permanent reduction of appellee's power to earn money, resulting from an injury caused by the negligent act of appellant in question. *Muldraugh's Hill, C. & C. T. P. Co. v. Maupin*, 79 Ky. 105; *L. & N. R. Co. v. Case's Adm'r*, 9 Bush. 736. It was shown in this case that appellee was a man of middle age, and there was some evidence that for some years he had been of infirm health, and that he had frequently complained that he was unable to do more than a half day's or half a man's work. It was not proper, therefore, for the jury to have considered the injury sued for, assuming him to have been a robust person, sound in health; but they should have been told that, in estimating the amount of damages, they should take into consideration the age and situation of the plaintiff, and his

§ 3592. **Master and Servant—Injury to Employee, a Child.** If in this case you believe from the evidence that the defendant failed to instruct the child as to the danger surrounding the work where it was employed, and that by reason of that failure to instruct the child, the child was injured, then it will be your duty to give the child such amount of damages as you feel it is entitled to, not exceeding the amount prayed for in the complaint.<sup>49</sup>

§ 3593. **Fault about Half and Half, One about as much at Fault as the Other.** If the fault was about half and half—one about as much at fault as the other—the jury so thought—you would have the right to give the plaintiff half damages.<sup>50</sup>

§ 3594. **Contributory Negligence—Compensatory Damages.** If the jury believe from the evidence that on the occasion in controversy plaintiff was injured, and that his injury was the direct and natural result of the gross negligence of defendant's agent and servants in charge of train No. 56, they should find for him such compensatory damages as will fairly and reasonably compensate him for such injuries, not to exceed \$20,000, unless they further believe from the evidence that in receiving his injuries plaintiff was himself negligent, and that his said negligence, if any, so far contributed to his injuries that he would not have been hurt but for his own negligence, if any.<sup>51</sup>

earning capacity, in fixing the damage sustained by the want of his limb injured. *Greer v. L. & N. R. R. Co.*, 94 Ky. 177, 21 S. W. 649, 42 Am. St. 345. The phrase 'and all such further injury, if any, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of such injury' should have been omitted."

49—*Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164 (1905).

"Here again is an unnecessary departure from the plain and express rule of law governing damages. Section 3333 of the Civil Code declares: 'For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby whether it could have been anticipated or not.' The damages, therefore, permissible in such cases, is the amount in money which will compensate for all injury proximately caused thereby. To say that the jury may award such damages as they feel the plaintiff is entitled to is the equivalent of telling them that they may give play to their emotions of sympathy for the injured child, emotions which, eminently proper in themselves, can have no just place in fixing an award for actual damage. Thus the jury would be justified in departing from the express rule that the damages must be proximate, and would be permitted, under the influence of their feelings, to make an award which, based upon sympathy, would contain elements of damage, both

speculative and remote. *Erie Iron Works v. Barber*, 102 Pa. 156."

50—*Southern Ry. Co. v. Watson*, 104 Ga. 243, 30 S. E. 818 (1919).

"This charge we also think was error. In the case of *Central Railroad & B. Co. v. Newman*, 94 Ga. 560, 21 S. E. 219, which was a suit against the railroad company for killing a horse, etc., the court, among other things charged the jury (as an illustration) that 'if the damages were \$500, and they were both, in your opinion, according to the evidence, equally to blame, the plaintiff would not be entitled to recover but \$250; and if the plaintiff was three-fourths to blame and the defendant was one-fourth to blame the same proportion would hold good; or if the plaintiff was one-fifth to blame and the defendant four-fifths to blame these proportions would still be carried out.' This court on review of the charge held that it was error and said 'where the injury complained of was the result of mutual negligence by the plaintiff's (railroad's) servant and the defendant, there can be no recovery unless the servant was less in fault than the defendant.'"

51—*L. & N. R. Co. v. Hiltner*, 21 Ky. Law 1826, 56 S. W. 654 (1906).

"The instruction is more favorable to the appellant than it should have been, in so far as it required gross negligence on the part of those in charge of the passenger train to make appellant liable to appellee. If appellee was injured by reason of their negligence, appellant is liable to him, although the negligence was not gross. But the court should also have told the jury that it was

**§ 3595. Ordinary Care of Plaintiff Should Not Be Limited to the Time of the Accident—Damages.** You are instructed that if you believe from the greater weight of the evidence that the plaintiff was in the exercise of ordinary care for his own safety at the time of the injury complained of in this case and that the defendant negligently and wrongfully ran a car into his wagon in such a manner as to injure him in a manner and form as charged in the declaration or some count thereof, then the jury should find a verdict for the plaintiff and assess his damages at such a sum as you believe from the evidence will compensate him for the money he expended in being treated for such injuries, if any, and allow him such further sum as you believe from the evidence will reasonably compensate him for the suffering, if any, that he has undergone in consequence of such injury.<sup>52</sup>

**§ 3596. An Instruction on the Measure of Damages should not Assume Liability.** You are instructed that in the determination of the question as to how much you should assess the damages, you should take into consideration all the evidence, facts and circumstances in the case, and determine from such evidence what in your judgment would be a reasonable compensation, and fix the amount accordingly.<sup>53</sup>

**§ 3597. Instructions Open to Construction of Double Damages.** (a) If you find for plaintiff, then you will find from the evidence in his favor that sum of money which will be a fair and just compensation for injuries to his hearing, if any, injuries to his stomach, or intestines, if any, causing rupture, if any; for his reasonable expenses of medicine, if any, and doctor's bills, if any; for loss of time, if any; pain and suffering, if any—not to exceed the amounts claimed for these several items up to this time. And if you further find from the evidence that these injuries, if any, are continuing and permanent, you will find that sum of money which, if now paid, would be a fair and just compensation therefor.<sup>54</sup>

the duty of those in charge of this train, if they stopped at Moore's longer than three minutes, to send back a flagman a sufficient distance to warn the following train of the danger, but that if the train did not remain standing there as much as three minutes they were not required to do this, and there was no negligence on their part."

52—Central Ry. Co. v. Sehnert, 115 Ill. App. 560 (564).

"The objection to this instruction is, that it limits the duty of appellee to exercise due care for his own safety to 'the time of the injury.' Standing alone this instruction would be erroneous and require a reversal of the case under the ruling of the Supreme Court in Chi., M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248, 23 N. E. 1028, and No. C. St. R. R. Co. v. Cossar, 203 Ill. 608, 68 N. E. 88, \* \* \* but the omitted qualification or needed element in this instruction is supplied by other instructions in the series which fully advise the jury that appellee was required to exercise reasonable care in attempt-

ing to cross the street, so that reading the instructions as a whole they correctly state the law and are not misleading. Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; T., M. & N. Ry. Co. v. Haws, 194 Ill. 92, 62 N. E. 312."

53—Dolbear v. Coultas, 94 Ill. App. 55 (56).

"This instruction is vicious, because it assumes that the plaintiff has made out his case, and that the only question left to the consideration of the jury was the assessment of damages."

54—International & G. N. R. Co. v. Tisdale, 36 Tex. Civ. App. 174, 81 S. W. 347.

"Appellant's contention is that this charge authorizes the recovery of double damages. We are inclined to think that that part of said charge which instructs the jury to find for plaintiff 'that sum of money which will be a fair and just compensation for injuries to his hearing, if any, injuries to his stomach or intestines, if any, causing rupture, if any, \* \* \* And if you further find from the



(b) If you find for the plaintiff, you will say so by your verdict, and assess the damages at such sum as, from all the evidence, will, in your sound judgment, fairly compensate the plaintiff for impairment of his general health, and for the physical injuries he suffered, and for such physical and mental suffering as resulted therefrom, and for the expenses for which he has become liable for medical treatment, and for the reduction and impairment of his ability to earn a living in the future, if such injuries to his general health and such expenses and such impairment and reduction in his ability you find he has suffered.<sup>55</sup>

(c) If, under the evidence and the foregoing instructions, you believe that the plaintiff ought to recover, you will find for him, and include in the sum of his damages whatever you believe the evidence shows he has lost in being rendered unable to work, or less able to work, by the injury; also what he has had to pay out for medicines and doctors' bills by reason of the injury, not to exceed a reasonable and fair amount therefor; also what you may deem reasonable, fair and just pecuniary compensation for the bodily injuries, disabilities, pains and suffering and distress of mind caused by the accident of his fall.<sup>56</sup>

**§ 3598. Instructions should not Assume any Damage on Which There is no Proof.** (a) The court instructs the jury that in estimating the damages which the plaintiff may have sustained by reason of the injury complained of, the jury, if they find for the plaintiff are not confined to such damages as may have resulted to

evidence that these injuries, if any, are continuing and permanent, you will find that sum of money which, if now paid, would be a fair and just compensation therefor—is subject to the criticism of appellant, and hence should not have been given. *St. Louis, S. W. R. Co. v. Smith*, 2 Tex. Ct. Rep. 823, 63 S. W. 1064-1067, and authorities there cited."

<sup>55</sup>—*Galveston, H. & S. A. Ry. Co. v. Perry*, 36 Tex. Civ. App. 414, 82 S. W. 343 (345).

"The objections urged are that it allows double damages, and fails to confine the recovery for medical expenses to such as were reasonable. We are of opinion both objections are valid. The first is directly sustained by the case of *Mo. K. & T. Railway v. Hannig*, 91 Tex. 347, 43 S. W. 508. The force of the second objection is sought to be avoided on the ground that only one witness spoke as to the amount of medical expenses and he testified they were reasonable. The witness' estimate was 'five or six hundred dollars.' As he did not choose between the two sums, the choice as to what sum was reasonable was for the jury. We are unable to say what sum they awarded for this item. In this state of the evidence the error cannot be said to be harmless."

<sup>56</sup>—*St. Louis S. W. Ry. Co. v. Highnote*, — Tex. Civ. App. —, 74 S. W. 920.

"This charge, in our opinion, authorizes a double recovery. All the damages resulting to appellee flowed from his bodily injuries and disabilities caused by his fall. To include what the 'evidence shows he has lost in being rendered unable to work, or less able to work, by the injury,' applies only to the damages sustained for the loss of time, etc., up to the time of trial; and, had the court limited the recovery to damages that might accrue thereafter from the injuries, a correct measure would have been given. This was not done, however, but the effect of the court's charge is that, in addition to the damages that had accrued to the trial, plaintiff was entitled to reasonable, fair and just compensation for bodily injuries, disabilities, etc. This last part of the charge is sufficiently broad to cover all the damages sustained, and necessarily included the damages that accrued before the trial as well as those that might subsequently accrue. The charge, being capable of this construction, was calculated to mislead the jury, and cause them to make a double assessment. Whether this was done or not, we cannot tell from the record; hence a reversal is rendered necessary. *Mo. K. & T. Railway Co. v. Hennig*, 91 Tex. 347, 43 S. W. 508; *St. Louis S. W. Ry. Co. v. Smith*, 2 Tex. Ct. Rep. 823, 63 S. W. 1064; *Houston City St. Ry. Co. v. Richart*, 87 Tex. 539, 29 S. W. 1040."

the plaintiff by loss of time or medical attendance, but may give such additional damages, for the loss of the natural use of plaintiff's arm, if anything, the pain and suffering, mental anguish, which the jury, exercising sound discretion under the evidence, may deem a just compensation for the injuries received.<sup>57</sup>

(b) If you believe from the evidence in this case that the agents and employes of defendant failed to exercise the highest degree of care to prevent accident or injury to plaintiff at the time and place alleged in plaintiff's petition, and that plaintiff's injuries, if any, were the approximate result of such failure, then you will find for the plaintiff damages in the sum of what you may believe from the evidence will reasonably and fairly compensate plaintiff for her physical suffering, if any; for loss of time, if any, which she may sustain in the future by reason of said injuries, if any; also for all reasonable and necessary expenses incurred by plaintiff for medical attention, if any, and for medicines, if any.<sup>58</sup>

(c) If under the evidence and instructions of the court the jury find the defendant guilty, then in assessing the plaintiff's damages the jury may take into consideration not only the loss, expense and immediate damage arising from the injuries received at the time of the accident, if any, as shown by the evidence, but also the permanent loss and damage, if any is proved, arising from any disabilities necessarily and naturally resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received.<sup>59</sup>

(d) You may take into consideration what, if any, bodily pain plaintiff may have suffered by reason of such injury, mental anguish

57—C. & A. Ry. Co. v. Martin, 120 Ill. App. 254.

"The instruction assumes that the plaintiff had lost time by reason of the injury received. There is no proof in the record that he lost any time by reason of his injury or by reason of anything. The proof is that he lost no time on any account. The instruction also assumes that the plaintiff had suffered mental anguish occasioned by his injury while the record is barren of proof thereof. It also assumes that the plaintiff had lost, entirely lost, the natural use of his arm. There is proof tending to show that the natural use of his arm had become impaired, and there is evidence tending to prove to the contrary, but there is no proof that there was entire loss of it. These are all questions of fact to be determined by the jury from the evidence and from the evidence alone. They are not matters to be determined or assumed by the court."

58—Northern Texas Traction Co. v. Jamison, — Tex. Civ. App. —, 85 S. W. 305.

"It is pointed out by appellant under these assignments that appellee in her pleadings did not claim expenses for medicines, nor did she prove that there had been any such

expenses incurred. We find these contentions to be correct. It is uniformly held to be the law, in this state at least, that a trial court commits error when he submits to the jury an issue not raised both by the pleadings and the evidence. *Dodd v. Arnold*, 28 Tex. 97; *Loving v. Dixon*, 56 Tex. 75; *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717; *Missouri Pac. Ry. Co. v. Lyde*, 57 Tex. 505; *Galveston, H. & S. A. Ry. Co. v. Silegman*, — Tex. Civ. App. —, 23 S. W. 298; *Houston & Tex. Cent. Ry. Co. v. Tierney*, 72 Tex. 312, 12 S. W. 586; *Atchison T. & S. F. Ry. Co. v. Click*, 5 Tex. Civ. App. 224, 23 S. W. 833; *Houston & Tex. Cent. Ry. Co. v. Kimbell*, — Tex. Civ. App. —, 43 S. W. 1049."

59—*Cicero & P. St. Ry. Co. v. Richter*, 85 Ill. App. 591.

"The above instruction is, in our opinion, erroneous when considered with reference to the evidence in the case. Among other items of damages which the instruction allows the jury to consider is that of 'permanent loss and damage' to the plaintiff arising from any disabilities necessarily and naturally resulting to the plaintiff from the injury in question, etc.; there is no evidence of any permanent injury to appellee."

and distress, loss of the use of her arms and shoulder, expense for care and nursing, doctor's bill and damage to her buggy.<sup>60</sup>

(e) The court instructs the jury that if, from the evidence and under the instructions given you by the court, you find the defendant guilty, then in determining the amount of damages the plaintiff has sustained, if any, you may take into consideration the time lost by the plaintiff on account of the injury, if the evidence shows any, the pain and suffering endured by the plaintiff on account of the injury, if the evidence shows any, the permanency of the injury to the plaintiff, if shown by the evidence, and award him such sum in damages as you think will fully compensate him for the injury sustained.<sup>61</sup>

(f) In estimating the plaintiff's damages, if the jury find for the plaintiff, it is proper for the jury to estimate the effect of the injury in future upon the plaintiff's health, if any, as well as the effect it has had upon him already, and the bodily pain and suffering, if any, endured by him, including the necessary expenses and all damages, present and prospective, which can be treated as a necessary result of the injury, if any, inflicted by the defendant upon the plaintiff.<sup>62</sup>

60—Hobbs v. City of Marion, 123 Ia. 726, 99 N. W. 577.

"It is objected to this that there is no evidence as to the expense incurred for care or nursing, nor of the value of the care or nursing given to the plaintiff, nor of the amount of the damage to the buggy; and that in the absence of such evidence the jury should not have been permitted to place its own estimate upon these items. An examination of the record forces us to the conclusion that this objection is well taken. While the evidence does tend to show that the buggy was injured, and that plaintiff did receive the care and attention which her unfortunate condition required, we find nothing to show the value of such services or the amount of such damages. The jury may and indeed must be left to place its own estimate upon damages of pain and suffering, for they are not measurable by the test of market values; but the value of services and the amount of damages to property are matters concerning which under ordinary circumstances direct and competent evidence is available, and without it they should not go to jury. *Muldowney v. R. R. Co.*, 36 Ia. 462; *Trapnell v. Red Oak*, 76 Ia. 744, 39 N. W. 884; *Nichols v. R. R. Co.*, 68 Ia. 732, 28 N. W. 44; *White v. Spangler*, 68 Ia. 222, 26 N. W. 85; *Eckerd v. R. R. Co.*, 70 Ia. 353, 30 N. W. 615; *Winter v. R. R. Co.*, 74 Ia. 448, 38 N. W. 154. Under the rule established by these cases we think the giving of the instruction was prejudicial error."

61—City of Elgin v. Nofs, 96 Ill. App. 291 (294).

"Such instruction ought not to have been given. While it is true that it is not necessary to repeat in every clause of an instruction 'that the jury may find from the evidence,'

this instruction, although reminding the jury that their finding must be from the evidence and under the instructions given by the court, tells the jury that in determining the amount of damages they may consider certain things if the evidence so shows, and that having so done may award the plaintiff such a sum in damages as they think will fully compensate him for the injuries sustained. As the jury had not heard any testimony as to what sum the damage sustained by the plaintiff amounted to, they might well, under such instruction, think that in arriving at the sum to be awarded the plaintiff, they would be controlled not so much by the evidence as by what sum upon general principles they thought would fully compensate him for the injuries. Nor should the phrases 'fully compensate' or 'barely compensate' be made us of in an instruction as to damages. The instruction should not have been given. *C. C. C. & St. Louis Ry. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 66 Am. St. 296; *Illinois Central Ry. Co. v. Farrell*, 86 Ill. App. 436; *City of Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Chicago R. I. & P. R. R. Co. v. Austin*, Admnx., 69 Ill. 426; *Norris v. Warner*, 59 Ill. App. 300."

62—N. C. St. R. R. Co. v. Cook, 145 Ill. 551 (555), 33 N. E. 958.

"The objection is that the jury are allowed, in case they find for appellee, to award him damage for 'necessary expenses' in and about being healed, etc. The evidence showed that appellee had an arm broken and was otherwise injured; that a physician attended him in setting the bone of the arm, for which he was paid, and also that another physician attended him during his illness following the injury, but



(g) If the jury find for the plaintiff, they should award such damages, if any, as the proof shows he has sustained. In estimating the amount of damage, the jury should take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, and his bodily suffering and mental anguish, and the extent to which he is disabled in making a support for himself by reason of the injuries received; and the jury, in addition to such compensatory damages, may award punitive damages, not exceeding, in all, \$25,000.<sup>63</sup>

§ 3599. **Damages Must be Found from the Evidence.** (a) If you find for the plaintiff, you will assess her damages in any amount you may deem proper, not exceeding \$—, and in estimating such damages you may consider the physical and mental pain she has suffered and may continue to suffer. You may also consider the extent of plaintiff's injury, and if you find that the use of one of her legs is impaired, you may also consider the fact that she is deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of the free use of all the members of the body. You may further consider the impairment of her ability, either past or future, to perform her household duties, and the expense she has incurred for physician's services, and allow such damages as will reasonably and justly compensate the plaintiff for her injuries.<sup>64</sup>

(b) In the event you find for the plaintiff, it will be your duty to assess such damages in favor of plaintiff as will fully compensate her for such injuries as she received by reason of the facts alleged in the complaint. In determining the amount of such damages, it will be proper for you to consider the physical condition of plaintiff

there is no evidence as to the amount paid or what would be a reasonable charge for the services rendered. We are of the opinion that it was error to give the instruction in the absence of all proof tending to show the approximate amount or value of such services. *Shear. & Red. on Negligence*, 759; *Reed v. Railroad Co.*, 57 Ia. 23, 10 N. W. 285; *Duke v. Railroad Co.*, 99 Mo. 347, 12 S. W. 636; *Eckerd v. Railroad Co.*, 70 Ia. 353, 30 N. W. 615; *Illinois Central R. Co. v. Frelka*, 9 Ill. App. 605; *Joliet v. Henry*, 11 Ill. App. 154; *C. B. & Q. R. R. Co. v. Hale*, 83 Ill. 360, 25 Am. Rep. 403."

63—*L. & N. R. Co. v. Hall*, 24 Ky. Law R. 2487, 74 S. W. 280 (282).

"This court has frequently announced, in actions for personal injuries where death does not ensue, that compensatory damages were confined to the expense of cure, value of time lost, and fair compensation for physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money. See *Parker v. Jenkins*, 66 Ky. 587; *L. C. & L. R. Co. v. Case's Admr.*, 72 Ky. 736; *Central P. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; *Carson v. Singleton*, 23 Ky. Law 1626, 65 S. W. 821. The instruction is erroneous in that it does not confine the jury to the

consideration of these elements of damage. It is also erroneous in telling them that they should take into consideration the situation of the plaintiff, and in authorizing punitive damages,—both for the reason that the jury are not required to find, as a condition precedent to awarding such damages, that the acts of the defendant which are complained of amounted to gross negligence, and for the reason that the proof discloses no ground for the recovery of punitive damages at all."

64—*Town of Sellersburg v. Ford*, —Ind. App. —, 79 N. E. 220 (222).

"Appellant cites *Chicago, etc. R. Co. v. Thrasher*, 35 Ind. App. 58, 73 N. E. 829. In a subsequent instruction the court said: 'In arriving at a verdict in this case, you are to do so on the whole evidence and testimony in the case.' In the case above referred to, the court held the instruction erroneous, because there was nowhere in the instruction any express reference to what the jury might find from the evidence. The court said: 'There was no other instruction relating to the assessment of damages,' so that, standing alone, it was erroneous. So too, in this case, the instruction alone would be erroneous, but all the instructions must be considered."

both before and since the collision, mentioned in the complaint, the physical suffering and mental anguish experienced, if any, by reason of such injuries, the reduction of the power of plaintiff to perform labor by reason of such injuries and all of the facts and circumstances proven in the case.<sup>65</sup>

(c) If the jury find from the evidence in the cause that the defendant, in raising its railroad track at the crossing in question, left the south approach to said crossing in such defective, dangerous and hazardous condition as to render travel with wagons and horses thereover unsafe and hazardous, and that in consequence thereof the plaintiff, while passing over the south approach of said crossing in his wagon, was violently thrown therefrom to the ground, and his ear greatly lacerated and almost severed, and otherwise injured, then the jury will find for the plaintiff, and assess his damages at such sum as they may think he has sustained, not exceeding \$2,500.<sup>66</sup>

**§ 3600. Form of Verdict—Damages Must be Based on Evidence.** The form of your verdict which is given you gentlemen, is this: We, the jury, find the defendant guilty, and assess the plaintiff's damages at the sum of \$———. Whatever amount you think should be awarded you will write in there, and each of you will sign your names to the verdict. Retire with the bailiff and consider your verdict.<sup>67</sup>

65—Broadstreet v. Hall, 32 Ind. App. 122, 69 N. E. 415 (417).

"It is this clause 'and all of the facts and circumstances proven in the case' to which objection is made. If appellee was entitled to recover anything, it was only such damages as were occasioned by the accident resulting in her injury. She was not entitled to recover any punitive damages. \* \* \* The instruction under consideration as applied to all the facts which the court permitted appellee to prove was erroneous. It is not the province of the jury to determine the amount of recovery 'from all the facts,' but only from such facts as form proper elements for consideration in computing damages. The reason of this is self-evident. If evidence comes to the jury which has no bearing whatever upon the question of damages, and they are told that in the determination of that question they are to consider such evidence, or in the language of the instruction 'all the other evidence and circumstances proven in the case,' they have presented to them an incorrect basis from which to fix the amount of recovery. \* \* \* See City of Delphi v. Lowery, adm'x., 74 Ind. 520, 39 Am. Rep. 98."

66—Camp v. Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96.

"What are the proper elements of damage in an action of this kind is a question of law, concerning which it is the duty of a court to instruct the jury correctly, if at all. Haysler v. Owen, 61 Mo. 270; Morrison v. Yancey, 23 Mo. App. 670; Wilburn v. Railway Co., 36 Mo. App. 203. Mere

vagueness of instruction on this point has been tolerated sometimes, but appellate courts steadily set their faces against the practice of issuing a 'roving commission' to juries to establish their own standards of damages in place of those defined by the rules of law. A commission to 'think' the damages is truly boundless, Lake Shore & M. So. Ry. Co. v. May, 33 Ill. App. 366.

"The worst form adopted by the court in the case at bar in dealing with this subject was that followed in the above instruction, which told the jury to assess such damages for plaintiff 'as they may think he has sustained, not exceeding \$2,500' (the amount claimed in the petition). The direction just quoted left the jury entirely at sea concerning the proper elements of recovery. Nothing in other instructions can fairly be said to have cured, or even qualified, the language just mentioned. That such a mode of instruction is objectionable, and constitutes reversible error, where injurious results follow, is too clear for argument, in view of the Missouri authorities. Stephens v. Railroad Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. 336; Flynt v. Railway Co., 38 Mo. App. 94; Badgley v. City of St. Louis, 149 Mo. 122, 50 S. W. 817."

67—Chgo. & Milwaukee Elec. Ry. Co. v. Krempel, 116 Ill. App. 253 (259).

"The jury should not have been instructed to return a verdict of guilty. They were sworn, and properly so, only to assess plaintiff's damages. The verdict of guilty has no proper place in the assessment of

§ 3601. **Negligence—Comment of Court as to Absence of Evidence.** The plaintiff alleges in her complaint that by the injury to her left eye on April 1, 1899, she lost the sight thereof. I instruct you that there has been no evidence introduced showing that the left eye of plaintiff was in good condition before the accident thereto on April 1, 1899, or that she could see therewith prior to said date. You will not, therefore, in estimating damages, if you find for the plaintiff, take into consideration the matter of the loss of the sight of said eye.<sup>68</sup>

§ 3602. **Measure of Damages—Instructions Should Not be Argumentative.** The court instructs the jury that the burden of proof is upon the plaintiff to show that his condition at the present time is the result of the accident, and, if you believe from the testimony and all the circumstances proven in the case, that very little, if any, of the injuries complained of at the present time, are the result of the accident, then in such case you will only allow the plaintiff for the actual damage sustained.<sup>69</sup>

§ 3603. **Damages Must be Restricted to Allegations in the Declaration.** (a) The court instructs the jury that if they find the defendant guilty under the law and the evidence in this case, then in estimating plaintiff's damages you will take into consideration the pain and suffering caused by the injury to the plaintiff in body and mind, if any such appear from the evidence, and the extent and nature of the injuries received by the plaintiff, whether permanent or otherwise, if any such appear from the evidence, reasonable expenses incurred by the plaintiff in and about endeavoring to be cured of such injuries, if any such appear from the evidence, and assess such damages as the jury may believe from all the evidence before them in this case, the plaintiff has sustained or will sustain by reason of said injuries.<sup>70</sup>

damages, but it may be rejected as surplage without affecting the assessment.

"By this instruction the jury were told that they should assess plaintiff's damages at whatever amount they thought should be awarded, when the law permitted them to assess plaintiff's damages only at such a sum as the evidence warranted, or as they found from the evidence he had sustained by reasons of the injuries to his wife. It has been frequently held reversible error to give such an instruction. *Pisa v. Holy*, 114 Ill. App. 6; *Brinks Ex. Co. v. Herron*, 104 Ill. App. 269; *Waldron v. Marcier*, 82 Ill. 550.

"Such an instruction was especially harmful in this case, because the plaintiff, in order to show the consequential damages to the plaintiff resulting from the injuries to his wife, proved the injuries to her and her subsequent physical condition. This evidence tended to show that as a result of the injuries she lost the sight of one eye; that the sight of the other was much impaired; that she suffered from hysteria, and that she ought to be sent to a sanitarium devoted to nervous diseases

for at least a year. Plaintiff's right of recovery is limited to a pecuniary compensation for the loss of consortium with his wife, and the expenses he was put to by her injuries. The jury could not properly allow anything for the suffering of the wife or for the anxiety or wounded feelings of the husband. *Pa. R. R. Co. v. Goodman*, 62 Pa. S. 329."

68—"It was for the jury to determine what the evidence showed." *Van Camp Hardware & Iron Co. v. O'Brien*, 28 Ind. App. 152, 62 N. E. 464.

69—*L. E. & W. R. R. Co. v. DeLong*, 109 Ill. App. 241 (244).

"We think the instruction was properly refused for the reason it is argumentative."

70—*N. C. St. R. R. Co. v. Lehman*, 82 Ill. App. 238.

"Appellant insists that the giving of such instruction constituted error, because of the lack of any allegation in the declaration of suffering in mind, and of any evidence in the case tending to establish such mental suffering.

"There was evidence that tended to show she suffered severe pain.

"Mental pain is undoubtedly a



(b) If you believe and find from the evidence that the plaintiff has been damaged by reason of the defendant's negligence, and that he is entitled to recover damages under the instructions given in the main charge, you are further charged that he is entitled to recover damages for his physical pain and suffering, and also for his injuries, provided you believe he was so damaged and suffered any injury and pain. You are also charged that plaintiff is entitled to recover for any reasonable physician or doctor bill, if any, he incurred by reason of his injuries, and provided you believe he is entitled to recover. And you are further charged that if by reason of his injuries, he has lost his own services for any length of time, then he is entitled to recover the reasonable value of said services for the time actually lost, provided he is entitled to recover.

(c) If from the evidence, under the foregoing instructions, you find for the plaintiff, you will find for him such damages as you think he sustained thereby.<sup>71</sup>

§ 3604. **Plaintiff Having Made Out Her Case as Laid in the Declaration, Held Error, Where Jury Took, against Objection, the Declaration to the Jury Room—Damages.** (a) If the jury believe from the evidence that the plaintiff has made out her case as laid in the declaration by a preponderance of the evidence, then they should find the defendants guilty, and assess the plaintiff's damages, if any, at such sum as they believe from the evidence will fairly compensate the plaintiff for the injuries, if any, suffered by her by reason of the injury complained of, but not exceeding the amount claimed in the declaration.<sup>72</sup>

proper element of damage to be considered by a jury, when it arises directly out of and is a part of the physical suffering that is endured as the result of an injury. *C. C. Ry. Co. v. Canevin*, 72 Ill. App. 81; *C. C. Ry. Co. v. Anderson*, 80 Ill. App. 71, aff'd 182 Ill. 298, 55 N. E. 366. But we know of no authority or principle that admits of it being taken into account in estimating the compensation to be awarded to an injured person, where neither it, nor anything from which it may be directly inferred, is averred in the declaration—in other words, where the plaintiff does not lay claim to damage on account of it. Proof of it, with no averment to support the proof, does not aid the lack of averment.

"It is not enough, in this case, to say that mental pain is the direct result or concomitant of severe physical pain, and therefore need not be specially averred, for there is no averment that any bodily pain was suffered."

71—*Texas & P. Ry. Co. v. Durrett*, 24 Tex. Civ. App. 103, 58 S. W. 187.

"When the further fact is stated that the verdict and judgment are in general terms we think it will be apparent that the court in so charging committed material error, as assigned. It is well settled that a charge should not submit to the jury

elements of damage not alleged, and that a recovery must be limited to the amount and items charged. *F. W. & D. C. Railway Co. v. Measles*, 81 Tex. 474, 17 S. W. 124; *G. C. & S. F. Railway Co. v. Simonton*, 2 Tex. Civ. App. 558, 22 S. W. 285, and cases of like import. Under the charges here complained of it is clear that the jury were thus authorized, in estimating damages, to include lost time, and the injury to appellee's hearing not alleged, and to allow the full amount of the physician's bill as stated by him. We are unable to say the jury did not do so. The verdict not being itemized, we are unable to determine the amount the jury may have allowed upon these items, and the judgment therefore must be reversed, and the cause remanded."

72—*West Chicago Street Railway Co. v. Buckley*, 102 Ill. App. 314 (316), aff'd 200 Ill. 260, 65 N. E. 708.

"The three counts of the declaration were bound together. The court against the objection of the defendant allowed the jury to take the declaration to its consultation room. \* \* \* The giving of an instruction such as was here given to the jury finding that the plaintiff has made out her case as laid in the declaration has frequently been declared by the Supreme Court to be error."

(b) If you believe from the evidence that the plaintiff was injured at the time and in the manner substantially as charged and alleged in the plaintiff's petition, you will find for the plaintiff such an amount as will compensate him for his bodily pain and mental suffering by reason of such injury, and for cost of proper medical attention for his treatment, and for a sum sufficient to compensate him for his diminished ability to earn money after he becomes twenty-one years old.<sup>73</sup>

§ 3605. **Instructions for Damages Should not be too General.** (a) If the jury believe from the evidence, under the instruction of the court, that the plaintiff is entitled to recover, then in fixing the damages which he ought to recover the jury should take into consideration all the circumstances surrounding the case, so far as these are shown by the evidence, such as the circumstances attending the injury, the loss of time of the plaintiff, if any, occasioned by the injury; the pain he has suffered, if any; the business he was engaged in, if any, at the time he was injured, and the extent and duration of the injury, and give the plaintiff such damages as the jury believe from the evidence he has sustained.<sup>74</sup>

(b) If from the evidence in this case the jury believe that the plaintiff has proven, by a preponderance of testimony, the allegation in the declaration, then the verdict must be for the plaintiff, and it is not necessary to prove the exact date of the injury, nor prove by witnesses the exact amount of dollars and cents as damages, but the jury may assess such an amount as damages as from the evidence they believe plaintiff entitled to.<sup>75</sup>

73—Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869 (871).

"The practice of referring the jury to the pleading to determine for themselves what are the issues presented has been uniformly condemned by our courts, and, if the pleadings in a case in which such charge is given are so involved and technical as to render it doubtful whether the jury could clearly understand the issues presented, a charge of this kind would require a reversal. Bradshaw v. Mayfield, 24 Tex. 482; Barkly v. Tarrant County, 53 Tex. 257; Texas & N. O. Railway v. Scott, 30 Tex. Civ. App. 496, 71 S. W. 36.

"It was clearly error for the court to instruct the jury that the facts alleged in plaintiff's petition as to the manner in which he was injured established negligence on the part of appellant, and we are satisfied the trial judge did not so intend. The jury are told that: 'If they find that plaintiff was injured by defendant in the manner substantially as charged and alleged in the petition, they must find for the plaintiff.' The jury were not authorized to find for the plaintiff unless they found from the evidence that plaintiff's injury was directly caused by defendant's negligence, and the above charge was manifestly erroneous, unless it can be said as a matter of law that the facts alleged in plaintiff's petition as

to the manner in which the plaintiff was injured established negligence on the part of the defendant."

74—Chicago City Ry. Co. v. Rohe, 118 Ill. App. 322 (326).

"This court has previously expressed a disapprobation of this, or a very similar instruction in a cause like this, because of the too general language in which the elements for the jury to consider are described. Heimsoth v. Anderson, 16 Ill. App. 152; Chicago v. Gilfoil, 99 Ill. App. 88. But the Supreme Court in Chicago, R. I. & P. R. R. Co. v. Otto, 52 Ill. 416, said they found no reversible error in it, and indeed no objection to it, although in that case it was attacked. We still think its language subject to criticism, but we should not reverse this judgment for that cause."

75—Freeman Wire & Iron Co. v. Collins, 53 Ill. App. 29.

"If the instruction had told the jury that plaintiff would be entitled to recover if he had proved the material allegations of his declaration, it would have been in harmony with the holding of the Supreme Court on this question.

"Instead of this, however, the instruction to the jury that they should find for the plaintiff if he had proved the allegation of his declaration. What allegation—the first or the last? Was it that defendant was a corporation, or that it

(c) If you find for the plaintiff, you will bring in such damages as will make him whole, in dollars, as far as possible.<sup>76</sup>

(d) If the jury find for the plaintiff, they should find for her in such sum in damages, not exceeding \$20,000, as will fairly compensate the plaintiff for any injury done her by reason of her fall from said car. In estimating the injury done the plaintiff, if the jury find for the plaintiff, the jury should allow the plaintiff compensation for any pain suffered by her, mental and physical, and such further sum as will fairly compensate her for the loss of her foot.<sup>77</sup>

### CIVIL ASSAULT.

**§ 3606. Reference to Defendant's Ability to Pay.** The jury are instructed by the court that if under the evidence you find the defendants, or either of them, guilty of an assault and battery, as charged in the plaintiff's declaration, and that such assault and battery was unprovoked by the plaintiff, and was maliciously and wantonly committed on the plaintiff, and that the plaintiff suffered actual damage thereby, then the jury in fixing the amount of the plaintiff's damages are not confined to the actual damage proved, but they may give in addition thereto such exemplary or punitive damages or "smart money" as in their judgment will be just and proper as a punishment to the defendants or either of them in view of all the facts and circumstances proved on the trial; and in determining the assessment of such exemplary or punitive damages they may take into consideration the circumstances of the defendants

was engaged in making barbed wire, or that it should have supplied its employes with safe machinery, or that the plaintiff was injured, or that he had paid out money in endeavoring to be cured?

"The error might have been obviated by a few strokes of the pen, perhaps by the addition of the letter 's' to the word 'allegation.' This seems to be a slight change, and yet there is a wide difference between the meanings of the word in its singular and plural forms.

"The instruction is also erroneous in authorizing the jury to 'assess such an amount as damages as from the evidence they believe plaintiff entitled to.' The record in this case discloses no facts upon which a claim for exemplary or vindictive damages could be predicated; and yet this clause of the instruction is broad enough to cover such damages, and to allow the jury to determine what amount should be recovered without any rule to guide them in making their estimate. The measure of the recovery should have been such damages as appellee had sustained. *Keightlinger v. Egan*, 65 Ill. 235; *Waldron et al. v. Marcier*, 82 Ill. App. 550; *James et al. v. Johnson*, 12 Ill. App. 286; *Heimsoth v. Anderson*, 16 Id. 151."

<sup>76</sup>—*Guinard v. Knapp, Stout & Co. Company*, 95 Wis. 482, 70 N. W. 671 (673).

"It is impossible to know how this advice impressed the jury, nor what effect it had upon the size of the verdict. It sounds like an invitation to make free with the defendant's goods."

<sup>77</sup>—*Lexington Ry. Co. v. Herring*, 29 Ky. Law R. 794, 96 S. W. 559 (562).

Comment of the court. "In *L. & N. R. Co. v. Logsdon*, 24 Ky. L. 746, 71 S. W. 905; *South Covington & Cincinnati R. Co. v. Nelson*, 28 Ky. Law R. 287, 89 S. W. 200; *L. & N. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280, and in many other cases decided by this court, an instruction similar to the one given in this case has been disapproved, and it was held that the jury should have been instructed that, in estimating the damage plaintiff was entitled to recover, they were confined to such a sum as would fairly compensate her for the value of time lost, reasonable expense incurred, and for physical and mental suffering caused by the injury, and for any reduction of her power to earn money. In obedience to the rule announced by this court, and adhered to in many cases, defining the character of instruction that should be given in cases for personal injuries where death does not ensue, we feel constrained to reserve this judgment for the error of the lower court in giving this instruction."



or either of them as to wealth and property, so far as these appear from the evidence; that they may take into consideration also the position of the plaintiff in society, his age and pecuniary circumstances, so far as they appear in the evidence; and they may give a verdict for such a sum as, from the evidence, they think the plaintiff ought to receive and the defendants or either of them ought to pay under all the circumstances of the case.<sup>78</sup>

§ 3607. **Assessing Damages Without Proof.** The jury is further instructed that, in arriving at the compensatory damages in this case, they are not necessarily restricted to the naked pecuniary loss and injury, for besides damages for pecuniary loss and injury, the jury may allow such damages as are the direct consequence of the act complained of, for injury to the plaintiff's good repute or social position, or physical suffering, bodily pain, anguish of mind, sense of shame, humiliation and loss of honor, not exceeding \$5,000, the amount claimed in the declaration.<sup>79</sup>

§ 3608. **Assuming Facts in Issue.** Even if the jury find from the evidence that the plaintiff had no right on the premises in question, this fact of itself would not justify the defendant in using any more force than was reasonably necessary to remove the plaintiff from the premises. And if the jury find from the evidence that the injuries complained of were inflicted without any reasonable necessity therefor, or were wantonly or recklessly inflicted, then and in such case it is the duty of the jury to find the verdict in favor of the plaintiff.<sup>80</sup>

78—In *Lister v. McKee*, 79 Ill. App. 210 (213), the above instruction was held bad because there was no evidence as to how much defendant owns.

The court cited to this point *Tolledo, &c. R. R. v. Smith*, 57 Ill. 517; *Smith v. Wunderlich*, 70 Ill. 426 (437), and added:

"In the last case, and also in *Holmes v. Holmes*, 64 Ill. 294, it is held that an instruction making the damages to depend to any extent upon the ability of the defendant to pay is erroneous, citing 2 *Greenleaf on Evidence*, section 269. In a proper case, proof of a defendant's financial condition and his position in society is admissible, but merely for the purpose of characterizing and showing the extent of the injury, and as bearing on the question of what the plaintiff should receive. 2 *Greenleaf on Evidence*, 269. It is obvious

that, while a defendant might be able to pay a million dollars, the plaintiff might not be entitled to receive a thousand."

79—*Judd v. Isenhardt*, 93 Ill. App. 520 (522).

The court said: "The instruction named injury to plaintiff's good repute or social position as elements for which the jury were at liberty to allow damages, when there was no proof that her good repute or social position had suffered in the least, or that anyone except her husband had ever heard of the circumstances until she brought this suit."

80—*La Pointe v. O'Toole*, 44 Ill. App. 43 (45), condemns the above because it assumes against defendant the proposition that his plea puts in issue whether he forcibly threw plaintiff from the house in question.

## CHAPTER CXXXI.

### DAMAGES—MEASURE OF—NEGLIGENCE CAUSING DEATH.

See Approved Instructions, Chapter XLIV, Vol. I.

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| <p>§ 3309. Damages must be limited to the actual pecuniary loss sustained.</p> <p>§ 3610. Earning capacity of deceased considering the age and probable duration of his life.</p> <p>§ 3611. Jury should assess damages with reference to the pecuniary loss suffered by the wife and children—Superintendence and attention to the care of his family.</p> <p>§ 3612. Fair compensation for pecuniary loss—Must be based on the evidence.</p> <p>§ 3613. May give such damages as are proportioned to the injury resulting from death.</p> | <p>§ 3614. Expectancy of life—Mortality tables not conclusive.</p> <p>§ 3615. Judgment and discretion of jury—Probable time deceased would have lived.</p> <p>§ 3616. What the heirs would likely have received from estate.</p> <p>§ 3617. Disease causing death accelerated by personal injuries—Whether substantial damages are recoverable.</p> <p>§ 3618. Court cannot instruct jury to give punitive damages—Such damages are in the sound discretion of the jury.</p> |
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**§ 3609. Damages Must be Limited to the Actual Pecuniary Loss Sustained.** (a) The court instructs you that if you believe from the preponderance of the evidence that the deceased V. D. W. was killed in manner and form as charged in the declaration, and that the defendant was guilty of the negligence charged against him in either count of the declaration, then your verdict should be for the plaintiff, and you should assess his damages at such sum as you may believe from the evidence will compensate the loss sustained, not, however, to exceed five thousand dollars.<sup>1</sup>

(b) If you find for the plaintiff in this case, then you should assess the amount of (his) recovery at such an amount as the widow and children of the deceased has suffered by his death, and in arriving at such amount you are to consider his age, his physical vigor, his ability to earn money, and his expectancy of life as shown by the Carlisle Tables introduced in evidence; said amount not, however, to exceed the amount claimed in the petition, which is \$5,000.00.<sup>2</sup>

1—Malott v. Crow, 90 Ill. App. 628 (630).

"The instruction is not accurate as it does not confine the measure of damages to the actual pecuniary loss sustained."

2—C. R. I. & P. R. Co. v. Sizer, 1 Neb. (unof.) 32, 95 N. W. 498 (499).

"The first objection urged against the instruction is that it does not confine the jury in the assessment of

damages to pecuniary injuries. No action would lie at common law for causing the death of a human being. Wilson v. Bumstead, 12 Neb. 3, 10 N. W. 411. It follows, then, that in such cases plaintiff's recovery is limited by the provisions of the statute. The statute limits the amount of recovery to the pecuniary injury and an instruction like that just quoted is, perhaps, broader than the statute."

(c) The court instructs you that in an action such as this if the plaintiff recovers at all, the actual pecuniary loss to the next of kin is the sole measure of recovery. Every item and element of damages claimed must be shown by a preponderance of the evidence in the case, and every item and element of damages which in the judgment of the jury is not sustained by a preponderance of the evidence should be disallowed. The law does not permit the jury to base a verdict upon any mere speculative or unproved view of what might or might not happen in the future. No amount or dollar can be given by the jury that is not based upon the evidence admitted by the court; that must be based upon the evidence actually in the case and not upon statements of counsel not supported by the evidence if any such statements have been made. The law does not allow a recovery for anything whatever, for court costs, attorney's fees nor witness' fees, nor any expense of the suit or funeral nor any loss sustained by the deceased himself nor anything for doctor's bills, medicines, nursing or attendance, nor anything whatever for any mental pain or suffering of the next of kin.<sup>3</sup>

**§ 3610. Earning Capacity of Deceased, Considering the Age and Probable Duration of His Life.** (a) If the jury find for the plaintiff they will fix the damage at a fair equivalent in money for the power of deceased to earn money, lost by reason of the destruction of his life, not exceeding \$10,000; and in fixing the damages the jury will take into consideration the age of the deceased at the time of his death, his earning capacity and the probable duration of his life.<sup>4</sup>

3—*Prendergast v. Chicago City Ry. Co.*, 114 Ill. App. 156 (160).

"By this instruction the jury were told that the plaintiff can recover only 'the actual pecuniary loss to the next of kin,' that 'every item and element of damages claimed must be shown by a preponderance of the evidence,' that 'every item and element' not so shown 'should be disallowed'; that the verdict cannot be based 'upon any mere speculation or unproved view of what might or might not happen in the future'; that 'no amount or dollar can be given that is not based upon the evidence.' Then follows a long list of specified items for which the jury were informed 'the law does not allow a recovery.'

"The court having previously excluded all proof tending to show 'actual pecuniary loss to the next of kin' or damages suffered by them from the death of the deceased, it is somewhat difficult to understand how the jury, with this instruction before them, could do otherwise than render a verdict of not guilty. The giving of the instruction coupled with the exclusion of the proof virtually amounted to a declaration by the court to the jury that they should exonerate the defendant from liability. Moreover, the instruction is not the law. Its language as a whole would almost certainly lead the jury to believe that the proof

must be such as to enable them to compute the loss and damage in dollars and cents. 'In this class of cases it is not necessary that damages be proved in dollars and cents, but having proved such kinship as raises a presumption of pecuniary loss or offered proof of loss in cases of collateral kindred of adult children, the jury must from age, health, etc., fix the damages sustained.' *Chicago & W. I. R. Co. v. Ptacek*, 171 Ill. 9, 49 N. E. 191; *O. & M. R. R. Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 760."

4—*Smith's Adm'x v. Middleton*, 23 Ky. Law R. 2010, 66 S. W. 388 (389), 56 L. R. A. 484.

"Ordinarily this instruction fairly presents the law as administered in this state on this subject. In this case, considering the tender years of the decedent, we are of the opinion that the use of the expression 'his earning capacity' was probably misleading to the jury. We rather think that an instruction after this form would have been more appropriate: 'If the jury find for the plaintiff, they will fix the damages at such a sum, not exceeding \$10,000, as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money; and in fixing such damages the jury should take into consideration the age of deceased at the time of his death, and the probable duration of his life.'"



(b) I charge you, gentlemen of the jury, that should you get so far as to estimating the amount of damages, the damages to be allowed are compensatory, and you will exclude from your calculations the earnings and savings of deceased up to the age of 21 years, and in this case calculate what is earned and saved after that age.<sup>5</sup>

(c) You are further instructed that, if you find for the plaintiff under the foregoing instructions, the measure of damages would be pecuniary compensation for the loss of her husband; that is, such amount of money, estimated as received at the present time, as she might reasonably and probably have received from his earnings and accumulations had he not been killed.<sup>6</sup>

§ 3611. **Jury Should Assess Damages with Reference to the Pecuniary Loss Suffered by the Wife and Children—Superintendence and Attention to the Care of His Family.** If, under the evidence and instruction of the court, the jury find the defendant guilty, then,

5—*Tutwiler Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 336, 30 So. 600 (602).

This "was an improper instruction. Its last clause,—that the jury should calculate what was earned and saved (by deceased) after he was 21 years of age,—is confusing and abstract, since there could have been no earnings by deceased after he was 21, when he was killed before reaching that age."

6—*Houston & T. C. Ry. Co. v. Turner*, 34 Tex. Civ. App. 397, 73 S. W. 712.

"This charge is assigned as error, and the assignment must be sustained. It is peculiarly worded, of doubtful construction, and, under the most favorable consideration, does not conform to the rule announced by our Supreme Court. In the case of *Ft. W. & D. C. Railway Co. v. Morrison*, 93 Tex. 527, 56 S. W. 745, it is said: The 'charge given required the jury only to find the amount of the pecuniary aid which the plaintiffs would have received from their son if he had not been killed, and assumed that such amount was fixed by law as the measure of damages. This took from the jury the right to consider the question whether or not a less sum paid now would compensate the plaintiffs for their loss of the aid which their son would have rendered it, during the whole of their lives. \* \* \*

Whether or not a less sum than that to which the son's whole contributions would have amounted would compensate plaintiffs for the loss of such contributions, as he would have made them, was a question which should not have been taken from the jury by a charge which assumed that the compensation must necessarily consist of a sum equal in amount to that of such contributions.' In the more recent case of *Merchants' & Planters' Oil Co. v. Burns*, 96 Texas 573, 74 S. W. 758, the substance of a special charge asked and refused was as follows: 'She can only recover such

sum as would represent the present worth of the probable amount which A. would have contributed to her support had he lived.' This charge was held to be erroneous, and in discussing it Judge Brown remarks: 'The effect of this charge would be to prescribe a mathematical rule by which to ascertain what a given sum would be worth at the time of the trial. While the jury may not arbitrarily assess such sum as to them may seem proportionate to the injury without reference to the facts and circumstances of the case, yet the law does confide to them considerable discretion, and the court should not undertake to lay down a fixed rule by which they must be governed in ascertaining that sum which, now paid, would be compensation for the pecuniary injury sustained. \* \* \* The trial court should inform the jury that the effect of the law is to give compensation for the pecuniary loss, but the jury must be permitted to decide, under all the circumstances of the case, whether a sum less than the aggregate amount which the deceased would probably have contributed to the injured party, if he had lived, would compensate for the pecuniary injury sustained.' See also *San Antonio Traction Co. v. White*, 94 Tex. 468, 61 S. W. 706; *Galveston, H. & S. A. Ry. Co. v. Worthy*, 87 Tex. 459, 29 S. W. 376.

"Giving the charge under consideration in the present case the most favorable construction of which its language is susceptible, for the purpose of upholding it, still, when tested by the rule announced in the cases mentioned, it is clearly incorrect, and requires a reversal of the case. It unquestionably assumes that compensation for the pecuniary injury sustained by appellee in the loss of her husband must necessarily consist of a sum of money equal to such an amount as she might probably have received from his earnings and accumulations from time to time throughout his life, had he not

in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss suffered by the wife and the children of the deceased, having regard for the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, etc., of the deceased, during what would probably have been his lifetime if he had not been killed. So far as these matters have been shown by the testimony in the case, and also having regard to the value of his services, and the superintendence and attention to the care of his family and the education of his children, of which they have been deprived by his death, not exceeding, however, \$5,000.<sup>7</sup>

§ 3612. **Fair Compensation for Pecuniary Loss—Must Be Based on the Evidence.** (a) The jury are instructed that if they find for the plaintiff, they may assess the damages at such a sum as will be a fair compensation, with reference to the pecuniary injuries resulting from such death, to the widow and next of kin of X., not exceeding the sum of ——— dollars.<sup>8</sup>

(b) If you find the defendant is guilty, under the evidence and instructions of the court, then it is your duty to assess the plaintiff's damages, and in assessing the damages, you have a right to take into consideration all of the facts and circumstances shown by the evidence, bearing upon the question, and to allow such damages as you may deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of the plaintiff's intestate to her next of kin.<sup>9</sup>

been killed, and deprived them of the right to consider whether or not a less sum paid now would have compensated her for the loss sustained."

7—N. C. St. R. R. Co. v. Irwin, 202 Ill. 345 (350), 66 N. E. 1077, rev'g 104 Ill. App. 150.

"There was no evidence relating to services of the deceased in the care of his family or in the education of his children, or of his fitness by nature or disposition to superintend or give attention to the education of his children, or to provide for the moral or intellectual training of his children. For this reason this instruction falls within the condemnation of the principle laid down by this court in I. C. R. R. Co. v. Weldon, 52 Ill. 290, and C. R. I. & P. R. Co. v. Austin, 69 Ill. 426."

The same instruction substantially was approved in C. R. I. & P. Ry. Co. v. Zerneck, 59 Neb. 689, 82 N. W. 26; see sec. 974, volume 1.

8—Lake Shore & M. S. Ry. Co. v. Rohlf, 51 Ill. App. 215 (221).

"It will be observed there was a total absence of reference in the instruction to the evidence as a basis for the jury to act upon. It was of such an instruction that the Supreme Court, in C. B. & Q. R. R. Co. v. Sykes, Admr., 96 Ill. 162, remarked: 'The instruction is inaccurate in telling the jury that if they found defendant guilty, they might assess plaintiff's damages at some amount not exceeding \$5,000, the

amount claimed in the declaration. This part of the instruction leaves the jury at liberty to find any amount not exceeding the amount claimed without the slightest reference to any proof of the amount of damages sustained. It amounted to an uncontrolled license to find any sum under the limit that they might choose, and as they have found to the full limit, it may be, and probably they did, exercise the liberty the instruction gave them without reference to the evidence on that question. In this class of cases instructions should be accurate and precise in reference to the finding of damages. They may have misled, and probably did mislead the jury in assessing damages.'"

9—Illinois Central R. R. Co. v. Farrell, 86 Ill. App. 436 (438).

"This instruction told the jury to allow plaintiff 'such damages as you may deem fair and just compensation' without limiting them to the evidence, or giving them any rule to estimate the damages. This was improper for it left the jury to give such damages as they deemed the plaintiff ought to recover according to their individual notions of right and wrong, regardless of the evidence. Keightlinger v. Egan, 65 Ill. 235; Rolling Mill Co. v. Morrissey, 111 Ill. 646, and C. C. & St. L. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811. The giving of this instruction as drawn was prejudicial error."

(c) The court instructs the jury as a matter of law, in estimating the damages to be awarded the plaintiff, in case they should find, from the evidence, the issues for the plaintiff, they should calculate in reference to a reasonable expectation of benefit as of right or otherwise which the next of kin might have received from the continuance of life of said X. The parents and even brothers and sisters may reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate as of grace or favor, if not of right, at any age of life, and our statutes impose the duty of support in case of their becoming paupers, of parent by child and of one brother or sister by another brother or sister, but the court instructs you as a matter of law that in no event can the plaintiff recover more than five thousand dollars.<sup>10</sup>

§ 3613. **May Give Such Damages as are Proportional to the Injury Resulting from Death.** (a) The jury are instructed that, if they find for the plaintiff, they will assess her damages at such sum as from the evidence they believe she would probably have received in a pecuniary way from her husband, if he had not been killed.<sup>11</sup>

(b) On the measure of damages, should the jury find for plaintiffs, M. J. and her child, P. J., or for C. T., the mother of the deceased, you are instructed as follows: That in an action for negligently causing death the measure of damages, if any, is such sum as, from all the evidence in the case, the jury may consider

10—*Locher v. Kluga*, 97 Ill. App. 518.

"This instruction is erroneous in that it permits the jury to assess the damages in cases they should find the defendant guilty without any reference to the evidence; also because it leaves the jury free to assess the damages based upon a reasonable expectation of benefit as of right or which the next of kin (which, of course, may include collateral kindred, such as brothers and sisters) might have received from the continuance of life of said X. without proof that such collateral kindred were in the habit of claiming and receiving pecuniary assistance from deceased; also in telling the jury that the plaintiff could in no event recover more than \$5,000. This last error may not in itself alone be cause for reversal. *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *City of Chicago v. Scholken*, 75 Ill. 470; *Holton v. Daly*, 106 Ill. 131-138, and cases cited; *Chicago, R. I. & P. R. R. Co. v. Austin*, 69 Ill. 426; *E. St. L. C. Ry. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917; *Chicago, P. & St. L. R. R. Co. v. Woolridge*, 174 Ill. 330-4, and cases cited. In the *Holton* case, supra, the court say: 'If the next of kin are collateral, it is a material question whether they were in the habit of claiming and receiving pecuniary assistance from the deceased. If they were not, they can recover but a nominal sum, but when the relationship of husband and wife or parent and child exists

the law presumes pecuniary loss from the fact of death.' To the same effect is the latest expression of the Supreme Court in the case of *Woolridge*, supra. In so far as the cases of the *City of Chicago v. O'Keefe*, 114 Ill. 230, 2 N. E. 267; *Ohio & M. Ry. Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 787, and *B. & O. Ry. Co. v. Then*, 159 Ill. 535, 42 N. E. 971, relied upon by appellee can be said to conflict with the other rulings of the Supreme Court, if they do so conflict they must yield to the later case of *Woolridge*, supra."

11—*Houston & T. C. R. Co. v. Loeffler*, — Tex. Civ. App. —, 51 S. W. 536.

"The law is: 'The jury may give such damages as they think proportionate to the injury resulting from the death.' We do not think the law as quoted is clearly reflected by the charge. The charge intrrenches upon the discretion of the jury, if they are to look only to the sums of money which would probably have come into the hands of the wife from the earnings of the husband had he not been killed. The jury are to consider all evidence bearing on the subject, including the pecuniary status of the parties, and their reasonable expectations from the labors of the husband; and from all the facts, and from the experience and observation of the jury, determine what sum would be a just compensation to the wife for the pecuniary loss sustained by her in the death of her husband, allowing nothing for her distress and the deprivation of his society."



proportionate to the pecuniary injury, if any, occasioned to the person or persons, if any, entitled to recover by the death of the deceased person, allowing nothing for the distress of mind of any of the survivors, or loss to such survivors, if any, of the deceased person's society, as the law in such cases gives compensation only for pecuniary loss, by estimating the money value, if any, of the life of the dead person. If from the evidence you believe that M. J. suffered no pecuniary loss through the death of C. J., you will, in such event, find for defendant as against M. J., whatever may be your finding on other questions. If you believe from the evidence that P. J. has suffered no pecuniary loss through the death of C. J., you will, in such event, find for the defendant as against P. J., whatever may be your finding on other questions. Should you, from the evidence, believe that C. T. has suffered no pecuniary loss through the death of the deceased, C. J., you will, in such event, find for the defendant as against C. T., whatever may be your finding on other questions.<sup>12</sup>

§ 3614. **Expectancy of Life—Mortality Tables not Conclusive.** (a) The court charges the jury that if they believe from the evidence that John Jones at the time of his death was in good health and of sober habits, and was 48 years of age, that his expectancy of life was as much as eighteen years.<sup>13</sup>

(b) The measure of damage is the reasonable expectation of pecuniary benefit from the continued life of the deceased to those who

12—Houston & T. C. R. Co. v. Johnson, 27 Tex. Civ. App. 420, 66 S. W. 72 (73).

"It is clear that this charge is erroneous in that it instructs the jury that the amount of damages to which the plaintiffs would be entitled in event the jury should find in their favor would be the money value of the life of the deceased. The court evidently intended to say the money value to the plaintiffs of the life of the deceased, which would have been an accurate statement of the law; but the charge as given is clearly erroneous, and we cannot say that it did not mislead the jury."

13—Ala. M. R. Co. v. Jones, 114 Ala. 519, 21 So. 507 (510), 62 Am. St. 121.

"The court at the request of the plaintiff instructed the jury that if deceased was, at the time of his death, in good health and of sober habits, and was 48 years of age, his expectancy of life was as much as eighteen years. This charge was an invasion of the province of the jury. In assessing damages in cases like this it devolves upon the jury, upon consideration of all the circumstances bearing upon the subject, as disclosed by the evidence, to ascertain what the duration of the party's natural life would have been. There is no method of ascertaining it, as a positive fact. The period fixed in any case is necessarily an inference drawn from many conditions and circumstances. In the same case, different minds of equal intelligence,

might reach different conclusions. The tables of mortality, computed upon the experience of life insurance companies, which, being of such universal recognition, courts will judicially notice, are not conclusive that the life expectancy of any particular person, though in good health and of sober habits should be declared to be the period they estimate. It may be stated as a fact generally known that in the system of insurance many conditions enter, as factors, in the determination of the hazards and duration of a person's life. Though good health and sober habits, at the time, prevail, there may be other physical infirmities creating extraordinary hazard; such, for instance, as inheritable diseases in ancestors, undue relation of height to weight, and the like. Again, the occupation the party pursues is of weighty consideration—whether or not involving extraordinary risk and danger. These may be all matters of evidence before the jury, in a given case, and it is for that body to draw the proper inference as to the real duration of the party's natural life. In the present case, not only the age, good health and sober habits of the deceased were shown in evidence, but that he was pursuing an occupation attended with unusual dangers. The charge was bad, in that it withdrew that fact from the consideration of the jury, as well as because it made the court to draw the inference which it was alone the province of the jury to draw."

would have been dependent on him had he continued to live out his natural life, and the expectation of one 17 years old would be 44 2/10 years, and the damage will be the net moneyed value of intestate's life to those dependent upon him, had he continued to live out his appointed time.<sup>14</sup>

(c) The court instructs the jury that if you believe from the evidence that the plaintiffs are entitled to recover, then, in estimating the actual damages sustained by plaintiffs by reason of the death of I. W., you may, as to the right of recovery on the part of the children of F. W., take into consideration what would be the net earnings of I. W. during their minority, as they believe the proof shows might reasonably be expected to live, as you may believe is shown by the proof; and that as to the plaintiff F. W. you may, if you believe from the evidence that the plaintiff is entitled to recover, take into consideration in estimating the actual damages resulting from the death of I. W., what would be the reasonable amount for the support and maintenance of the said F. W. for the number of years which a woman of her age, as shown by the proof, might reasonably be expected to live, as shown by the proof, unless they believe from the evidence that she would outlive the said I. W. But if they believed from the evidence that he would die before her, then her damage should be calculated on the basis of his life.<sup>15</sup>

14—*Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 23 S. E. 264 (268), 53 Am. St. Rep. 611, 30 L. R. A. 257.

"Though the court states the abstract proposition, as we find it formulated in the books, if the first clause of that portion of the charge relating to damages, we think that the substitution of the subsequent portion of it for the more specific instruction to which the defendant was entitled, and for which he asked, was erroneous. The instruction given, viewed without reference to the prayer of the defendant, was objectionable, in that it left the question of the date which would be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that the net income would be estimated as of the period, when those dependent on him would have realized the benefits of his labor had he not come to an untimely end."

15—*Vicksburg R., Power & Mfg. Co. v. White et al.*, 82 Miss. 468, 34 So. 331.

"This instruction was written upon the theory that the deceased or his wife had been shown by the proof to belong to the class of persons upon whom the mortality tables are based. In volume 15, Am. & Eng. Ency. of Law, p. 881, it is said that Carlisle, Northampton, or other mortality tables, together with the age and general health of the person, are admitted in evidence by courts for the purpose of showing what is the probable duration of life under peculiar conditions. These tables are compiled in connection with proof of the health, constitution, habits,

etc., of the parties. These tables only show the probable age which a sound and healthy person belonging to the class may expect to reach, whose age is given. In *Ill. C. Rd. Co. v. Crudup*, 63 Miss. 303, this court, speaking through Justice Cooper, said: 'In all cases of this character it must be the expectation of that one who would soonest die which should control.' The age is shown, but no evidence of the health, physical condition, habits of the parties are given, placing them in the class of persons, or selected risks, which is the foundation of the tables. The instruction assumed that Ike White would have lived until the children were of age. It also assumes that Ike and Flora White were of the class of persons contemplated by the tables. *Roose v. Perkins*, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409; *City of Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500. In *Roose v. Perkins*, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409, it was held that the foundation was properly laid for the introduction of the mortality tables, as the party was shown to be strong, healthy and robust.

"The instruction is erroneous in basing the two children's damage upon the net earnings of the father during their minority, as the proof shows that he might reasonably be expected to live, and, of course, assumes they will live, during such minority or that Ike White would have lived during such minority. The instruction is erroneous in basing the damage

**§ 3615. Judgment and Discretion of Jury—Probable Time Deceased would have Lived.** The amount of damages, if you find for the plaintiff, rests in your judgment and discretion. There is, in such a case as this, no fixed rule or standard to measure the damages that should be awarded the plaintiffs, if you find in their favor. You should take into consideration the age, health, habits, industry, capacity for business, and probable time deceased would have lived in the ordinary course of events, and award the plaintiffs, if you find in their favor, such an amount as will compensate them for the damages they have sustained by reason of the death of W.<sup>16</sup>

**§ 3616. What the Heirs Would Likely Have Received from Estate.** I charge you, that if the jury believe the plaintiff is entitled to recover, the measure of damages is what the intestate's heirs and distributees would likely have recovered from his estate, considering the evidence as to the age of deceased, probable duration of life, habits of intestate, means, business, earnings, health, skill and reasonable future expectations.<sup>17</sup>

**§ 3617. Disease Causing Death Accelerated by Personal Injuries—Whether Substantial Damages Are Recoverable.** If the jury shall

of Flora White upon a reasonable amount per year for the support and maintenance for the number of years a woman of her age might be expected to live, as shown by the proof; erroneous because there is no proof in the record supporting the instruction that she had any life expectancy; erroneous in assuming that Ike White, the husband, had any life expectancy! It would have been sufficient to show the ages of the plaintiffs and the deceased, their condition of health and constitution, and left the jury to say how long they, or either of them, would likely live; but when one relies upon the mortality tables to show life expectancy it then becomes necessary to show that the party belongs to the class. The mortality tables are made from arbitrary rules, and the class is an arbitrary one, out of the general run of mankind, and one relying upon them must show that the parties come within the class of persons contemplated."

16—*Duval v. Hunt et al.*, 34 Fla. 85, 15 So. 876 (884).

"This charge is assigned as error, and it is clearly erroneous, according to the terms of our statute itself, and to the adjudged cases upon statutes with the same provisions in reference to the damages to be recovered in such cases. While all the authorities agree that it is almost impossible to formulate any definite rule for the assessment of the damages to be recovered, still there are certain well-defined legal principles that serve as guides to the ascertainment of the amount to be awarded that should not be ignored; and we find no case that sanctions the broad assertion of this charge 'that there is no fixed rule or standard to measure the damages that should be

awarded, but that the amount thereof rests in the judgment and discretion of the jury.' The charge is fatally defective too, in practically telling the jury that in estimating the damages they shall take into consideration the full time that the deceased would probably have lived. The language of our statute on the subject of the damages to be awarded in such cases is: 'And in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed.' The plain meaning of this is that the damages to be awarded are such only as will compensate the beneficiaries of the action for the loss resulting to them from the death."

17—*Tutwiler Coal, Coke & Iron Co. v. Enslen* (Sup. Ct.), 129 Ala. 336, 30 So. 600 (602).

"The language of this refused charge is faulty in the use of the expression, 'what the heirs and distributees would likely have received.' The recovery is for the money value of the intestate's estate, having regard to his age, probable duration of life, habits of industry, means, business, earnings, health, skill, reasonable future expectations, etc., and not what the intestate's heirs and distributees would likely have received from his estate. They could only receive what is left after paying costs and expenses of administration, and the suit can be maintained only by the personal representative of the deceased, the recovery being for the benefit of his distributees. Code, par. 1751; *James v. Railroad Co.*, 92 Ala. 231, 9 So. 335; *Louisville & N. Railroad Co. v. Orr*, 91 Ala. 548, 8 So. 360."



find that intestate's death was caused by disease, and would have occurred from disease which he had at the time of the accident to him, even if the accident had not befallen him, then they shall answer the first issue "No," even if they shall further find that the fall aggravated his disease and hastened his death.<sup>18</sup>

**§ 3618. Court Cannot Instruct Jury to Give Punitive Damages—Such Damages Is in the Sound Discretion of the Jury.** If you should find that the negligence of the defendant was gross or wanton, you shall make proper additions to the compensatory damages by way of punitive damages; that is, damages by way of punishment. If, however, you should find that the deceased himself was guilty of contributory negligence, then you must take this into consideration, in mitigation of damages, and make proper deductions for this negligence.<sup>19</sup>

18—*Meekins v. Norfolk & S. R. Co.*, 134 N. C. 217, 46 S. E. 493 (1904).

"In this instruction there was substantial error for which a new trial must be granted. The first part of the instruction would of course be correct if taken by itself, as the defendant would not be liable for the death of the intestate if a pre-existing disease were its proximate cause; but in contemplation of law the cause of death is that which produces death at the time it happens. The unlawful killing of a human being would be none the less murder or manslaughter, as the case might be, even if the innocent victim were in the last stages of a fatal disease. We see no reason why the defendant should not be held civilly liable for negligently doing an act, the intentional commission of which might subject an individual to the punishment of death. Any other construction of law would be liable to the gravest consequences.

"It has been repeatedly held by this court that substantial damages are recoverable where the death of the intestate was hastened or accelerated by injuries resulting from the negligence of the defendant. In *Lewis v. Raleigh*, 77 N. C. 229, where the jury found that 'the death of John Godwin was accelerated by the noxious atmosphere of said guardhouse,' it was held, in a well-considered opinion, that his administrator could recover. In *Gray v. Little*, 126 N. C. 385, 35 S. E. 611, this court says on page 387 (page 611, 35 S. E.): 'His honor, in charging the jury, substantially followed the charge approved in *Benton v. Railroad Co.*, 122 N. C. 1007, 30 S. E. 333, and in addition thereto instructed the jury in these words: 'But in considering the second issue as to the cause of the death of the plaintiff's intestate, if you find that the death of the intestate was only hastened or accelerated by the acts or omissions of the defendant as alleged, then you are instructed that, in answering the third issue as to damages, you cannot award the

plaintiff any more than nominal damages; that is, such small sums, as, for instance, five cents, or other small sum, because in such state of the case, if the death of the intestate was only hastened or accelerated by the defendant, you could only respond to this issue in nominal damages.' The error in that part of the charge lies in considering the act expediting death as a mere technical injury. This is not the language of the law nor of the text books on criminal matters. There are instances in the common-law reports where the accelerator paid the severest penalty known to the law. We know of no decision of a final appellate court in this country declaring otherwise. In view of the uniform decisions of our state, it is needless to cite outside authorities, but a further discussion of the question may be found in *Louisville & N. Railroad v. Northington*, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268, and in 1 *Thompson, Neg. Sec. 149.*"

19—*Louisville & N. R. Co. v. Satterwhite*, 112 Tenn. 185, 79 S. W. 106 (112, 113).

"The criticism upon the instruction contained in the general charge on this subject is that the assessment of punitive damages by the jury is made compulsory, and not discretionary. We are of opinion that this criticism is well taken. It will be observed that the trial judge instructed the jury that, if the negligence of the defendant was gross or wanton, the jury should add damages by way of punishment. The allowance of punitive, exemplary, or vindictive damages, as the term is variously used, is left to the sound discretion of the jury. It has never been supposed that it was within the province of the court to instruct the jury that punitive damages must or should be assessed.

"In *Ferguson v. Moore*, 98 Tenn. 349, 39 S. W. 342, the trial judge had instructed the jury as follows:

"You may give what is called 'vindictive damages' to punish the defendant, if guilty, and deter others

from doing likewise; and it is not only your right, but your duty to do so.

"This court, on appeal, adjudged this instruction to be erroneous, saying: 'The giving of punitive damages is a matter of discretion with the jury, and they should not be told that it is their duty to give them.'

"The Supreme Court of Kentucky, in the case of *L. & N. A. R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. 135, held that an instruction to the jury that they should, under certain facts, if they found them to be true, give punitive damages, was error.

"Mr. Sutherland, in his work on Damages, in the last edition, says that: 'In Vermont, Mississippi, Kentucky, Illinois, Missouri, New York, Rhode Island, Tennessee, Wisconsin, Alabama, Maryland, North Dakota, North Carolina, Maine, punitive damages cannot be claimed as a matter of right; but it is always a question for the jury, within its discretion, no matter what the facts are.' *Southerland on Damages* (3d Ed.), vol. 2, § 403.

"In *Robinson v. Superior, etc.*, 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897, it appeared that the jury had been instructed, in effect, by the trial judge, that, 'If the conductor maliciously put the plaintiff on the car, then he was also entitled to what are call exemplary or punitive damages.'

"The court said: 'In *Day v. Woodworth*, 54 U. S. (13 How.) 371, (14 L. Ed. 181), Mr. Justice Greer, speaking for the court, said 'that in actions for trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant; having in view 'the enormity of his offense. rather than the measure of compensation to the plaintiff. This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the peculiar circumstances of each case.'

"The court continues later on: 'It is true that an instruction to the effect that the jury "ought" to give exemplary damages in such a case

was sustained by this court in *Hooker v. Newton*, 24 Wis. 292; but the case is not in harmony with the best considered cases, nor with the weight of authority. Mr. Thompson, in his excellent work, after stating that "the jury may, if they think proper, give damages by way of punishment," says: "It may be stated that in cases in which such damages may be given whether they will be given, or not, is a question within the discretion of the jury."

"The case of *Hooker v. Newton*, 24 Wis. 292, referred to herein, was afterwards overruled by the case of *Robinson v. Superior, etc.*, 94 Wis. 345, 68 N. W. 691, 34 L. R. A. 205, 59 Am. St. 897.

"*American & English Enc. of Law* (2d Ed.) vol. 12, p. 51, lays down the following rule: 'The rule that the question of exemplary damages is one for the jury, in the exercise of their discretion, has been held to apply, though it was established, in point of fact, that elements existed which would, according to the general rule of exemplary damages, warrant such an assessment. It has been held, therefore, to be erroneous to instruct the jury that, in any state of facts, it is their duty to award exemplary damages, or that they should, will, ought to, or must do so, or, if they find a given state of facts, the plaintiff is entitled to recover such damages; and, so carefully is the discretion of the jury guarded in this particular, it has been declared that an instruction, several times repeated, which seemed to invite the jury to give punitive damages, was erroneous.'

"It is said, however, that the language now criticised in this instruction was borrowed almost literally from the opinion of this court in the case of *Davidson-Benedict Co. v. Severson*, reported in 109 Tenn. 572, 72 S. W. 967. It is true, in that case while dealing with the general question of damages, the following language was used, viz.: 'In cases where the negligence of the person that inflicted the injury is gross or wanton, they (the jury) should make proper additions by way of adding punitive damages.'

## CHAPTER CXXXII.

### DEEDS.

See Approved Instructions, Chapter XLV, Vol. I.

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| <p>§ 3619. Transfer of real property by deed only.</p> <p>§ 3620. Recording of deed at request of grantor not conclusive proof of delivery.</p> | <p>§ 3621. Presumptions—Truth of contents of certificate of notary public.</p> |
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§ 3619. **Transfer of Real Property by Deed Only.** The jury are instructed that there is no method known to the law for conveying real estate, so as to convey the legal title from one person to another, except by deed, in writing and under seal, executed and delivered by the person holding the legal title or else executed and delivered by some one authorized, in writing, and under seal by the person holding the legal title, to make such deed for and in the name of the owner.<sup>1</sup>

§ 3620. **Recording of Deed at Request of Grantor Not Conclusive Proof of Delivery.** If you believe from the evidence that plaintiff made a deed to the land in dispute to his son, that the same had been duly recorded in the records of deeds of this county at the request of the son, and that he delivered it to the clerk for that purpose, and that the deed was executed before the institution of this suit, it took the legal title out of him, and he cannot recover in this suit, it matters not what private agreement there may have been between plaintiff and his son about the deed, and you will find for the defendants.<sup>2</sup>

1—Detroit Steel & Spring Co. v. Whitney, 57 Ill. App. 164 (167, 170).

"This instruction, as the record stands, could have no other effect than to befog the jury with the notion that there was some abstruse notion that there was some abstruse doctrine of the law of real property, much in favor of the appellees."

2—Ellis v. Clark et al, 39 Fla. 714, 23 So. 410.

"The charge given at the request of defendants was, in our judgment, erroneous, and was calculated to deprive the plaintiff of that consideration of the case by the jury to which he was legally entitled on the evidence submitted. The charge in effect, states as the law that, if the plaintiff delivered the deed from himself to his son to the clerk for record, and the deed was duly recorded before the institution of the suit, it divested the legal title on the evidence submitted. If this view of the law be correct, the record of a deed at the request of the grantor would be conclusive proof of deliv-

ery. The delivery of a deed by the grantor, and its acceptance by the grantee, are essential to convey title; and when a grantor causes an acknowledged deed, conferring substantial benefits on the grantee, to be recorded, there can be no doubt that it will afford prima facie evidence, and even strong presumptive evidence, of a delivery to, and acceptance by, the grantee, but such presumption can be overcome by evidence that no delivery in fact was intended and none made. At least, the clear weight of authority holds that to be the correct rule. Webb, Record Titles (section 144); Metcalf v. Brandon, 60 Miss. 685; Young v. Guilbeau, 3 Wall. 636; Lepoc v. Bank, 32 Md. 136; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Samson v. Thornton, 3 Metc. (Mass.) 275, 37 Am. Dec. 135; Gilbert v. Insurance Co., 23 Wend. 43, 35 Am. Dec. 543; Cravens v. Rossiter, 116 Mo. 338, 22 S. W. 736, 38 Am. St. 606, and note Alexander v. Alexander, 71 Ala. 295; Devl. Deeds, par. 292."



**§ 3621. Presumptions—Truth of Contents of Certificates of Notary Public.** When a party exercises the functions of a notary public, the law presumes that he is duly empowered and qualified to act as such unless the party attacking his official act shall show by a preponderance of evidence that he was not qualified as such. The recitals contained in an acknowledgment to a deed before a notary public are presumed to be true except in case of fraud, accident, mistake, or deception, and in such cases the recitals contained in such acknowledgment may be shown to be untrue by a preponderance of evidence clearly showing that fact.<sup>3</sup>

3—Thompson et al. v. Johnson et al., 24 Tex. Civ. App. 246, 58 S. W. 1030 (1031).

"We do not think that under the facts of this case where the question to be determined was the truth or falsity of the recitals in the officer's certificate, the court should have charged on the presumptions to be drawn in favor of the truth of such recitals. If Mrs. T. appeared before the officer for the purpose of acknowledging the instrument, and thereby called into exercise the authority of the officer, and did attempt to do what the law required her to do, then as to inno-

cent purchasers for value, the certificate is conclusive of the facts therein stated. *Wheelock v. Cavitt*, 91 Tex. 679, 45 S. W. 796; *Koucourek v. Marak*, 54 Tex. 205, 38 Am. Rep. 623. But if she did not appear before the officer for the purpose of acknowledging the deed, or did not acknowledge it, then the recitals in the certificate would not be binding upon her. The charge placed too great stress upon the certificate of the notary, and we think the jury may have been misled thereby. The charge was error. *Stooksbury v. Swan*, 85 Tex. 563, 72 S. W. 963."

## CHAPTER CXXXIII.

### DIVORCE.

See Approved Instructions, Chapter XLVI, Vol. I.

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| <b>§ 3622.</b> Acts of cruelty must be limited to time alleged in bill. | <b>§ 3623.</b> Adultery not presumed; must be proven—By clear preponderance. |
|   | <b>§ 3624.</b> Degree of proof required.                                     |

#### **§ 3622. Acts of Cruelty Must Be Limited to Time Alleged in Bill.**

(a) If the jury believe, from the greater weight of the evidence, that the defendant since her marriage to the complainant and while in anger and without any reasonable cause for so doing, has used two or more acts of physical violence toward the complainant as explained in these instructions, the jury should find her guilty of extreme and repeated cruelty.

(b) If the jury believe, from the greater weight of the evidence, that defendant on two or more occasions has since her marriage, without any reasonable cause for so doing, and in anger, struck the defendant and pulled his whiskers in such manner as to cause him bodily pain and suffering, then in that case defendant would be guilty of extreme and repeated cruelty.<sup>1</sup>

**§ 3623. Adultery Not Presumed; Must Be Proven—By Clear Preponderance.** The court instructs the jury that the act of adultery cannot be presumed, but must be alleged and clearly established by a preponderance of all the evidence; and in this case, if you believe the facts and circumstances relied upon to prove the plaintiff, —, to have been guilty of adultery are as well consistent with her innocence as with her guilt, then it is your duty to find her not guilty of adultery.<sup>2</sup>

<sup>1</sup>—Shoup v. Shoup, 106 Ill. App. 167 (169).

<sup>2</sup>“The instructions prompted the jury to find defendant guilty upon the proof of acts committed long before the time specified in the bill. It is a fundamental rule in equity that a decree cannot give relief which facts disclosed by proof would warrant where there are no averments in the bill to which the evidence can apply. (Dorn v. Geuder, 171 Ill. 362, 49 N. E. 492.) These instructions were therefore erroneous, even if defendant did not make proper objections to the proof. Then repeatedly told the jury that, if defendant had been guilty of two or more acts of extreme and repeated cruelty to plaintiff, they should find her guilty. Under these instructions, the jury would have been re-

quired to find against defendant if she had twice been guilty of extreme and repeated cruelty to her husband, even though the proof showed that he had often been much more cruel to her.”

<sup>2</sup>—Lenning v. Lenning, 176 Ill. 180 (186), aff'g 73 Ill. App. 224, 52 N. E. 46.

“This, we think, was error, in that it tells the jury that adultery must be clearly established by a preponderance of all the evidence.

It was sufficient if the jury believed that such charges were proven by the preponderance of the evidence. (Crabtree v. Reed, 50 Ill. 206; McDeed v. McDeed, 67 id. 546.) In this case, it was held that instructions which required a plaintiff to make out his case by a clear preponderance of the evidence were erroneous.”

§ 3624. **Degree of Proof Required.** (a) The jury are instructed that even though it appears from the evidence that the defendant and W. were in a position where it was possible for them to commit adultery, still, in order to find for the complainant in this case on that issue, they must be seen together not only under circumstances which would make it possible for them to commit adultery, but also under circumstances which can not be accounted for reasonably, under the evidence, unless they had that design.

(b) You are instructed that even though you believe from the evidence that there is a probability of the guilt of the defendant, still you are instructed that you should not for that reason alone find the issue for the complainant. In this case, it is not sufficient if the evidence shows a mere probability of the guilt of the defendant. The law requires that the proof should be satisfactory where, as in this case, a divorce is sought from the wife for adultery; and unless there is satisfactory proof of the guilt of the defendant of the actual offense of adultery, it is your duty to find the issue for the defendant.

(c) You are instructed that it being important to the well-being of society that the marriage relation should not be severed, the law requires that the proof should be satisfactory when a divorce is sought from a wife for adultery.

(d) You are instructed that while adultery may be proven by circumstantial evidence, still the law requires that the proof should be satisfactory in order to establish the charge.

(e) You are further instructed for the defendant that the law requires that the complainant, in order to entitle him to a verdict, should establish his case by a preponderance of the evidence; and if the jury find the testimony so contradictory, or so evenly balanced, that they are unable to arrive at a satisfactory conclusion as to the truth or falsity of the charge against the defendant, then the jury should find the issue for the defendant.<sup>3</sup>

<sup>3</sup>—Pittman v. Pittman, 72 Ill. App. 500.

"The effect of these instructions was to take the case out of the rule governing civil cases as to the degree of proof required of a complainant or plaintiff to entitle him to recover.

"Instructions of this character

have been repeatedly condemned by our Supreme Court as magnifying the burden which the law casts upon the plaintiff in a civil suit. Herrick v. Gary, 83 Ill. 85; Graves v. Colwell, 90 Ill. 612; Ruff v. Jarrett, 94 Ill. 475; Stratton v. Central City Horse Railway Co., 95 Ill. 25; Rolfe v. Rich, 149 Ill. 436, 35 N. E. 352."



## CHAPTER CXXXIV.

### DOMESTIC RELATIONS.

See Approved Instructions, Chapter XLVII, Vol. I.

§ 3625. Voluntary absence of a minor from home does not forfeit claim for support.

§ 3626. Guardian and ward—Burden on guardian.

§ 3627. Married woman—Transfer of real estate.

§ 3628. Married women—Right to convey personal estate—Consent of husband.

§ 3625. **Voluntary Absence of a Minor from Home Does Not Forfeit Claim for Support.** (a) The court instructs the jury that a child by voluntarily remaining away from home of his father against the father's consent, forfeits his claim to support, and those who credit the child, even for necessities, cannot look to the parent for payment. And the court further instructs the jury that it is no excuse that the persons so furnishing necessities were not aware that the child was acting contrary to the will of the father, for it is the duty of those who give credit to the infant to know the infant's precise situation at their peril.<sup>1</sup>

(b) The court instructs the jury that if they believe from the preponderance of the evidence that the plaintiffs sold the minor child of the defendant certain articles of clothing and that the same were necessities suitable to the condition of said minor child, and if they further believe from the evidence that the defendant authorized plaintiff to sell and furnish her minor children with goods on her credit by either direct instructions or by circumstances which would lead a reasonable man to infer that the defendant would pay for said goods, then your verdict must be for the plaintiffs for the amount proven to be due.<sup>2</sup>

§ 3626. **Guardian and Ward—Burden on Guardian.** In suits by wards against their guardian for the negligence of the guardian, it

1—Bradley v. Keen, 101 Ill. App. 519 (520).

The court in holding this instruction erroneous said: "It is an abstract proposition of law and inapplicable to the facts of the case, and even as an abstract proposition is erroneous. . . . It is not the law that a child between eight and nine years of age by voluntarily remaining away from her father's house against his will forfeits her claim to support."

2—Wall v. Wall, 69 Ill. App. 389 (391). The court said that where "the child resides from home without the consent of the parent, in order to hold the parent for goods

furnished, an express promise must be proven or the facts and circumstances must be such that a promise can be inferred. There is a difference between circumstances from which a promise may be inferred and circumstances that would lead a reasonable man to believe the goods would be paid for. Parents often pay debts improvidently made by children when there is no legal obligation to do so. It is sometimes done from a spirit of pride and sometimes to prevent unpleasant consequences following the child. Under such circumstances a reasonable man would be led to infer that the parent would pay."

is the duty of the jury to presume in favor of the wards, and against the guardian, as strongly as the facts will warrant.<sup>3</sup>

§ 3627. **Married Woman—Transfer of Real Estate.** If, under the foregoing instructions, you find that plaintiff was both legal and beneficial owner of the land, and that after divorce from F. R., and prior to August 4, 1897, that she knew that Mrs. L. claimed to own the land, and knew that defendant believed Mrs. L. owned the land, and that the defendant intended to buy the land of Mrs. L., and if you further find that, acting under such belief, defendant bought the land from Mrs. L., took her deed therefor, paid her \$500 cash and made her his note for \$300 for the land, and that plaintiff had either informed defendant that Mrs. L. owned the land, or that from the words and conduct of plaintiff relating to the land the defendant reasonably believed Mrs. L. owned the land, and took such deed under such circumstances, and in reliance thereon made permanent improvements on the land of value in excess of the value of the use of the land during defendant's occupancy, then plaintiff is estopped to recover the land, and, if such is the case, find the land for the defendant.<sup>4</sup>

§ 3628. **Married Women—Right to Convey Personal Estate—Consent of Husband.** If the note was executed by the defendant to his mother, and by her indorsed and transferred to the defendant without her husband's knowledge or consent, and that was his only claim, that would avail the defendant nothing, and the note would have passed to the husband as his property upon the death of his wife, subject to the payment of her debts.<sup>5</sup>

3—*Wainwright v. Smith*, 106 Ind. 239, 6 N. E. 333 (334).

"As applicable to the facts in this case, the instruction was erroneous. Where a guardian deals with his ward, the rule which obtains as to transactions between persons standing in a fiduciary relation is applicable. The guardian who contracts with his ward like an agent who contracts with his principal, takes the burden, when the transaction is drawn in question, of showing that he dealt fairly, and that no benefit resulted to him from the contract. *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203."

4—*Williamson v. Gore*, Tex. Civ. App. —, 73 S. W. 563 (567).

"To estop a married woman from asserting any rights to land, it is essential that she should be guilty of some positive fraud, or else of some act or concealment or suppression which in law would be equivalent thereto. *Stone v. Sledge*, — Tex. Civ. App. —, 24 S. W. 698, id. 87 Tex. 49, 26 S. W. 1069, 47 Am. St. 65; *Johnson v. Bryan*, 62 Tex. 626; *Steed v. Petty*, 65 Tex. 490; *Williams v. Ellingsworth*, 75 Tex. 483, 12 S. W. 746; *McLaren v. Jones*, 89 Tex. 131, 33 S. W. 849; *Bigelow Estop*, 510, 512. There is no evidence in the record tending in the least to show that Mrs. G. at any time between the dates of her divorce and of the deed purporting to be from

her mother to W., was guilty of any positive fraud, act or concealment or suppression, which would in law be pronounced as such. Therefore, this portion of the charge was not obnoxious to the objection."

5—*Vann. v. Edwards*, 135 N. C. 661, 47 S. E. 784 (785).

"The Constitution (article 10, sec. 6) provides as follows: 'The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried.' It is provided by the Code (section 1826) that 'no woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader as hereinafter allowed.' Our answer to the question we have stated must be in the affirmative. The decision of the case turns upon

the construction of section 6 of article 10 of the Constitution, for if, by that section, a married woman is vested with the power of disposing of her personal property, such as the note upon which the suit was brought, this power cannot be divested or taken from her by any act of the Legislature, and section 1826 of the Code can have no operation in such a case, assuming it to be fully sufficient in its scope to embrace her executed contracts of sale of her gifts. It is provided by the Constitution, which is the higher, and indeed the supreme, law, to which all conflicting legislation must yield, that the property of every female, whether acquired before or after her marriage, shall be and remain her sole and separate estate, and shall not be liable for any of the debts, obligations, or engagements of her husband. If this were all of the section, we would have to conclude that, as a married woman is thus vested with full and complete ownership of things real and personal acquired by her before or after her marriage, having both the legal and equitable title, she must necessarily have also acquired every right which inheres in or is incidental to such ownership, and the most important and most valuable among them is the right of alienation, or what is commonly known in the law as the *jus disponendi*. While this may not accord with the view taken of that section in one or two of the cases, it will be found upon examination that they did not involve a decision of the question of a married woman's right to dispose of her personal property, but of her power to contract so as to bind her property generally, and it was held that, notwithstanding the provision of section 6, art. 10, of the Constitu-

tion, the disability of coverture remains as it was at common law, and prevents her from making a valid executory contract.

"The question as to the right of a married woman to dispose of her personal property without the written assent of her husband is directly and squarely presented in this case, by the defendant's request for instructions and the charge of the court to which exception was taken, and it is the first time, as we think, that it has been so presented. Having held that the transfer of the note by his mother to the defendant was valid, it follows that the court erred in refusing to give the instruction requested by the defendant, and in giving the instruction to which he excepted, because, if the indorsement and delivery of the note to the defendant constituted a valid gift of it to him, the fact that the jury have found that he did not have possession of the note at the time of his father's death should not defeat his title to it acquired by the gift, as the defendant may be able to show that, even if his father had possession of the note at the time of his death, and there is therefore a presumption in favor of plaintiff, he is himself the real owner of it by virtue of the gift from his mother. This is a question for the jury to decide upon all the facts of the case and under proper instructions from the court, and, by holding that defendant acquired no title to the note by his mother's indorsement, the court deprived him of the use of that important fact in developing his defense. The error thus committed entitles the defendant to another trial."

For further discussion of this important subject see the very full opinion of the court.



## CHAPTER CXXXV.

### FRAUD AGAINST CREDITORS.

See Approved Instructions, Chapter LI, Vol I.

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| <p>§ 3629. Fraudulent sale to hinder creditors—Burden of proof.</p> <p>§ 3630. Fraud never presumed, must be affirmatively proven.</p> <p>§ 3631. Assignment void on account of fraud, false representations of financial standing to obtain credit—Knowledge of by assignees.</p> <p>§ 3632. Right of insolvent debtor to transfer property in payment of a debt due a creditor—Motive of vendor immaterial.</p> | <p>§ 3633. To render sale void the vendee must participate in the fraud in some way—Mere knowledge of vendor's fraudulent intent is not sufficient.</p> <p>§ 3634. Setting aside a conveyance because of fiduciary relations.</p> <p>§ 3635. Title of wife in property formerly her husband's—Wife holding adversely to husband's creditors.</p> <p>§ 3636. Fraudulent transfer—Rights of creditor—Bailment or sale.</p> |
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#### § 3629. Fraudulent Sale to Hinder Creditors—Burden of Proof.

(a) The defendant charges fraud in the transactions of the sale and delivery of the stock of goods in controversy by the plaintiff to his brother-in-law, A., and the sale and transfer of said stock of goods by A. back to the plaintiff. The burden of proof is upon the defendant to establish that one or both of such transactions were fraudulent, by a preponderance of the evidence, to entitle defendant to a verdict in his favor. But a fraudulent sale and transfer of property may be proven by showing the existence of other facts or circumstances surrounding or connected with the transaction tending to show a fraudulent intent on the part of the parties to such sale or conveyance, or tending to show a purpose not consistent with an honest intent; and if you find from the evidence that the stock of goods in controversy was sold by the said A. to the plaintiff, and if you further find from the evidence that the said A. and the plaintiff intended by such sale and transfer to hinder and delay and defraud the creditors of said A., and not to secure the payment only of an actual and honest indebtedness of said A. to said X., then, and if you so find, your verdict should be for the defendant.<sup>1</sup>

<sup>1</sup>—Williams v. McConaughy, 58 Neb. 656, 79 N. W. 549.

"Manifestly this instruction was prejudicially erroneous. It advised the jury, in effect, that if the defendant established, by a preponderance of the evidence, fraud in either one of the sales—the sale from X. to A., or that from the latter to the former—then the defendant was entitled to a verdict. Upon the trial no evidence was given tending in the least to impeach the sale

of the stock from X. to A., but the good faith of that transaction was established beyond controversy. Had that sale been ever so fraudulent, it would not have justified a verdict in favor of the sheriff, since the property was attached as belonging to A., and he acquired no title except as through X. In the language of counsel for plaintiff: 'If the transaction of sale from X. to A. was fraudulent, the attachment plaintiffs ratified and confirmed

(b) The jury are further instructed that the defendant attacks the sale to the plaintiff upon the ground that it was made with intent to delay or defraud the creditors of said B. in the collection of their debts, and particularly one C. The jury are instructed that this is an affirmative defense, and, in order to sustain the allegations of their answer, defendants must establish it to the satisfaction of the jury by a preponderance of the evidence that the said sale from B. to the plaintiff was made with intent to delay or defraud the creditors of said B.; and unless you find as a fact from the evidence that the said transfer and sale from B. to plaintiff was made with the intent to delay or defraud said creditors in the collection of their debts, then your verdict should be for the plaintiff.<sup>2</sup>

§ 3630. **Fraud Never Presumed, Must Be Affirmatively Proven.** (a) The court instructed the jury that fraud is never presumed, but must be affirmatively proven by the party alleging the same. The law presumes that all men are fair and honest, that their dealings are in good faith and without intention to disturb, cheat, hinder, delay or defraud others; where a transaction called in question is equally capable of two constructions, one that is fair and honest and one that is dishonest, then the law is that the transaction called in question is presumed to be fair and honest.<sup>3</sup>

it. They are in no position to question it in the least. They had no dealings with X. at all. They had none with A. until after he acquired the stock from X. Even if the acquisition of the stock by A. from X. was fraudulent, the attachment plaintiffs were not prejudiced thereby. They can gain no rights by impeaching the title of A. Their claim must necessarily be through A. They may not at one and the same time impeach his title and found rights upon it. They may not at once both reprobate and approbate—blow hot and cold. As the sale from X. to A. was not and could not be assailed by the defendant, the instruction was clearly misleading. It submitted to the jury a question not before them. Instructions should be confined to the issues in the case. *Frederick v. Kizner*, 17 Neb. 366, 22 N. W. 770. "While it is true, as argued by counsel for defendant, that instructions must be construed together, yet an erroneous paragraph of a charge is not cured by another instruction stating the rule correctly. *Carson v. Stevens*, 40 Neb. 112, 58 N. W. 845, 42 Am. St. 661; *Richardson v. Halstead*, 44 Neb. 606, 62 N. W. 1077; *Metz v. State*, 46 Neb. 547, 65 N. W. 190."

2—*Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961.

"If plaintiff relies for his title upon a sale from B., he must show a valid sale. The burden is not upon defendants to show that it is invalid. If the answer had admitted the sale, and had sought to avoid its effect by alleging fraud in its inception, the instruction in this respect would have stated the law, but no such allegations were made

by defendants, and the instruction is therefore not only inapplicable, but erroneous. The plaintiff, in his complaint, claims that he was the owner of the goods at the time of their seizure and subsequently. The answer puts this in issue by a denial of such allegations, and alleges that B. was such owner. The burden throughout was upon plaintiff to prove this ownership or right of possession. The defendants might rely upon his failure to make such proof, or, if he attempted to prove his ownership by showing a purchase from B., they might, under a general denial of such ownership, show that such sale was void. *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510."

3—*Diefenthaler v. Hall*, 96 Ill. App. 639 (640-1).

"The vice of the instruction is that the law only presumes all men honest until the evidence proves the contrary, the qualifying clause having been omitted from the instruction. All that follows the first sentence of the instruction is in no manner qualified by it, and seems to be wholly regardless of the evidence. The jury might well infer that while it was necessary to prove fraud affirmatively, still the law is that notwithstanding this and without regard to the evidence the presumptions are that men are fair and honest, and the transaction was equally capable of being considered honest or dishonest, and therefore must be deemed honest. In every case where the burden of proof rests upon either party, it is because the presumptions either of law or fact are against such party, and it is always error to assume that such presumptions prevail, if there is evidence to repudiate it."

(b) When a transaction called in question is equally capable of two constructions, one that is fair and honest and one that is dishonest, then the law is that the fair and honest construction must prevail, and the transaction called in question must be presumed to be honest and fair.<sup>4</sup>

(c) The law presumes that parties, in their dealings, intend to conduct them honestly; and, where a transaction which is challenged will admit either of an honest or a dishonest construction, it is the duty of the juror to accept the former—that is, to accept the honest construction.<sup>5</sup>

§ 3631. **Assignment Void on Account of Fraud, False Representations of Financial Standing to Obtain Credit—Knowledge of by Assignees.** The court instructs the jury that if you believe from a preponderance of the evidence that in the spring of — R. M., of the firm of R. M. & Co., and of the firm of M. & E., and in the fall of —, a short time before the said firms of M. & E. and R. M. & Co. assigned to said O., made false representations to wholesale merchants of New York and other cities as to the amount of available assets or property the said firm then owned, and as to the amount of debts they were owing, and the amount of debts due to them, and obtained a large credit upon these representations, and that the plaintiffs had knowledge of such representations by assignors, or of facts and circumstances connected with said assignments, that by diligent inquiry they could have ascertained the circumstances under which said assignment was made, then the court charges you that the said assignment of said firms would be fraudulent and void as to creditors, and that plaintiffs would be bound by said fraud. The title to the property so assigned would remain in said firms of R. M. & Co. and M. & E.<sup>6</sup>

4—A F. Shapleigh Hardware Co. v. Hamilton, 70 Ark. 319, 68 S. W. 490 (493).

"This instruction was calculated to induce the jury to disregard the preponderance of evidence in the event they found it showed that the transaction was dishonest, and there was evidence to the contrary. Under the evidence in the case, it was misleading and prejudicial."

5—Det. El. L. & P. Co. v. Applebaum, 132 Mich. 555, 94 N. W. 12 (13).

Citing *Watkins v. Wallace*, 19 Mich. 57; *Sweeney v. Devens*, 72 Mich. 301, 40 N. W. 454; *Kipp v. Lamoreaux*, 81 Mich. 299, 45 N. W. 1002; *Morley v. Insurance Co.*, 85 Mich. 210, 48 N. W. 502; *Knop v. Fire Insurance Co.*, 107 Mich. 323, 65 N. W. 228.

The criticism on this was that by the charge a burden was put upon the plaintiff which does not exist even in cases of fraud. "If the word 'equally' had been used, the charge would not have been objectionable."

6—*Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632 (633).

The court said this instruction was clearly wrong; it stated, in effect "that the assignment was void as to creditors, on account of fraud, and plaintiffs would be bound by it if the jury believed from a preponderance of the evidence, that

R. M., in the spring of 1885, or in the fall of that year, and a short time before the assignment was executed, made false representations as to the financial condition of his firms, and obtained credit upon such representations, and that plaintiffs had knowledge of such representations, or of such facts and circumstances connected with the assignment that by diligent inquiry they could have ascertained the circumstances under which it was made. The only facts and circumstances tending to avoid the assignment, of which plaintiffs had knowledge, or by diligent inquiry they could have ascertained, as submitted by the charge, are the false representations made by R. M. a short time before the assignment was made. There is no direct testimony that plaintiffs had knowledge of the representations made by R. M. in New York, and aside from their connection, as clerks, with the firms of M. & E. and R. M. & Co., there is no basis for the conclusion that they knew of the representations. The charge not only directs a finding against plaintiffs if they knew of the representations, but if, by diligent inquiry, they could have ascertained them. They were at the time under no duty, so far as it appears, to ascertain what representations had been made by R. M., and



§ 3632. **Right of Insolvent Debtor to Transfer Property in Payment of a Debt Due a Creditor—Motive of Vendor Immaterial.** An insolvent debtor has the right to transfer his property to one of his creditors in payment of the debt due such creditor even though the effect of such transfer is to hinder or delay other creditors, provided the creditors receiving said property act in good faith, and take the property for the sole purpose of collecting his debt; and the fact that such transfer may have the effect to prevent other creditors from collecting their debts will make no difference. \* \* \* If H. B. was justly indebted to A. B., and if the stock of jewelry was transferred to her in payment of such debt, and if the goods transferred were not of greater value than the amount of the debt, and if the only purpose of A. B. in taking such jewelry was to collect her debt, she would be entitled to recover the value of the property so levied on, even though you may believe that the purpose of H. B. in transferring the property was to cheat or defraud his other creditors. In this connection you are further charged that if you find and believe from the evidence in this cause that H. B. was insolvent, and sold the property in controversy to the plaintiff A. B. in payment of a *bona fide* debt owing by the said H. B. to A. B., and if you believe it was the purpose of the said H. B. to hinder, delay or defraud his creditors; and if you believe that the plaintiff A. B. had knowledge of such purpose on the part of the said H. B., or had knowledge of such facts and circumstances as would have put a reasonably prudent person on inquiry, and that by such inquiry she would have learned the purpose of said H. B., or if she participated in such fraudulent purpose, then, in that event, you are instructed that such transfer would be fraudulent and void as to the creditors of the said H. B., and the plaintiff in such an event could not recover.<sup>7</sup>

the charge is subject to criticism in submitting such a view to the jury. *Seavy v. Dearborn*, 19 N. H. 351. But independent of this the charge was, in our judgment, wrong, in assuming, as a conclusion from the fact that R. M. made the false representations mentioned a short time before the assignment was made, that it was fraudulent. In speaking of the charge of the trial court on the evidence under our system, we said in *Pinson v. State*, supra, not only is the trial judge prohibited from charging the jury directly as to the sufficiency or weight of the evidence or from assuming in his charge that certain facts in issue are proven, but he cannot draw an inference or presumption of fact from the evidence. He may charge as to the presumptions which the law, by settled rule, draws from given facts; but an inference of a fact, or the conclusion of the evidence of a fact from some other fact or facts, is already drawn by the jury, who are the triors of the questions of fact. It may be proper for a jury, in reaching a conclusion as to whether an assignment was made with a fraudulent intent, to consider the conduct and declarations of a party under circumstances similar to those surrounding

R. M. when he bought goods in New York just before the assignment was made by his firms; but the question of a fraudulent intent, under such circumstances, is one for the jury, and not for the court. The court in the charge in this case, does not connect, or leave the jury to find any connection between, the false representations and the assignment subsequently made, notwithstanding there was positive testimony that the assignment was not contemplated when the statements were made."

7—*Bruce v. Koch*, 94 Tex. 192, 59 S. W. 540 (541).

The court said that it was "directly contrary to the rule laid down in the case of *Haas v. Kraus*, 86 Tex. 689, 27 S. W. 256, which so aptly and clearly expresses the law that we can do no better than to copy from that opinion as follows: 'The moving or primary purpose of a debtor in paying to a creditor a debt by conveying to him property, or in mortgaging property to secure a debt due him, maybe to prevent some other creditor from subjecting it to the payment of a sum due to him; but this within the meaning of the law will not render the conveyance or mortgage fraudulent as to such creditor, if

**§ 3633. To Render Sale Void the Vendee Must Participate in the Fraud in Some Way—Mere Knowledge of Vendor's Fraudulent Intent Is Not Sufficient.** (a) The court instructs the jury that if you believe from the evidence that the facts and circumstances surrounding and connected with the so-called sale of this stock of goods from M. to K. are such that they are not consistent with an honest purpose, then the sale is fraudulent in law.

(b) If the jury, in reviewing the questions as to whether the sale of the stock of goods by M. to K. is fraudulent as to creditors, should take into consideration all the facts and circumstances surrounding the transaction and give the same due weight, and if, after so doing, they believe that such facts and circumstances are not consistent with an honest purpose, then they should find said sale to be fraudulent as to creditors.

(c) The law is that a sale or conveyance of property made with the intent on the part of the vendor to delay, hinder or defraud a particular creditor of his debts, is void, as against all the creditors of the vendor, if the intent be known to or participated in by the vendee, although the sale is made for a good and valuable consideration.<sup>8</sup>

his purpose is solely to have payment or security for the sum actually due. As said in *Ellis v. Valentine*, 65 Tex. 547: 'What it is lawful to do cannot become unlawful by reason of the fact that it is done through a motive or with an intent not friendly to all creditors. A hindrance or delay which does not operate as a fraud upon other creditors is not that prohibited by law.' To have made the mortgage in question fraudulent the secured creditor must have had some purpose other than the security and payment of the sum due. He may have known that the debtor would not have given him the security but for a desire even to defeat some other creditor in the collection of the sum due him but this would not render it unlawful for him to take security for payment of sum due. With regard to the charge under consideration the court of civil appeals said: 'We think there is no error in the charge complained of.'"

8—*Kuhlenbeck v. Hotz*, 53 Ill. App. 675 (678-680).

"The first and second instructions directed the jury to find that the sale was fraudulent, provided they believed that the facts and circumstances surrounding the transaction were not consistent with an honest purpose. An honest purpose on whose part? Is a sale fraudulent as against creditors, simply because there is fraud on the part of the vendor? The phrase 'not consistent with an honest purpose', would authorize the jury to find the sale to be fraudulent even though the vendee may have paid for the property all it was worth, and may have been entirely ignorant of any improper motive on the part of the vendor. Even if this verbiage could

be approved as far as it goes, it should certainly have been made more specific by qualifying words showing that a participation on the part of the vendee in the vendor's dishonest purpose was necessary in order that the sale might be condemned as fraudulent. The use of the word 'so-called' in instruction No. 1 was improper as being calculated to advise the jury that the transaction was regarded with suspicion from the bench. Instruction No. 2 is open to the criticism that it did not require the jury to base their verdict upon the evidence admitted on the trial. Instruction No. 3 renders the sale void, although made for a good and valuable consideration, provided the vendor's fraudulent intent was known to the vendee. The language is not 'known to and participated in,' but 'known to or participated in.' Let it be borne in mind that this was not a sale by one largely indebted to one who was not his creditor, but that it was a sale to pay debts which had been contracted in good faith, or what is practically the same thing, it was a sale to indemnify a surety who was responsible for the payment of the debts, and by the terms of the sale undertook to pay such obligations absolutely and as if they were his own. In such case mere knowledge of the vendor's fraudulent purpose will not defeat the sale. To render the sale void the vendee must participate in the fraud in some manner. It is not enough that the stream take its rise in a corrupt source; it must also flow into a corrupt receptacle. *Myers v. Kinzie*, 26 Ill. 36; *Gridley v. Bingham*, 51 Id. 153; *Bowden v. Bowden*, 75 Id. 143; *Welsch et al. v. Werschm*, 92 Id. 115; *Wood v. Clark et al.*, 121 Id. 359."

**§ 3634. Setting Aside a Conveyance Because of Fiduciary Relations.**

I further instruct you, gentlemen of the jury, that if, at the time of the execution of the conveyance which is the subject of this controversy, you find from the evidence that the plaintiffs were far advanced in years, were greatly enfeebled in body and mind, and were greatly troubled and uneasy about their own personal welfare in the future, and by reason of these conditions were not in a mental condition to carefully weigh and transact such business as was involved in transferring the land involved in this action, and had become childish, and dependent upon their daughter, Mrs. M., and her husband, for counsel and advice, then and in that event an equitable wardship or fiduciary relation existed between them. A person is said to stand in a fiduciary relation to another when he has rights and powers which he is bound to exercise for the benefit of that other person. Hence he is not allowed to derive any profit or advantage from the relations between them, except with the full knowledge and consent of the other person, and such other person must be in possession of all his powers before he can be bound by that knowledge or consent. The relations of attorney and client, principal and agent, guardian and ward, are instances of fiduciary relations. And generally, whenever, from the positions of the two persons, one of them reposes and has a right to repose confidence in the other, a fiduciary relation is thereby created and exists. So, in this case, if you find, from a full, fair, and candid consideration of all the evidence in the case, that a fiduciary relation existed between the plaintiffs and the defendants, actual fraud is not essentially necessary to set aside the conveyance sought to be set aside in this case, but the burden of establishing the perfect fairness and equity of the conveyance, under such circumstances, is thrown upon the defendants.<sup>9</sup>

**§ 3635. Title of Wife in Property Formerly Her Husband's—Wife Holding Adversely to Husband's Creditors.** The court instructs the

<sup>9</sup>—Meyer et al. v. Reimer et al., 65 Kan. 822, 70 Pac. 869.

"It will be seen from this a new issue entirely different from that tendered by the pleadings or supported by the evidence, was submitted to the jury, and by it the jury was told that, if it should conclude from the evidence that fiduciary relation existed between the parties, then it was not necessary to prove actual fraud. The instruction even went further than this, and advised the jury that in such case the burden no longer rested upon the plaintiff. Issues so foreign to the pleadings as the one submitted by this instruction may not be interpolated into a case. The jury was not authorized, upon the issues or the theory of the case, to consider the fiduciary relation, and questions growing out of the same, in the case, at all, or, at most, only in so far as such consideration served to explain or emphasize matters bearing upon the active fraud charged, and not to create another ground for relief, so that, in our opinion, the court clearly erred in giving this instruction, and we think it was a material error. It could hardly be

otherwise in an action of this sort, where an aged parent was pitted against his child, that much of sympathy should be stirred up in the mind of the juror; and, warranted by such an instruction, he might find ground for a verdict therein other than in the evidence supporting the allegations of the petition. It is true, the jury found, in answer to special questions, the facts upon the issues tendered in the pleadings for the plaintiff, but they may have so found because of the influence which the erroneous instructions injected into the case. While these findings were not binding upon the court in this sort of a case, the court did adopt them, and permitted them to control its judgment. More than this, we may not gather from this instruction that, in the court's mind, the theory mentioned therein was material in the case, and how can we say that it was not, in view of the court, determining of the rights of the plaintiff? The trial theory, as well as instructions, should be based upon and conform to the issues made by the pleadings, else there is no certainty or order in procedure."



jury that a wife cannot acquire and hold property adverse to her husband's creditors when it is made to appear that the claim of title made by the wife was of property that formerly belonged to her husband, and title assumed thereto after her husband had been insolvent or unable to pay his debts.<sup>10</sup>

§ 3636. **Fraudulent Transfer—Rights of Creditor—Bailment or Sale.** If you believe from the evidence, that at the time this suit was commenced and before, the defendant was the sheriff of Cook County, Illinois, that he took possession of said goods by virtue of writ of *fiery facias* against the goods and chattels of one B., and that he was detaining possession thereof under said writ at the time of the commencement of this suit, and if you also find that the said B. was not entitled to possession of said goods and as against plaintiff, then you are instructed that the right of defendant A. was no greater than that of said B., provided you believe further, from the evidence, that a demand was made by the plaintiff or its agent, before this suit was begun, on the defendant for the return of said goods.<sup>11</sup>

10—Gollobitsch v. Rainbow, 84 Ia. 567, 51 N. W. 48 (50).

The court said that this "statement of the law ignores the fact that the wife may acquire title to exempt property from her insolvent husband without the payment of a consideration, and the further fact that she may acquire title from him to property not exempt by paying its value in good faith, and is therefore erroneous."

11—Gilbert v. Forest City Furniture Co., 72 Ill. App. 186 (189, 191). "This instruction for appellee does not state the law, under the evidence in this case, correctly, as it appears from the following cases: Bastress v. Chickering, 18 Ill. App. 208; Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455; Brundage v. Camp, 21 Ill. 331; Stadfeld v. Huntsman, 92 Pa. St. 56; Lapp v. Pinover, 27

Ill. App. 171; Ketchum v. Watson, 24 Ill. 591; Thompson v. Wilhite, 81 Ill. 358; Orr v. Gilbert, 68 Ill. App. 429. This instruction ignores the rights of creditors who, as stated in the case last cited, would be entitled to levy their execution when the arrangement between the real owner and the debtor was fraudulent in law. Had this instruction told the jury what in law was a bailment and sale, and then left them to find from the evidence whether the arrangement between the parties, under all the evidence, was a bailment or sale, so far as third parties are concerned, and if the jury found that there was a bailment, then the conclusion of the instruction, that appellant's right was no greater than that of B., would have been correct."

## CHAPTER CXXXVI.

### FRAUD, FALSE REPRESENTATIONS, ETC.

See Approved Instructions, Chapter LII, Vol. I.

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| <p>§ 3637. False and fraudulent statements are not mere matter of belief.</p> <p>§ 3638. Fraudulent representations as ground for rescinding sale—Must be to an existing or past fact.</p> <p>§ 3639. Sale of stock, fraud, knowledge of.</p> <p>§ 3640. Stating matter to be true of which party has no knowledge—Must be false.</p> <p>§ 3641. Obtaining goods by fraud—Giving of check in payment—Failure to pay check not fraud per se.</p> <p>§ 3642. Rescission of sale induced by false representations, relied on—Motive or intent is not required to be shown.</p> <p>§ 3643. Victim of fraud not required to prove actual intent to defraud.</p> <p>§ 3644. False representations to commercial agency—Intent presumed — Commission merchant's misrepresentation.</p> <p>§ 3645. False representations must be made knowingly, with intent to deceive.</p> <p>§ 3646. Presumption of honesty—More convincing proof is required of the good faith of a transaction between near relations than between strangers.</p> | <p>§ 3647. Merely attempting a fraud is not sufficient—Must be a successful attempt.</p> <p>§ 3648. Representations made to the defrauded party alone to be considered.</p> <p>§ 3649. Omission to correct a false statement innocently made.</p> <p>§ 3650. Vendee's failure to notice defects no bar to recovery.</p> <p>§ 3651. Contributory negligence of the victim of fraud no bar to relief.</p> <p>§ 3652. Language imparting an assumption that sales were not bona fide and characterizing the sales as "pretended sales," held error.</p> <p>§ 3653. Cancellation of deed—Pecuniary necessity compelled undue sacrifice of property.</p> <p>§ 3654. Fraud—Circumstantial evidence.</p> <p>§ 3655. Instruction to find verdict must contain all the elements in the case.</p> <p>§ 3656. Fraud—Degree of proof.</p> <p>§ 3657. Signing without knowledge of contents—Fraud.</p> <p>§ 3658. The motive in bringing an action for a valid claim is immaterial.</p> |
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§ 3637. **False and Fraudulent Statements Are Not Mere Matter of Belief.** (a) If the jury are not satisfied to a reasonable certainty that the plaintiff made false and fraudulent representations to the defendant about the amount of the goods, accounts, and money in bank, then you will find for plaintiff.

(b) The defendant must show to your reasonable satisfaction that the statements, if any were made by the plaintiff at the time of the trade, were false, and that the statements were made as facts, and not as opinion or belief.<sup>1</sup>

<sup>1</sup>—Hooper v. Whitaker, 130 Ala. 324, 30 So. 355 (356).  
These charges "were calculated to

mislead the jury to the conclusion that plaintiff was entitled to recover, notwithstanding the jury may have

§ 3638. **Fraudulent Representations as Ground for Rescinding Sale—Must Be to an Existing or Past Fact.** The court instructs the jury that if you find from the evidence in this case that A., acting as the agent of B., on the 27th day of May, —, agreed with the plaintiffs that if any injurious changes occurred in the financial condition of the said B., the plaintiffs should be notified of said injurious changes before any further purchases of goods were made, and if you find from the evidence that afterward an injurious change did take place in the financial condition of the said B. and that after said change the goods in question were purchased, and the plaintiffs were not notified of said injurious change prior to the purchase of said goods, then you should find the issues for the plaintiffs.<sup>2</sup>

§ 3639. **Sale of Stock, Fraud, Knowledge of.** (a) The court tells you as a matter of law that if you find from the evidence in this case that McD. telegraphed W. an offer of par for his (W.'s) stock and W. received such telegraphed offer, and before McD. withdrew such offer, W. telegraphed McD. an acceptance of such offer, and you believe said offer or acceptance was not modified, a contract then was thereby made between McD. and W. as shown by the testimony in this case, except the mere fact of the actual transfer of the stock, is immaterial to this case and should be disregarded utterly by you, unless you believe that what occurred thereafter tends to explain the sale of stock; and the mere fact of the actual transfer is only material as showing compliance with the contract of sale into which W. entered.<sup>3</sup>

believed his statement was false, and not known by defendant to be false, as to the value of the stock of goods, if he made it. In other words, they were, in effect, a direction to the jury that they must be reasonably satisfied that all the statements, if made, of plaintiff's, were false and fraudulent, whereas one may have been and the others not."

<sup>2</sup>—Murray v. R. P. Smith & Sons, 42 Ill. App. 548 (553 and 554).

"The financial statement contains an agreement that if any injurious change occurs in the financial condition of the deceased, notice thereof would be given plaintiffs before any further purchases were made. This, it will be observed, is not a representation as to any existing or past fact, but is only a promise to do an act in the future. A failure to comply with such a promise does not constitute fraud. The general rule is that to amount to fraud there must be a willful, false representation as to an existing or past fact. It is true that some authorities hold that if a promise is made with the fraudulent intent in the mind of the maker not to keep it, then a breach of the promise may be regarded as a fraud. Bigelow on Fraud, pages 11 and 12."

<sup>3</sup>—McDonough v. Williams, 77 Ark. 261, 92 S. W. 787.

"The ground of appellant's objection to this instruction is that there was evidence tending to show that after plaintiff sent the message from St. Louis agreeing to sell the stock at par, he received information of

the alleged fraud and deception and after receipt of such information he proceeded to perform the contract, thereby waiving the alleged fraud. The question therefore arises: Can the vendor in an executory contract for the sale of corporation stock or other personal property, who has been induced by fraud and deceit to enter into the contract, and who subsequently performs the contract by delivering the property and receiving the purchase price after discovery of the fraud, maintain an action for damages for the fraud? It seems clear to us, upon principle, that he cannot, though a search of the adjudged cases reveals a paucity of authority on the precise question. Authority is not however, entirely lacking to sustain the proposition that the fraud is waived under such circumstances. Thompson v. Libby, 36 Minn. 287, 31 N. W. 52; Thweatt v. McLeod, 56 Ala. 375; Gilmer v. Ware, 19 Ala. 252; Schmidt v. Mismser, 116 Cal. 267, 48 Pac. 54; Western Elec. Co. v. Hart, 103 Mich. 477, 61 N. W. 867; Edwards v. Roberts, 7 Smedes & M. 544. An executory contract which has been procured by fraud is not binding upon the party against whom the fraud has been perpetrated. He may, after discovering the fraud, either perform it or rescind it, and if with knowledge of the fraud he elects to perform it this is equivalent to his making a new contract, and to permit him, under those circumstances to recover for a fraud would be to do violence to every rule upon which



(b) If you find from the evidence in this case that the plaintiff gave to the defendant general authority to sell or dispose of his, plaintiff's, stock along with his, defendant's, in the M. Coal Company; that thereafter defendant, while the plaintiff was absent from the state, at Battle Creek, Mich., entered into a contract with a third party for the sale of the entire issued capital stock of said coal company at the price of approximately \$33,000 for the \$24,000 of said issued capital stock, and after having made said contract he (defendant) attempted to acquire and did acquire the stock of the plaintiff for a less sum of money than he had contracted to, and did sell the same for, you will find for plaintiff in a sum equal to the difference between what defendant paid W. for his, W.'s, stock, and what he (defendant) got for said stock, unless you further find from the evidence in the case that defendant, before acquiring plaintiff's stock, explained fully to plaintiff his (defendant's) contract of sale of said stock to such third party, or that the plaintiff knew, or in the exercise of a due degree of caution ought to have known the facts in regard to the contract for the sale of stock.<sup>4</sup>

§ 3640. **Stating Matter to Be True of Which Party Has No Knowledge—Must Be False.** Representations and statements must not only be false, but the party making them must have known them to be false, or must have stated that he knew a proposition to be true, concerning which he had no knowledge. If, therefore, a person make a statement of material fact which he knows to be false, or if he state that he knows a matter to be true concerning which he has no knowledge, he is, in either case, guilty of false and fraudulent representations; and if the other party believed such representations, and relied

compensatory damages are allowed. We are aware that there are some cases which appear to hold to the contrary but upon examination they will generally be found to be cases where the contract had been executed wholly or in part when the fraud was discovered, or where the fraudulent representations were treated as warranties and damages awarded for breaches thereof. *Whitney v. Allaire*, 4 Denio, 554; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380. Of course, where the representation to a purchaser amounts to a warranty of title, value, or quantity, he may, without waiving the breach of the warranty, execute the contract and sue for the breach. The case of *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612, is sometimes quoted as holding that performance of an executory contract after discovery of the fraud is not a waiver of the right to sue for the fraud, but in that case the contract had been partly executed when the fraud was discovered. We hold that no action can be maintained for the damages where the contract is executed after discovery of the fraud, and the court erred in so instructing the jury and in excluding evidence tending to establish the fact that appellee knew of the alleged fraud when he consummated the sale by transfer of the stock."

4—*McDonough v. Williams*, supra. "This instruction, aside from erroneously putting the case before the jury upon a theory inconsistent with the pleadings and proof, is incorrect in that it cuts off, as a matter of law, all right of the defendant to purchase the stock from plaintiff because of the fact alone of the latter having previously authorized him to sell the stock, regardless of any severance of the relation of principal and agent, and regardless of the question whether plaintiff was then relying upon defendant for full disclosure of all the facts, or had the right to so rely. Even though the relation of principal and agent subsisted between the parties they had the power to dissolve that relation and by agreement to create another of a different character, and if they did so, and the circumstances and further transactions between them were such as to absolve the quondam agent from disclosure of facts coming to his knowledge, then he could with propriety deal with the former principal without making such disclosure. These are questions of fact for trial juries to determine and not matters of law for the court. Upon the statement of facts made by the defendant, he had the right to have these questions passed upon by the jury, but the instruction just quoted entirely eliminated them from consideration."

thereon, and was induced thereby into the transaction from which he has suffered, fraud is established, and the injured party will be protected by the law, and his injuries must be redressed.<sup>5</sup>

**§ 3641. Obtaining Goods by Fraud—Giving of Check in Payment—Failure to Pay Check not Fraud Per Se.** (a) If the jury believes the goods in question did not belong to the plaintiff, but were the property of the defendant, then the plaintiff cannot recover, in whatever way the plaintiff may have gained possession of his own property.

(b) As this suit is not brought upon the check, but upon the fraudulent conversion of defendant's property, the plaintiff cannot recover unless he establishes to the satisfaction of the jury that the defendant was guilty of fraud in giving the check.

(c) The plaintiff cannot recover unless he satisfies the jury that there was a fraudulent conversion of the property in question.

(d) Unless the jury believes that the defendant was guilty of a deliberate deceit, the plaintiff cannot recover.

(e) If the jury believe that the defendant gave the plaintiff the check in good faith, and with a bona fide intention of paying the same, there can be no recovery, in the absence of other evidence of fraud; and the mere failure to pay the check is not a fraudulent conversion of goods.

(f) Failure to pay the check or stopping its payment is not a fraud, in the absence of testimony to show that the check was given or its payment stopped in bad faith.<sup>6</sup>

**§ 3642. Rescission of Sale Induced by False Representations, Relied On—Motive or Intent Is Not Required to Be Shown.** (a) The jury are instructed that if they believe from the evidence that the plaintiffs relied upon the statements of the defendant as to his financial condition at the time of the sale, and delivery of the goods in controversy in this cause, and if the jury further believe from the evidence that such statements were known to the defendant to be untrue, or were made in such a way as to deceive the plaintiffs, and with the preconceived design, or with the intention, at the time never

5—Allison v. Jack, 76 Ia. 205, 40 N. W. 811.

"The foregoing instruction, given to the jury, in our opinion, is erroneous, for these reasons: It holds that the statement of a matter of which defendants had no knowledge would authorize the jury to find that defendant was guilty of false and fraudulent representations. The jury are not required to find that the statement is false. They, therefore, under the instruction, could have found against defendant without finding that the representations he made without knowledge were false. In this regard the instruction is plainly erroneous."

6—Cole v. High, 173 Pa. 590, 34 Atl. 292 (293, 295).

"We feel obliged to sustain all the assignments of error as to these charges. This necessity grows out of the character of the action. It is based entirely upon the allegation of fraud and deceit practiced by the defendant in obtaining the goods. If there was no fraud or deceit, the defendant is not

liable in this action. There is no claim in the plaintiff's statement for goods sold and delivered. No claim is made upon the checks, and we are unable to discover in the statement any cause of action which is not based upon an accusation of fraud in obtaining the goods. The mere non-payment of the check is not, of itself alone, any evidence of fraud, especially in view of the defendant's testimony and the theory of the whole transaction. Hence we think there was error in the various rulings complained of in the several assignments of error we are now considering. Of course, if there was fraud in fact, there could be a recovery upon the plaintiff's theory, and under the statement, as the transaction in that respect would have authorized the plaintiff to rescind the contract and recover just as he claims. But the court by the charge, and in answer to the several points of the defendant, denied the necessity of any fraud to accomplish that result, and in so holding there was error, in our judgment."

to pay for them, the purchase was fraudulent, and the jury should find the issues for plaintiffs.

(b) The plaintiff, to entitle him to recover, must prove, by a preponderance of the evidence that defendant, P., obtained the goods in question from the plaintiff under false and fraudulent representations made by him to the agent of the plaintiff as to his financial condition, that such representations were made by P., knowing them to be false, and with the intention of deceiving the plaintiff, and of obtaining the goods in question on credit and with the intention of not paying for the same.<sup>7</sup>

§ 3643. **Victim of Fraud Not Required to Prove Actual Intent to Defraud.** (a) The jury are instructed that, in order to constitute actual fraud, there must be contrivance and design to injure another. Actual fraud is not to be presumed, but it must be proved by the party alleging it by a preponderance of the evidence; and although actual fraud may be proved by proof of actual facts and circumstances tending to show fraud, still, if the motive and design of an act can as well be traced to an honest and legitimate source as to a corrupt and dishonest one, the former must always be preferred.

(b) The jury is instructed that, in order to find the defendant guilty in this case, the jury must believe, from the evidence, that the defendant made the representations and statements alleged in the declaration; that such representations and statements were false; that the defendant knew they were false, and had no good reason to believe they were true; that they were made with the intent to defraud the plaintiff; that the plaintiff was induced thereby to sell, and deliver to the firm of S. W. & Co., and did so sell and deliver to said firm the goods and merchandise for which they now seek to recover damages from the defendant, and that by means thereof the plaintiff has sustained damages as alleged in his declaration.<sup>8</sup>

7—*Reed & Co. v. Pinney & Co.*, 35 Ill. App. 610.

"These instructions announce an erroneous rule. To entitle one to rescind a sale of goods that has been induced by false and fraudulent statements, the vendor is only required to show the statements made, that he relied upon them to his injury, and that they were false; the intent or motive with which such false representations were made need not be shown. 'It is fraud in law, if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad.' *Foster v. Charles*, 7 Bing. 103; *Case v. Ayers*, 65 Ill. 142. In reversing the case of *Gough v. St. John*, reported in 16 Wend. 645, *Cowen, J.*, said: 'I have yet to learn that our standard of legal morality is so low that a man may utter a falsehood with the view to influence another in a matter of interest, which falsehood shall prove pernicious, and yet the law withhold redress because independent proof is not given that the speaker intended to work the consequences which follow. This I understood to be the import of the charge. The party

may hope, and may pray, if he pleases, that the results shall be innocent; it would only add impiety to falsehood; he is guilty of a wrong; the poisoned arrow was aimed by him and sped from his hand, and he must answer for the effect. Instructions substantially like those above set out were considered by this court and held erroneous in *Keith et al. v. Goldston et al.*, 22 Ill. App. 457; see also, *Drabek v. The Grand Lodge, etc.*, 24 Ill. App. 82; *Farwell et al. v. Hanchett*, 120 Ill. 573, 11 N. E. 167."

8—*John V. Farwell Co. v. Nathanson*, 99 Ill. App. 185.

"The instructions severally announce erroneous rules of law applicable to the case at bar. *Case v. Ayers*, 65 Ill. 142, 11 N. E. 875; *Farwell v. Hanchett*, 120 Ill. 573; *Keith v. Goldston*, 22 Ill. App. 457; *McBeen v. Fox*, 1 Ill. App. 177; *Reed v. Pinney*, 35 Ill. App. 610; *Brabek v. Grand Lodge*, 24 Ill. App. 82; *Flower v. Brumbach*, 30 Ill. App. 249. 'It is fraud in law if a party makes representations which he knows to be false and injury ensues, although the motive from which the representations proceeded may not have been bad.' *Foster v. Charles*, 7 Bingham 103, referred to in sev-



§ 3644. **False Representations to Commercial Agency—Intent Presumed—Commission Merchant's Misrepresentation.** (a) The jury are instructed, that if they believe from the evidence that the statements introduced in evidence and made to the B. Company, were made by the said defendant, M., at the request of the B. Company, for the purpose of giving the said M. a rating in the Bradstreet Reports, and were not made by the said M. with the purpose and intent that the same should be used to establish or obtain a credit for himself, and he did not know that they would be so used, then the jury shall not consider the same as a representation of the financial standing of the said defendant, M., to the said plaintiffs, although the jury should further find from the evidence that the said plaintiffs did receive such a report from the said ——— company.<sup>9</sup>

(b) The court instructs the jury that if you find from the evidence that on ——— the defendant company, through any of its officers or agents, represented to the plaintiff that it, the said defendant, had sold or had a purchaser for a certain car load of oranges, referred to in the evidence as car No. ———, then belonging to plaintiff and consigned to him by railroad freight, and that defendant requested plaintiff to deliver said car or the bill of lading evidencing title to said oranges to it, the said defendant, and that said representations were false in point of fact, and defendant, at the time, had no such purchaser for said car load of oranges and had not sold them, and that plaintiff in belief of and relying upon said representations delivered said bills of lading and the possession of said car load of oranges to the defendant company, and that the defendant took possession of said car load of fruit and diverted it from the point where it then was, and that, as the direct result of said false representations and diversion by defendant, plaintiff was put to any loss, expense or damage, then the verdict of the jury must be for the plaintiff on the first count of the petition.<sup>10</sup>

eral of the cases above cited. \* \* \* The law infers a purpose to injure from an intentional false statement of fact. When a man knowingly makes a false statement to one who relies upon it and suffers injury, the latter's right of action is complete. The injured party is not required to prove as an additional element a design or purpose to injure or a fraudulent intent, nor is the wrongdoer allowed to escape liability for the damage he has caused by showing that he did not in fact intend that injury should result from his false statement."

9—Moyer v. Lederer, 50 Ill. App. 94 (95, 97).

"Its effect was to tell the jury that no greater weight should be attached to a statement made by appellant ——— to the commercial agency, for the purpose of giving himself a financial rating in the agency's reports, than to his secret intention at the time that he should not obtain credit therefrom for himself. M. knew the business mission of the commercial agency, and himself became a subscriber to it. He ought not to be permitted to shield himself from the effect of a business statement he was regularly called

upon to make for publication through the channels of the agency, behind his secret intention, at the time of making the statement, that he would not profit by it."

10—Serrano v. Miller & Teasdale Commission Co., 117 Mo. App. 185, 93 S. W. (811, 812).

"This instruction is assailed on this appeal on the ground that it permitted a finding for the plaintiff without requiring the jury to find a scienter. The criticism is that the instructions should have required the jury to find that the representations were not only false, but were known to the defendant to be false at the time they were made, which, of course, would be proof of the fraudulent intent of scienter; or that it should have required the jury to find what in law would be equivalent to the proof of scienter, and that is that the statements of T. that the car was sold to the parties, and at the prices named, were made as facts of his own knowledge, when in truth he had no knowledge whatever on the subject as to whether the car was sold or not sold, or as to whether the statement made by him to that effect was true or false. The criticism would seem just and ordi-

§ 3645. **False Representations Must Be Made Knowingly, With Intent to Deceive.** The court instructs the jury that to recover in an action of deceit, it is only necessary for plaintiffs to prove that some material representation in the statement made to the plaintiffs was false; that it was communicated to the plaintiffs; that the defendant knew it was false, and that the plaintiffs relied upon it as true, were induced to act upon it, and were injured in so doing. The motives or intentions in making such misrepresentation are immaterial.<sup>11</sup>

§ 3646. **Presumption of Honesty—More Convincing Proof is Required of the Good Faith of a Transaction Between Near Relations Than Between Strangers.** (a) The law presumes that men act and intend to act in their business dealings fairly and honestly and without any intention of defrauding others; and therefore one who charges that a transaction has been entered into with fraudulent or corrupt motives, must establish his charge by a preponderance of the evidence.

(b) The law does not forbid relatives from dealing with each other, but on the contrary they have the same right to buy from and sell to each other as other persons have, and a sale cannot be held to be fraudulent merely because it was made from a father to a son or between other relatives; and the same presumption of honesty and fair dealing applies to such a sale as to transactions between other persons until it is overcome by a preponderance of evidence tending to show that a fraud was intended or committed.

(c) The fact that C. M. is the son of L. M., from whom he purchased the goods in controversy, of itself does not show that the sale was a fraudulent one, nor of itself raise any presumption against either the good faith of the parties or the validity of the sale. And before the sale can be impeached, there must be other evidence from which, in connection with the facts and circumstances in the case, you believe that the purpose of the sale was to hinder, delay or defraud creditors.<sup>12</sup>

narily would be fatal, but whether or not it is on the peculiar facts of this case will be noticed further in the opinion."

11—*Wachsmuth v. Martin*, 45 Ill. App. 244 (248 and 249).

"In our opinion the last part of this instruction rendered it bad. Said Chief Justice Craig in *Schwabacker v. Riddle*, 99 Ill. 343, 'We are aware of no authority which will sanction a recovery in an action for deceit, unless a false representation has been made knowingly with intent to deceive.' This is the last expression of our Supreme Court, and while it does not harmonize with what is said by Justice Sheldon in *Case v. Ayers*, 65 Ill. 142, we believed it is based on a correct principle. Misrepresentations knowingly made are sufficient to warrant an inference of fraudulent intent, but to hold that the intention of a party making the misrepresentation is immaterial, would be against authority and principle."

12—In *Merrill v. Merrill*, 105 Ill. App. 5 (7), the foregoing instructions were held erroneous. The court said that the instructions "repeated-

ly impressed upon the minds of the jury as the law applicable to this case, that the law presumes that men act and intend to act honestly without intent to defraud, and this presumption of honesty applies to the sale from the father to the son in this case, and that the relationship of the parties does not raise any presumption against the good faith of the parties or the validity of the sale. These instructions as applied to the vital issues in this case are misleading; if for no other reason, because they call repeated attention to a prominent fact upon which fraud is predicated, the relationship of the parties, and ignored another important point incident to such relation which it was insisted appeared on the trial,—the knowledge of the son of the father's embarrassed circumstances. \* \* \* It has been said in *Second National Bank v. Gilbert*, 174 Ill. 485, 51 N. E. 584, 66 Am. St. 306, that where the parties to a transfer are near relations, clearer and more convincing proof is required of the good faith of the transaction than when they are strangers. In *Martin v.*

§ 3647. **Merely Attempting a Fraud Is Not Sufficient—Must Be a Successful Attempt.** Fraud vitiates or annuls every contract into which it enters and if the jury believe that there was any fraud practiced, or attempted to be practiced, by plaintiffs, or either of them, upon defendant, then, so far as the defendant is concerned, this alleged contract of sale and purchase was a void contract, and plaintiffs cannot recover.<sup>13</sup>

§ 3648. **Representations Made to the Defrauded Party Alone to Be Considered.** The jury are instructed by the court that the material allegations in the information are, first, that the defendant in this case, for the purpose of obtaining money upon this certificate of deposit, or of defrauding the owner thereof out of the money, represented to the bank, or any one, or remarked to the officials of the bank that he was a *bona fide* purchaser for value, and the owner of the certificate of deposit.<sup>14</sup>

§ 3649. **Omission to Correct a False Statement Innocently Made.** For instance, if a man makes a representation that he owns a piece of land, several months before he sold it to a party, and believed he owned it, and then afterwards, before he consummated the sale, and taking the man's money, he found that he did not own it, and did not correct it, it would be just the same as if he knew that he did not own it at the time that the representations were made. The guilt would be his knowing it any time before he received the payment and he not correcting it.<sup>15</sup>

§ 3650. **Vendee's Failure to Notice Defects No Bar to Recovery.** (a) If the jury believe from the evidence that the defendant recklessly or willfully made false representations to the plaintiff in respect to material facts about the construction or quality of the house, still the plaintiff can not recover for any such representations which relate to matters that were open to the inspection and scrutiny of the plaintiff before he made his purchase. As to all such matters plaintiff is bound by what he saw, or by what he might have seen had he examined the house, unless he, the plaintiff, was misled by the defendant by false representations, by reason of which he, the plaintiff, failed to examine the house.<sup>16</sup>

Duncan, 156 Ill. 280, 41 N. E. 43, an instruction was asked that, while it is not unlawful for brothers to deal with each other, yet where the parties to a transfer are near relatives, clearer and more convincing proof is required of the good faith of the transaction than when they are strangers; and it was said there was no good reason why the instruction should not have been given."

13—Behram et al. v. Newton, 103 Ala. 525, 15 So. 838 (839).

"The court erred in giving this charge for the defendant. This charge ignores the evidence which tended to show that the defendant waived the marking up of the goods above the original cost mark, and required a verdict for the defendant, if the plaintiffs attempted a fraud, whether the attempt was successful or not."

14—State v. Riddell, 33 Wash. 324, 74 Pac. 477 (480).

"This instruction must be read in connection with others following it, and when so done we think it was made clear to the jury that they could consider only representations made to the bank or its officials. That was the central idea repeatedly impressed upon the jury by subsequent instructions, and we do not think the somewhat inapt words of the single instruction misled the jury from the main thought couched in the charge as a whole."

15—Crawford v. State, 17 Ga. 247, 43 S. E. 762 (763).

"This was error," said the court, "inasmuch as it omitted all reference to the question as to whether defendants knew C. was relying on the previous representations, and whether the silence was fraudulent, and intended to deceive."

16—In Van Velsor v. Seeberger, 59 Ill. App. 322 (325), the court said: "There may be found cases which justify this, but they are no longer



(b) The jury are instructed that the purchaser of a house is bound before purchasing to make reasonably careful inspection for himself, in order to ascertain its character and quality, and he is bound by any facts which such inspection would have disclosed. He can not relieve himself from his duty of inspection by neglecting or refusing to make it, so long as the seller does nothing to dissuade or prevent him from making it. And the purchaser is bound not only by what such an inspection would have disclosed to himself personally, in view of his particular knowledge or ignorance of the subject, but what such an inspection would have disclosed to a person of ordinary intelligence and capacity making careful inquiry into the subject.<sup>17</sup>

§ 3651. **Contributory Negligence of the Victim of Fraud No Bar to Relief.** The court instructs the jury that the law requires of every person the exercise of reasonable prudence and caution in the affairs of life, and the law requires that, before relieving a party from a contract on the ground of fraud in obtaining its execution, it should appear from the evidence that on entering in such contract he exercised reasonable care and prudence to learn its nature and contents before he signed it; and the jury are further instructed that if they find from the evidence that the defendant could read at the time he signed the contract sued on, then it was the duty of the defendant to read such contract for himself before he signed it, unless the jury believe from the evidence that he was induced not to do so, without the want of reasonable care and prudence on his part, by the willfully false statements on the part of the plaintiff's agent; and if the jury find from the evidence that the defendant was able and had full opportunity to read such written contract before signing it, and was not induced to forego reading it by willfully false statements on the part of the plaintiff's agent, or that the defendant under all the facts and circumstances shown by the evidence did not exercise reasonable prudence and caution in not reading such written contract for himself before he signed it, then the court instructs the jury that the defendant can not now be permitted to say that he did not know what was contained in said contract when he signed it, and the jury should find that, when made, the contract became binding on the defendant.<sup>18</sup>

§ 3652. **Language Importing an Assumption that Sales Were Not Bona Fide and Characterizing the Sales as "Pretended Sales," Held Error.** You are instructed as a matter of law that if, from the evi-

authority. The law today stands upon a higher plane and enforces a better morality. A vendor may not willfully make false representations as to material facts about the construction or quality of a house and escape liability therefor by showing that the matters of which he spoke were open to the inspection and scrutiny of the defendant, and that if he believed the lie it was his own fault. Such is not, in this generation, either the law or a description of common honesty. Benjamin on Sales, 382-390; *Witherwax v. Riddle*, 121 Ill. 140, 13 N. E. 545.

17—*Van Velsor v. Seeberger*, supra.

"There is no more duty resting upon the purchaser of a house to inspect it before buying than there

is upon the buyer of any other article.

"Any person has a right to rely upon positive statements of warranties of a vendor as to the quality of an article he offers for sale, where the article is not present, or if present its appearance does not contradict the representations. A positive statement of quality, the truth or falsity of which is not apparent, has a tendency to dissuade one from making an inspection."

18—*Buckley v. Acme Food Co.*, 113 Ill. App. 210 (213, 214, 215).

"Under the above instruction, the jury had no alternative but to find for the plaintiff, his negligence having been established by his own testimony. The instruction incorrectly stated the law, and giving the same was prejudicial error."

dence, you will find that at the time of the pretended sale of the property in controversy by A. to B., and by her to this plaintiff, there was no immediate delivery to either of them, followed by an actual and continued change of possession, and you find that said pretended sale was made with the intention on the part of A. or B. to defraud the creditors of A., though said fraudulent intent was not known to or participated in by the plaintiff herein, the sale is void as to creditors, and you must find for the defendant, unless you further find that plaintiff purchased said property, and received possession then or prior to the levy of the attachment, or unless you find that C. consented to and agreed that such sale and transfer should be made in consideration of B.'s executing the conveyances referred to in these instructions.<sup>19</sup>

§ 3653. **Cancellation of Deed—Pecuniary Necessity Compelling Undue Sacrifice of Property.** If you find from the evidence that at the time plaintiff, H., made the deed hereinbefore mentioned to W. he was in such a condition of pecuniary necessity and distress as would be likely to cause a person similarly situated to make an undue sacrifice of his property, and such condition was then known to W., and that W. took advantage of such condition to obtain said deed from him, and if you find that the same was unfair, and made upon inadequate consideration, then you should find that such transfer was fraudulent.<sup>20</sup>

§ 3654. **Fraud—Circumstantial Evidence.** Fraud can seldom be

19—Powell v. Yeazel et al., 46 Neb. 225, 64 N. W. 695 (696).

The court said: "We think the learned district judge gave this instruction without sufficiently observing the language in which it is couched. It is, we think, in two respects erroneous, to the prejudice of the plaintiff. It twice characterizes the sales from A. to his wife, and from her to the plaintiff, as 'pretended' sales. The word 'pretended' used in such a connection signifies something falsely assumed; something claimed contrary to the truth of the matter. The jury could not have understood it in any other sense. As we have said, there was evidence justifying the jury in finding that both sales were bona fide, and the court should not have used language importing an assumption that they were not so."

20—Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584 (589).

"The above paragraph of the court's charge is assigned as error upon the ground that no facts were proven authorizing the court to give a charge on pecuniary necessity, and that the pleadings of appellee do not present a case authorizing the presentation of a charge upon that subject. The paragraph is taken from section 948 of volume 2 of Pomeroy's Equity Jurisprudence, and announces a well-established principle of equity. But, to authorize it to be given in charge to a jury, the case made by the pleadings and evidence must be one to which the principle is applicable. The pleadings in this case are not such as

make the pecuniary necessity of appellee, together with inadequacy of consideration, a distinct and separate ground for the cancellation of his deed. It is pleaded in connection with other facts and circumstances, which all together are intended to be taken as grounds for rescission of the contract. To authorize the rescission of a deed on account of the pecuniary necessity of the grantor, such necessity must be such as would show he would be likely to make an undue sacrifice, and it must appear from the evidence that advantage was taken of his condition to obtain from him a conveyance which is unfair, and made upon an inadequate consideration. If there is nothing but inadequacy of price, the case must be extreme in order to call for the interposition of equity. But when the accompanying incidents are inequitable, and show bad faith,—such as concealments, misrepresentation, undue advantage, ignorance, weakness of mind, incapacity, pecuniary necessity and the like,—such circumstances, or any of them, combined with inadequacy of price, may easily induce the court to grant affirmative relief. They operate to throw the burden of proof upon the party claiming the benefits of the transaction to show that the other acted voluntarily, knowingly, intentionally and deliberately, with full knowledge of the nature and effect of his acts, and that his consent was not obtained by any oppression, undue influence or undue advantage of his condition, situation or necessities. If the party upon

proved by direct evidence, and direct evidence is not always required of fraud. But fraud may be inferred from circumstances. While it may be inferred or deduced from circumstances, it ought not to be lightly inferred from slight circumstances, but the circumstances ought to be such that satisfy you that it exists. Fraud must be proved by clear and satisfactory evidence.<sup>21</sup>

§ 3655. **Instruction to Find Verdict Must Contain All the Elements in the Case—Opportunity of Knowing Facts.** If the jury believe from the evidence that the plaintiff by herself or agent, had any opportunity to ascertain or know the financial condition of the R. Company or the M. Company, and by the exercise of reasonable and ordinary care and diligence could have informed themselves of the true value of the stock of each of said companies, and that such failure was without fault on the part of the defendant, your verdict should be for the defendant.<sup>22</sup>

§ 3656. **Fraud—Degree of Proof.** One who alleges fraud must clearly and distinctly prove the fraud he alleges. It must be proven by clear and satisfactory evidence. It may be established by proving circumstances from the existence of which fraud is the natural and irresistible inference. But if the case made out is consistent with fair dealing and honesty, the charge of fraud fails. \* \* \* Fraud will never be assumed from mere obscurity or apparent error, nor will a fraud be presumed from incorrectness of a person's express estimate of the value of his property, although that estimate may be found to have been incorrect.<sup>23</sup>

whom the burden is thus cast succeeds in showing the perfect good faith of the transaction, it will be sustained. If he should fail, equity will grant affirmative relief. 2 Pom. Eq. par. 928, and authorities cited in notes. The evidence in this case does not tend to show that appellee, when the conveyance sought to be annulled was made, was in such pecuniary necessity as would be likely to cause him to make an undue sacrifice of his property. If it tended to show such condition, it clearly appears from the evidence and the very nature of the transaction that he was not induced to make the deed by reason of pecuniary necessity, for the transaction between him and C. M. W. was not such as would relieve present pecuniary necessity or distress; and, if appellee had any intelligence at all, he must have known, when he made the deed, that the consideration to be received by him would afford no present relief to his pecuniary necessities, if they existed. The transaction was an interchange of property, and no pecuniary consideration passed between or was contemplated by the parties, and appellee knew, if he knew anything, that his pecuniary condition would be the same when the trade was consummated as it was before. We conclude, therefore, that the above paragraph of the court's general charge should not have been given."

21—Walsh v. Taft, 142 Mich. 127, 105 N. W. 544 (546).

"All but the last sentence of this

charge is correct. We think the use of the word 'clear' is erroneous and within the following decisions: Watkins v. Wallace, 19 Mich. 77; McNaughton v. Smith, 136 Mich. 368, 99 N. W. 382; Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Gumberg v. Treusch, 103 Mich. 553, 61 N. W. 872."

22—Carruth v. Harris, 41 Neb. 789, 60 N. W. 106 (107).

"It entirely ignored one material branch of the issues in the case, viz., it did not require them to make any investigation of, or reach any conclusion upon the question of whether C. had ever transferred or delivered the shares of stock to Mr. and Mrs. H. Before the jury could find for C., they must have been convinced that such transfer and delivery had been effected. The instruction was defective, in that it omitted one of the essential elements of the case, and there was no error in the refusal to give it. City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167."

23—F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69 (73).

"This language is open to serious criticism. When the learned judge said, in effect, that the burden of proof to establish fraud is on the party alleging it, and that it is incumbent upon such party to establish the allegations in that regard by clear and satisfactory evidence, he said all there was to be said on that point, and gave to the jury the correct rule. Rice v. Jerenson, 54



§ 3657. **Signing Without Knowledge of Contents—Fraud.** The court instructs the jury that the law requires of every person the exercise of reasonable prudence and caution in the affairs of life, and the law requires that before relieving a party from a contract on the ground of fraud in obtaining its execution, it should appear from the evidence, that on entering into such contract he exercised reasonable care and prudence to learn its nature and contents before he signed it; and the jury are further instructed that if they find from the evidence that the defendant could read at the time he signed the contract sued on, then it was the duty of the defendant to read such contract for himself before he signed it, unless the jury believe from the evidence that he was induced not to do so, without the want of reasonable care and prudence on his part, by the willfully false statements of the plaintiff's agent; and if the jury find from the evidence that the defendant was able and had full opportunity to read such written contract before signing it, and was not induced to forego reading it by willfully false statements on the part of the plaintiff's agent, or that the defendant under all the facts and circumstances shown by the evidence did not exercise reasonable prudence and caution in not reading such written contract for himself before he signed it, then the court instructs the jury that the defendant cannot now be permitted to say that he did not know what was contained in said contract when he signed it, and the jury should find that when made, the contract became binding on the defendant.<sup>24</sup>

Wis. 248, 11 N. W. 549; *Blaeser v. Insurance Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Jones Ev.* para. 190. When he added thereto, 'it may be established by proving circumstances from the existence of which fraud is the natural and irresistible inference,' and that, 'If the case made out is consistent with fair dealing and honesty, the charge of fraud fails,' he, in effect, told the jury that, unless the evidence established fraud beyond a reasonable doubt, the charge fails. Probably the learned judge did not intend to be so understood, but unguardedly used language from which the jury might well have drawn such an inference. Again, when the court said, 'Fraud will never be assumed from mere obscurity or apparent error, nor will fraud be presumed from incorrectness of a person's express estimate of the value of his property, although that estimate may be found to have been incorrect,' the court, in effect, directed the jury in a matter which should have been left solely for their decision; moreover, directed them erroneously. Whether the obscurity in which a person charged with fraud leaves the facts, when he is so circumstanced that he can readily remove such obscurity if he is innocent, yet fails to do so, constitutes evidence sufficiently strong to satisfy the jury that he is guilty of the fraud charged, is a matter wholly for the jury to determine. The same may be said in respect to the direction which the court gave regarding the effect of overvaluation of property. The

weight to be given to such circumstances was a matter with which the trial court had nothing to do. *Fowler v. Colton*, 1 Pin. 331; *Ketchum v. Ebert*, 33 Wis. 611; *Lampe v. Kennedy*, 60 Wis. 110, 18 N. W. 730."

24—*Buckley v. Acme Food Co.*, 113 Ill. App. 210 (214).

The court said in comment that appellant, "by his special plea, alleged that his signature to the contract sued upon had been procured by fraud and circumvention of D. Appellant testified that he did not purchase 6,000 pounds of the food from appellee; but that the same was shipped to him for storage only; that he did not intend to sign nor know that he was signing any order for the same and that he did not read the paper before signing, but relied upon the statements made by D. that it was simply a memorandum to show to whom the food was to be shipped and where it was to be stored. If this be true, appellant was clearly guilty of negligence in not ascertaining the contents of the paper before signing it. By the latter clause of the instruction the jury were unqualifiedly told that if the defendant under all the facts and circumstances shown by the evidence, did not exercise reasonable prudence and caution in not reading such written contract for himself before he signed it, then he could not be permitted to say that he did not know what was contained in said contract when he signed it, and the jury should find that when made, the contract became binding on the

§ 3658. **The Motive in Bringing an Action for a Valid Claim is Immaterial.** If the jury finds from the evidence that this action is merely an attempt to defraud, hinder, and oppress the defendant —, they will find for the defendant.<sup>25</sup>

defendant. Under it the jury had no alternative but to find for the plaintiff, his negligence having been established by his own testimony."

25—Sullivan v. Collins et al., 107 Wis. 291, 83 N. W. 310 (313).

The court said: "We have been unable to find in the case, either in the way of evidence, or lack of evidence, anything which would justify the giving of this instruction. While the plaintiff's claim was old, and subject to the criticism that it was stale, still there was certainly enough testimony in its support to entitle it to be fairly submitted to the jury for decision without the implication contained in this instruction. The propriety of such an instruction in any case may well be doubted. What the jury would understand by it is certainly questionable. It may well be that some jurymen would understand that, even if the plaintiff had a valid claim against the defendant, still, if his only object in bringing the action was to hinder and oppress

the defendant, and otherwise the action would not have been brought, the plaintiff could not recover. This is not the law. The motive of the plaintiff cuts no figure, if he is doing a lawful act. Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, and the bringing of an action upon a valid claim is an entirely lawful act. So the test is, did the plaintiff prove his cause of action? If he did, he should recover, whatever his motive; and, if he did not, he should not recover, not because his motive was bad, but because he did not prove his case. We regard the instruction as it stands as not justified by the evidence, and also as distinctly misleading. If it were to be given in any case, there should be added to it a sufficient qualification which would inform the jury that, if the plaintiff had proven his cause of action, he could recover, notwithstanding his motive in bringing the action was to oppress the defendant."

## CHAPTER CXXXVII.

### INSURANCE—FIRE.

See Approved Instructions, Chapter LIV, Vol. I.

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| <p>§ 3659. Non-payment of premium—Tender of.</p> <p>§ 3660. Increased hazard.</p> <p>§ 3661. Implied authority of agent—Estoppel.</p> <p>§ 3662. Right to change condition of property temporarily.</p> <p>§ 3663. Conditions of forfeiture in policy not favored in law—Presumption.</p> <p>§ 3664. Threatened fire—Cost of removal.</p> <p>§ 3665. Failure of consideration—Cancellation — Unearned premium.</p> | <p>§ 3666. Benzine used on premises—Clause in policy against it—Amount of.</p> <p>§ 3667. Oral understanding does not waive condition.</p> <p>§ 3668. False swearing touching any matter relating to the insurance or the subject thereof.</p> <p>§ 3669. Sprinklers — Negligence of employe.</p> <p>§ 3670. Fraud—Degree of proof.</p> <p>§ 3671. Inventory—Proof of loss.</p> |
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§ 3659. **Non-Payment of Premium—Tender of.** The court charges the jury that if they believe that all that took place between S. and F. in the office of the bank of S. Bros. to which S. testified, was that said F. came in and asked S. whether he was going to pay the premium now, and that said S. said, "I will pay it now or pay it when the policies are returned," and that F. said "Pay it when the policies are returned," and that was all that occurred on that occasion, then I charge you cannot find that said plaintiff by said S. tendered or offered to pay the defendant the premium then due, and the defendant refused to take it, and such an offer to pay the same was not sufficient as a compliance with the condition requiring the premium paid on the 5th day of October, —, or within 10 days thereafter, or the policy is void and forfeited.<sup>1</sup>

§ 3660. **Increased Hazard.** If the jury believe from the evidence, that the hazard to the insured property was considerably increased

1—United States Life Ins. Co. v. Lesser, 126 Ala. 568, 28 So. 646 (653). "The instruction relates to the sufficiency of the evidence to support the first special replication, which is of tender of the premium within the time of credit allowed. The tender was made by S. on behalf and at the instance of the plaintiff. The point of the instruction seems to be that although S. had the money and offered prompt payment, yet if he gave F. the option of immediate acceptance of the money or of postponing acceptance until the return of the rewritten policies from New York, the evidence did not support the replication. As was said by the court in its general charge 'there is a difference between the tender of

money and the offer to pay money' and 'generally an offer to pay, and a refusal by the person to whom the money is due to accept it, is equivalent to a tender. The refusal to accept the money when offered rendered unnecessary its production, as by its production no purpose would be accomplished. Rudolph v. Wagner, 36 Ala. 698; Root v. Johnson, 99 Ala. 90, 10 So. 293; Appleton v. Donaldson, 3 Pa. St. 381; Moynahan v. Moore, 9 Mich. 9, 77 Am. Dec. 468, and note at close of opinion; Lacy v. Wilson, 24 Mich. 479. F. exercising his own option declined the offer of immediate payment of the money, converting the offer into a good tender. The instruction was properly refused."



by work and workmen engaged in reconstructing and repairing or altering the building, from shortly after the first fire, and that the plaintiff had knowledge of such facts so increasing said hazard, and that he did not notify the company thereof, and that the consent of the company to the continuance of such work beyond fifteen days was not asked nor obtained and indorsed in writing on the policy, then the policy, by reason of such considerable increase of the hazard, became and was void, even if you believe from the evidence, that the witnesses M. or H. saw the progress of said work, and knew of such increase of hazard thereby.<sup>2</sup>

§ 3661. **Implied Authority of Agent—Estoppel.** If the defendant company had previously allowed F. to use its blanks in aiding him to solicit and secure insurance in the defendant company, and delivered to the plaintiff in due course of mail or otherwise, the policy read in evidence with the name of F. indorsed thereon as a person by whom the application upon which the policy was issued, was sent into the company, then the company is estopped from denying that it ratified and accepted the act of F., as its agent; such facts, if proven, would sufficiently establish that F. in securing the policy of insurance read in evidence, acted as an agent of the defendant with the knowledge and consent of its officers, and if the evidence shows F. was such agent and as such, with the knowledge that the house insured had been or was vacant, and unoccupied, induced the plaintiff to believe that the company would not insist upon a forfeiture of the policy on that account, then said F. waived such forfeiture, and such waiver would be binding upon the defendant.<sup>3</sup>

§ 3662. **Right to Change Condition of Property Temporarily.** The jury are instructed that a party, while he has the right to change the condition of his property temporarily, has no right to make that change, except in a manner in which a prudent, cautious man would make it; and therefore if he did change it, and change it in such a way as manifests carelessness, negligence, gross negligence, such as a prudent man would not do, then it would bar his right to recover.<sup>4</sup>

2—*Mechanics Ins. Co. of Philadelphia v. Hodge*, 149 Ill. 298 (308), 37 N. E. 51.

"The instruction sought to state as law that a failure to notify as to the increased hazard, and the continuance of the work beyond fifteen days without the consent of the company, rendered the policy void, even though agents of the company saw the progress of the work, etc. We have already held that the agent having knowledge as to the increased hazards was notice to the company, and the policy covering only personal property, the clause as to mechanics' risk did not apply to it, and it was not error to refuse the instruction."

3—*Rockford Ins. Co. v. Boirum*, 40 Ill. App. 129 (130 and 132).

"The first proposition contained in this instruction, i. e., that if F. procured the insurance by sending in the application upon which the company issued the policy, F. would be the agent of the company, and it would be bound by the contract which F. as its agent may have made with appellee, may well be re-

garded as sustained by the authorities. But it by no means follows that because the company would be so bound as to the contract made, that after the time F. would have authority to either make a new contract for the company, or waive any of the provisions of the one he made. And in conveying such an idea to the jury, we think the instruction was erroneous and tended to mislead the jury."

4—*Southern Mut. Ins. Co. v. Hudson*, 113 Ga. 434, 38 S. E. 964 (967).

"This charge was error. The rule laid down in the former decision of this case as a proper one under the same facts was substantially this: If the insured, or one to whom he has intrusted the custody of the property, should, by doing any act or acts which one in the exercise of ordinary care and diligence would not have done under like circumstances, so change the use and occupancy of the premises as to materially increase the hazard of the insurance, the company would not be liable for a loss directly resulting as a consequence of such increase in

§ 3663. **Conditions of Forfeiture in Policy Not Favored in Law—Presumption.** The jury is instructed that the law does not favor conditions of forfeiture in an insurance policy, and when a defendant insurance company relies alone upon a forfeiture of the policy as a defense to avoid the payment of a loss thereunder, it is held to a strict proof of the same, and no presumption will be indulged in to support said forfeiture; but on the contrary the assured is entitled to the benefit of all reasonable presumption in his favor.<sup>5</sup>

§ 3664. **Threatened Fire—Cost of Removal.** (a) Plaintiff is not denied recovery simply because he made a mistake and it turned out that it was not necessary to disturb his goods. At the same time it is not sufficient for him to show that he, in good faith, really believing that this was necessary, did disturb his goods, and prepared to remove them. In order for him to recover, he must show to your satisfaction by the preponderance of evidence that the danger of destruction was so direct and immediate that a failure to do what he did would have been gross negligence on his part.<sup>6</sup>

(b) The jury are instructed that by the neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property should be endangered by fire in neighboring premises, it was the duty of the plaintiff, whenever danger from fire became so imminent as would have aroused the reasonable apprehension of a prudent man, to remove or prepare to remove the goods from danger.<sup>7</sup>

risk. That the issue for the jury to determine was whether or not there had been such negligent use of the property in question as to materially increase the risk of insurance, and to cause the damage complained of. The charge of the trial judge is to the effect that if the insured or the person having charge of the property did change it in such a way as manifests carelessness, negligence, gross negligence, such as a prudent man would not do, then the right to recover would be barred. 'Gross negligence' is defined by our Civil Code (section 2900) to be 'that want of care which every man of common sense, how inattentive soever he may be, takes of his own property.' Hence it can be readily perceived that the trial judge, by the use of the term 'gross negligence,' stated the rule differently from that laid down to govern the rights of the parties in this case; and, while that part of the charge which precedes that just referred to is certainly unobjectionable, the clause of the charge which refers to gross negligence is not rendered harmless by that which precedes it."

5—Denver Township Mutual Fire Ins. Co. v. Resor, 95 Ill. 197 (199).

"This instruction is not accurate. While it is true that forfeitures as defenses of insurance companies are not favored in law, there is no presumption of fact either in favor of or against them."

6—Ins. Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972 (1977).

"The standard of care in this case,

erected by the contract, was that which every prudent man would have exercised, under similar circumstances for the protection of his own property; not merely that which every man of common sense, how inattentive soever he may be, would have exercised in caring for his own property. The charge, if given as requested, would have been equivalent to instructing the jury that under the contract the insured was only required to exercise slight diligence to protect and preserve the property when it was endangered by fire, when, in our view, he was required to exercise ordinary diligence for this purpose.

7—Ins. Co. of North America v. Leader, supra.

The Supreme Court said that the trial court "very properly left the preliminary question as to apparent imminence of peril and consequent necessity for measures of protection to the jury, and should also have left to the jury the determination of the question whether, under the circumstances, the removal of the goods from the building endangered by the fire was a reasonable means to use for their preservation. The court should not have told the jury that it was the duty of the insured to do a specified thing for the protection of the goods, but should have instructed the jury that it was his duty to use reasonable means for this purpose, and that it was for them to decide whether, under the circumstances, the means which he resorted to, if any, were reasonable or unreasonable. 'Particular means

(c) Even if you should find that the fire was in close proximity and the peril was imminent when the plaintiff prepared his goods to remove, yet, if you further find that proper prudence and precaution would have dictated another course,—such as the protection of the roof of the house—then the plaintiff cannot charge the defendant with the results of his failure to exercise such prudence and precaution.<sup>8</sup>

**§ 3665. Failure of Consideration—Cancellation—Unearned Premium.** (a) The court instructs the jury that if they believe from the evidence that policies of fire insurance were issued and delivered by D. to defendant, and that a part of said policies was afterwards canceled, then the jury will find for the defendant. If they further believe from the evidence that the unearned premiums on said canceled policies equal or exceed said acceptance sued on, and that plaintiff received said acceptance merely as security for a present debt due him by D. then the jury will find for the defendant.

(b) The court instructs the jury that if they believe from the evidence that D. promised to insure defendant's property for the sum of \$—— for one year, in consideration of \$——, and that a sufficient amount of said insurance was canceled before the expiration of said year to equal in value the amount of the acceptance sued on as unearned premiums therefor, and that defendant received no benefit therefor, and that said insurance was canceled before the said defendant had notice of the transfer of said acceptance, then the jury will find for the defendant.<sup>9</sup>

or measures of diligence appropriate for use by a party should be left to the jury." *Smith v. Savannah, Florida & Western Ry. Co.*, 84 Ga. 698, 11 S. E. 455."

<sup>8</sup>—*Ins. Co. of No. America v. Leader*, *supra*.

"This instruction, if given, would have contained an intimation of opinion by the court upon the main issue of fact in the case. It would have been equivalent to instructing the jury that if, as was not to be expected, they should find that the plaintiff's contention as to the proximity of the fire and the imminence of the peril was true, and yet should further find, then, etc. Besides, the plaintiff was not bound, when the emergency was on him, to adopt the best means of saving and preserving the property; he was only required to use reasonable means. If the course which he pursued was such as a reasonably prudent man would have adopted under similar circumstances, it would make no difference whether there was really a better and more prudent course open to him or not."

<sup>9</sup>—*Gillespie v. Planters' Oil Mill Mfg. Co.*, 76 Miss. 406, 24 So. 900.

"By the above instructions given for the defendant the jury was erroneously advised as to what constituted a want or failure of consideration of the instrument sued on. If D., as the instruction presupposes, issued and delivered to the defendant valid policies of insurance, for the amount and time he had contracted to do, in consider-

ation of the instrument sued on, the subsequent cancellation by the insurance company would not show a want or failure of consideration. D. did not warrant that the policies once validly put in force should remain operative to the end of the term; that the companies would not exercise their usual right of cancellation. If there was valid insurance it could only legally be canceled by the insurer upon a return of the unearned premium; and if the defendant surrendered the policies for cancellation without requiring a return by the companies of the unearned premium, it cannot impose upon the plaintiff the loss thereby sustained. The evidence makes it certain that before any cancellation was discussed the defendant, through its chief officer, had notice that its acceptance was held by the plaintiff's intestate. He may not have been a holder for value, but he held in good faith and lawfully. He was entitled to enforce the obligation of the instrument, whatever it then was, against the defendant. A cancellation by the insurer of the policy without the concurrence of the assured would have been a nullity, without a return to it of the unearned premium. Cancellation without return of the premium, by consent of the defendant, would be cancellation by contract, and it is manifest that the defendant could not, by contract, create either a want or failure of consideration of the bill of exchange sued on. We express no opinion as to whether or



**§ 3666. Benzine Used on Premises—Clause in Policy Against It—Amount of.** The court instructs the jury that if they find from the evidence that before the time of the fire in question and during the term covered by the policy sued upon, there was kept, used, or allowed upon the premises described in said policy any benzine, then the defendants are not liable, and your verdict must be for the defendants.<sup>10</sup>

**§ 3667. Oral Understanding Does Not Waive Condition.** If the jury believe from the evidence that, at the time of and prior to creating (issuing) the policy of insurance in suit, defendant's agent talked the terms of the policy over with plaintiffs, and then gave plaintiffs to understand that the iron-safe clause, requiring a full set of books to be kept, would be omitted from said policy, or waived the terms of said clauses, and that upon the faith of such understanding with defendant's agent plaintiffs accepted said policy, then such understanding and agreement amounted to a waiver by defendant to demand that plaintiffs keep an iron safe in their store for keeping books and invoices, and also a waiver of the clause requiring plaintiffs to keep a full set of books.<sup>11</sup>

**§ 3668. False Swearing Touching Any Matter Relating to the Insurance or the Subject Thereof.** If you find that the plaintiff willfully included in the proofs of loss property removed by them, and such removal or disposition would secure no advantage to the plaintiffs in the adjustment or payment of the loss under the policy of insurance, to the prejudice or injury of the defendants, and would not be liable to have that effect, then there was no legal fraud as referred to in this question, unless you find that such acts on the part of the plaintiffs were liable to deceive the defendants and cause them to pay more than they in justice ought to pay.<sup>12</sup>

**§ 3669. Sprinklers—Negligence of Employee.** The court instructs

not valid policies were procured for the defendant by D. That question is one of fact. The instruction assumes that there had been; and if this is true, the plaintiff was, under the circumstances named in the instruction, entitled to recover."

10—*Szymkus v. Eureka Fire & Marine Ins. Co.*, 114 Ill. App. 401 (407).

"By this instruction, if the jury found from the evidence that any, even the smallest quantity, of benzine was on the premises at any time before the fire, and during the period covered by the policy, they were instructed to find for the appellees. This instruction would warrant a verdict against appellant if it appeared from the evidence that he had walked through the premises with a half ounce bottle of benzine in his pocket. In *Mears v. Humboldt Ins. Co.*, 92 Penn. St. 15, the prohibition was against keeping or having benzine on the premises. In respect to the words 'keep' or 'have,' the court say: 'The words 'keep or have,' as applied to the articles first enumerated, evidently were intended to prevent a storage of the prohibited articles upon the premises, either permanently or habitually. While the words are used in the disjunctive, they are evidently synonymous and signify to retain in posses-

sion. It would be straining a point to say that bringing a prohibited article upon the premises upon a single occasion, and for the sole purpose of cleaning machinery, was keeping or having it there within the meaning of the policy.' In respect to the word 'use,' the court say: 'We are not disposed to give the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. Nearly every policy of insurance issued at the present time contains this condition, or a similar one. What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency.' We think the instruction erroneous."

11—*J. W. Gillum & Co. v. Fire Ass'n of Philadelphia*, 106 Mo. 673, 80 S. W. 283 (284, 285).

"This instruction is a clear violation of one of the plainest and most beneficial rules of law, viz.: That all prior and contemporaneous agreements are included in the written agreement. \* \* \* The law is otherwise. *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Helm v. M. P. Ry. Co.*, 98 Mo. App. 419, 72 S. W. 148."

12—*Meyer v. Ins. Co.*, 127 Wis. 293, 106 N. W. 1087.

the jury that, under the terms of its policy offered in evidence, the defendant did not insure the property of the plaintiff therein mentioned against loss or damage caused by or resulting from the neglect of the plaintiff to use all reasonable means to save and preserve such property from loss or damage by water discharged from the sprinkler system mentioned in the policy; that by the expression "use all reasonable means to save and preserve the property" used in the policy, is meant that the plaintiff and its employes, while acting in the scope of their employment, should use every means that a person of ordinary prudence and caution, in a like or similar situation, would adopt in the management, operation and control of said sprinkler system, to prevent any discharge or leakage of water therefrom, and to protect the property from the consequence of any such discharge or leak. The degree of care which the plaintiff and its employes were required to exercise under the circumstances was such care as was reasonably commensurate with the situation, and the danger of a discharge or leakage of water reasonably to be apprehended, in view of the character, location and construction of this sprinkler system, the arrangements of the building in which it was located, the nature of the property insured, character of the business carried on by the plaintiff, the number of persons employed by it in its business conducted in this building, the nature of their duties, and the circumstances that might produce an interference on their part with this sprinkler system, together with such other circumstances as would reasonably influence and govern a person of ordinary prudence similarly circumstanced. If the jury believe from the evidence that the loss or damage here sued for was caused by or resulted from the failure or neglect of the plaintiff, or its employes acting within the scope of their employment to use all reasonable means to save and preserve the insured property from loss or damage through the leakage or discharge of water from the aforesaid sprinkler system, as defined in this instruction, and that such failure or neglect was known to plaintiff, or by the exercise of ordinary care and diligence might have been known to plaintiff, in time to have prevented any discharge or leakage of water from said sprinkler system, then the jury will find in favor of the defendant.<sup>13</sup>

§ 3670. **Fraud—Degree of Proof.** Now I come to a very important question. It is called in law "fraud." Fraud is a trick, a deceit,

"Each policy contained the following provision: 'This entire policy shall be void in case of any fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.'

"The instruction under consideration upon the facts in this case was not a proper statement of the law, was misleading, and therefore constitutes reversible error. It clearly gave the jury to understand that false swearing was not sufficient to avoid the policy, unless they found that the plaintiffs secured some advantage in the adjustment and payment of the loss under the policy of insurance to the prejudice or injury of the defendant, or would be liable to have that effect."

13—Wertheimer-Swartz Shoe Co. v. United States Casualty Co., 172

Mo. 135, 72 S. W. 635, 95 Am. St. 500, 61 L. R. A. 766.

"This instruction like that given at the request of the plaintiff was more favorable to the defendant than the law sanctioned. It, in effect, excepts from the risk loss occurring through the negligence of the insured or its servants. The proposition is thus expressed in the brief of defendant's learned counsel: 'We submit that, under the terms of this policy, no injury can be regarded as an accidental injury which could have been avoided by reasonable effort on the part of the plaintiff.' To sustain that proposition would be to overthrow a well-established principle that lies at the foundation of insurance. This argument is followed up by the counsel who say that the failure of the plaintiff to instruct its employe concerning this

a device, whereby one misleads another to do something to his prejudice. In law, however, it is not to be presumed. It is not even to be guessed at, and not arrived at by slight circumstances. It must be proven the same as any other substantial fact in the case. The burden of proving fraud is upon the one that claims it,—the one that charges it,—because it is out of the ordinary. It may be proven by circumstantial evidence but if proven by circumstantial evidence, the rule of circumstantial evidence being rather a strict one, it must be proven with force and conclusiveness to this degree that all the circumstances (where circumstances are relied upon to make the proof) must point to the one thing claimed, and admit of no other reasonable explanation. That is the rule always for circumstantial evidence,—that this must always converge or direct your mind between the points, and not admit of any other reasonable explanation.<sup>14</sup>

**§ 3671. Inventory—Proof of Loss—Burden of Proof on Plaintiff—Weight of Testimony.** There is upon the plaintiff the burden to establish every essential element of his case by a clear preponderance of testimony. The burden is upon him to establish the fact that the inventory produced before the board of adjusters of the defendant company, and here offered in evidence, is genuine, and was in fact made in the time and manner it purports to be and as the plaintiff swears it was. There is in the case the testimony of the witness B. and his son against the testimony of the plaintiff, tending to show that he stated on December 26th, when offering proof of loss, that he had no inventory, and had not taken any within the past three years, and, in fact, had taken no inventory at all. If you believe, from the testimony on this point, that the plaintiff did not, in fact, take and make the inventory in the time and manner it is here claimed, then your verdict will be for the defendant.<sup>15</sup>

machine is such want of care as to preclude a recovery, and in their argument on the point of willfulness, they say that the failure to so instruct the servant took his act out of the category of negligence, and made it the willful act of the plaintiff. Counsel say that this policy differs from one of fire insurance, and is peculiar. If it is correctly interpreted by the counsel it has very little, if any, force as insurance against accident. The criticism of the court's modification is that it does not direct a verdict for the defendant merely because the discharge of the machine was caused by the neglect of the plaintiff or its servant, but required the jury also to find that that neglect was known to the plaintiff, or by the exercise of ordinary care would have been known. It is argued that an instruction that the plaintiff knew, or by the exercise of ordinary care would have known of its own negligence, is meaningless. That criticism is founded more on the form of the expression than the substance or the meaning. No juror of ordinary intelligence would have any difficulty in understanding that it related to the plaintiff's knowledge of its servant's negligent act."

14—*Knop v. National Fire Ins. Co.*, 107 Mich. 323, 65 N. W. 228.

"The error in this charge is manifest. It virtually instructed the jury that the defense must be established beyond a reasonable doubt. *Morley v. Insurance Co.*, 85 Mich. 219, 48 N. W. 502. In that case, the erroneous instruction was as follows: 'Proof of fraud should be of such a character as to be inconsistent with any other view than that A. was guilty of fraud.' In the present case, the court instructed them in substance, that the facts relied upon to show fraud must not admit of any other reasonable explanation. It is perhaps fair to the jury in this case to say that they must have understood this instruction to mean that they must find the fraud proven beyond any reasonable doubt, for they were not controlled in their verdict by the clear preponderance of the evidence. The above instruction was given near the close of the charge, and there is no other language in it to explain or modify it. The charge, in fact, is entirely silent as to the preponderance of evidence."

15—*Walter v. Mutual City & Village Fire Ins. Co.*, 120 Mich. 35, 78 N. W. 1011 (1013).

"The court was under no obligation to point out the fact that two witnesses testified contrary to the plaintiff upon the subject of the inventory. That was the province of counsel."



## CHAPTER CXXXVIII.

### INSURANCE—LIFE.

See Approved Instructions, Chapter LV, Vol. I.

<p>§ 3672. Provisions in the policy construed against the company.</p> <p>§ 3673. Misrepresentation — Knowledge of agent.</p> <p>§ 3674. Dying of certain diseases within one year after issuance of policy.</p> <p>§ 3675. Excessive use of intoxicants.</p> <p>§ 3676. Suicide—Burden of proof.</p> <p>§ 3677. Premium—Receipt—Singling out evidence.</p> <p>§ 3678. Bodily injuries—Death by inhalation of gas.</p>	<p>§ 3679. Insurance on live stock—Representations contained in application.</p> <p>FRATERNAL AND BENEFIT SOCIETIES.</p> <p>§ 3680. Default of sick member—Notice of inability to pay.</p> <p>§ 3681. Restoring to membership—Waiving validity of.</p> <p>§ 3682. No presumption of suicide—Suicide by morphine or other narcotics—Preponderance of the evidence.</p> <p>§ 3683. Suicide—Coroner's verdict.</p> <p>§ 3684. Presumption of death from absence for seven years.</p>
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§ 3672. **Provisions in the Policy Construed Against the Company.** A contract of insurance like the one in the case at bar is by the court liberally construed with a view to effect its purpose. The language of the policy and of the interrogatories and provisions of the application are prearranged by the company. In its preparation the insured has no part. Whatever there may be in the language so prepared by the company which has any tendency to defeat the main purpose of the contract should be strictly construed against the company. If there is any ambiguity in any interrogatory propounded to the applicant, it must be construed most strongly against the company and most favorably to the insured in whose favor all doubts should be resolved.<sup>1</sup>

§ 3673. **Misrepresentation—Knowledge of Agent.** (a) It is for you to say, gentlemen of the jury, what answer was given to the agent. If you should say from the evidence in this case at the time when the application for the policy was made by W., the assured, that he, through inadvertence, or through intention, or for any other reason misled or imposed upon the company in the matter of his

<sup>1</sup>—Union Life Ins. Co. v. Jameson, 31 Ind. App. 28, 67 N. E. 199 (200).

"While this instruction contains a correct statement of the principle of the law governing the construction of contracts of insurance, Penn. Mutual Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769, yet, as the language indicates, it is a rule for the guidance of courts in the construction of such contracts. It has been so long and often held that it is the duty of the court and not the jury to construe a contract that is plain

and unambiguous that the citation of authorities is unnecessary. The first sentence in the instruction states a matter of no concern to the jury, and if it had any effect the jury doubtless inferred that they should give the contract a liberal construction. \* \* \* As the contract was plain and unequivocal, it was error to leave its construction to the jury. See *Masons' etc. Ass'n v. Brockman*, 20 Ind. 206, 50 N. E. 493; *Dixon v. Duke*, 85 Ind. 434; *Loutham v. Miller*, 85 Ind. 161; *Dutch v. Anderson*, 75 Ind. 35."

statement of his occupation, then he would not be entitled to recover. But if he made a statement of what his business was, although he did not go into detail of what it was, and the agent of the insurance company knew what his business was from any dealings or transactions with him while he was seeking to effect the policy of insurance between them, then that knowledge would be the knowledge of the company, and the company would be misled, not by any act of the assured, but by the act of the agent, if there was an answer to a question that was not true; and such mistake could not operate to the injury of the applicant, and the insurance company would be bound just as if the applicant had stated the facts truthfully.<sup>2</sup>

(b) If the jury believe from the evidence that the person insured did not sign the application, but that his name was signed thereto in his absence by an agent of the company and without his knowledge, then the defendant can not take advantage of any misstatements therein to defeat the payment of the policy.

2—Triple Link Mut. Indemnity Ass'n v. Williams, 121 Ala. 138, 26 So. 19 (27), 77 Am. St. 34.

"But the knowledge or notice of the company itself on the facts set up in the replication was constructive merely. It did not have actual knowledge that W. was the foreman of a switching crew, but the agent's knowledge on this subject is imputed to it. Now if the facts were not as laid in the replication, but were different therefrom in respect of the answer made by W. to the question, in that, as there is a tendency of the evidence to show W. in terms falsely represented to McC. that he was foreman of a railroad yard, and there was such a position, and it was less hazardous than that of switch foreman, in our opinion plaintiff should not be allowed to recover, although McC. knew or had been informed that W. was foreman of a switching crew. In the case just put the application containing the false statement furnished all the actual information the company itself had as to W.'s occupation, and by it the insurer was misled to issue the policy. McC. in forwarding it was either acting in collusion with W. to defraud the company (and all authorities concur that that is ground for avoiding the policy) or, at the very least, he was induced in some way by W. to get that false statement before the company,—either for that the fact of its being made caused him to doubt his knowledge or the correctness of his previous information on the subject or otherwise; and in any event it would not have come to the company they would not have acted upon it, they would not have been misled by it had W. not made the false statement. On these tendencies of the evidence, therefore, W. was clearly at fault in making the statement that he was foreman of a railroad yard; and sound principle, as well as the best considered adjudications, constrain us to hold that, if these be the facts, the misstatement avoids the policy, notwith-

standing the agent knew the falsity of the answer when he wrote it down and sent the application to the company. This is the vitiating fault on the part of the applicant which is referred to in our own cases cited above, and which is so declared by the weight of authority in other jurisdictions. 1 May Ins. § 133b. If the facts were as they were alleged in the replication—if W. was not at fault in representing his occupation to the agent; if the agent knew his occupation, and hence the company,—the issuance of the certificate to him was a waiver of the stipulation against his engaging in a hazardous occupation. On the case supposed he was insured by the company while engaged to its knowledge in the only hazardous occupation in which he was engaged at all, and he was insured with respect to that occupation. He never changed his pursuits but continued in them to the instant of his death. The defense that he violated the agreement not to engage in a hazardous occupation is therefore merely cumulative upon the defense that he misrepresented his occupation. If the latter fails the former must fail also; and if the latter is made good, the former recovery is defeated without the aid of the latter. \* \* \* Where the insurance company is misled by a false warranty of the applicant as to his occupation, the knowledge of the agent of its falsity does not, as we have seen, emasculate the warranty of its vitiating quality. Whatever his knowledge, it is to be presumed the agent would not have sent the false statement to his principal, but for its having been made by the applicant; indeed, the greater and more accurate the agent's knowledge, the more certain it is that a statement contrary to the truth is due to the fault of the applicant. The court erred in the part of the charge under consideration, and the ruling is not aided by other parts of the general charge."

(c) If the jury believe from the evidence that the application upon which the policy sued on was based, was filled out and signed by an agent of the defendant, without knowledge of the party insured, and without collusion with any person, then defendant is as much bound by its policy as if application had been signed in the regular way by the party insured. And defendant can not defend on the ground of any misstatements in the application.<sup>3</sup>

§ 3674. **Dying of Certain Diseases Within One Year After Issuance of Policy—Burden of Proof—When on Defendant.** (a) The court instructs the jury that the plaintiff, if entitled to recover at all, would be entitled to the full amount of the insurance only in case the insured was in sound health at the date of the policy, and did not die of any pulmonary disease within one year from the date of the policy; and, therefore, the plaintiff, in order to recover the full amount of the insurance, must prove, by a preponderance of the evidence, not only that the insured was in sound health at the date of the policy but also that he did not die of any pulmonary disease within one year from the date of the policy.

(b) The court instructs the jury that, upon the question whether the insured died of a pulmonary disease or not, the burden of proof is not upon the defendant to show that he did die of such a disease, but if the plaintiff is seeking to recover the full amount of insurance, the burden of proof is upon her to show that the insured did not die of such a disease but died from some other cause.

(c) The court instructs the jury that the plaintiff, if entitled to recover at all, cannot recover the full amount of insurance covered by the policy sued on in this cause unless the plaintiff shows that the insured did not die of any pulmonary disease; and unless the evidence shows that the insured died of some other disease than a pulmonary disease, the jury cannot award to the plaintiff more insurance than the plaintiff would be entitled to recover if the insured died of a pulmonary disease, even if the jury believe that the plaintiff is entitled to recover at all.<sup>4</sup>

§ 3675. **Excessive Use of Intoxicants.** If you find from the evidence that the nature of the deceased's employment and his physical condition occasioned thereby, if it were so occasioned, that he became weak and exhausted, and was compelled to and did resort to stimulants as he believed for his own protection and to enable him to continue his labors, and in so doing occasionally or at times drank intoxicating liquors even to the extent of being under the influence

3—Prudential Ins. Co. of America v. Fredericks, 41 Ill. App. 419 (421-22).

"The jury having their choice which instruction they would follow, quite naturally found a verdict against the insurance company. If the application had been made by the assured, any substantial departure from the truth, in the answers to the questions contained in it, would avoid the policy. Thomas v. Fama Ins. Co., 108 Ill. 91."

4—Metropolitan Life Ins. Co. v. McKenna, 73 Ill. App. 283 (285).

"There was no error in refusing these instructions because they tell the jury in effect that the burden of proof as to the points mentioned

was on the plaintiff. This is not the law of the case at bar. Clauses in a policy which limit the liability of the insurer by way of proviso or exception are solely for his benefit. He must interpose and prove the defense. The insured need not notice them in his pleading or proof, to make a prima facie case. Sohler v. Norwich Ins. Co., 11 Allen, 336; Commonwealth v. Hart, 11 Cush. 134; Freeman v. Ins. Co., 144 Mass. 572; 12 N. E. 372; Gooding v. United States Life Ins. Co., 46 Ill. App. 307; Clay F. & M. Ins. Co. v. Wusterhausen, 75 Ill. 285; Guardian M. L. Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180."



thereof, such indulgence could not be termed excessive, and could not be urged as a defense to this action, unless you further find from the evidence that such indulgences were excessive, or that they tended to or did shorten his life.<sup>5</sup>

§ 3676. **Suicide—Burden of Proof.** (a) The court instructs you as a matter of law, that Y. must be presumed to have been sane at the time of the commission of the act of shooting, unless his insanity is proved by a preponderance of the evidence.

(b) The court instructs you as a matter of law, that sanity being the normal condition of a person, the burden of proving that Y. was insane at the time of the commission of the act of shooting, if you believe from the evidence that he shot himself, is upon the plaintiff in this action, and must be proved by a preponderance of the evidence.<sup>6</sup>

(c) The plaintiff, to make out her case under the pleadings, is only required in the first instance to introduce in evidence the policy of insurance sued on, and then to show that the premiums on the policy have been paid; that the assured came to his death by external violent and accidental means, and that she has furnished to the defendant within the time limited in the policy the notice and the affirmative proofs of death, such as are required by the policy.

(d) If from the evidence the jury find these facts proved, then the plaintiff is entitled to your verdict for \$— and interest at — per cent per annum from —, unless one of the defenses urged by the defendant has been by it proved by a preponderance of the

5—Union Life Ins. Co. v. Jamieson, 31 Ind. App. 28, 67 N. E. 199 (200).

"This instruction is erroneous. If the jury understand it to mean (and we think they would so understand the language used) that the insured might use intoxicating liquors to any extent that he should believe necessary for his own protection and to enable him to continue his labors, it left it with the insured to determine for himself what would be an excessive use of liquors. The contract was violated if he used intoxicating liquors to excess, and to say in effect that he might make such use of liquors as he believed for his own protection is to annul that part of the contract. Moreover, the instruction is contradictory. It tells the jury that if they find the physical condition of the insured was such that he resorted to stimulants as he believed for his own protection and to continue his labors, and at times drank liquors even to the extent of being under the influence thereof, such indulgence could not be termed excessive, and would not be a defense unless they found that such indulgences were excessive or that they tended to or did shorten life; that is, while the court attempts to designate what indulgences would not be excessive, it leaves it with the jury to say whether these same indulgences were excessive. He had said by promissory warranty that he would not use intoxicating liquors

to excess, nor practice any pernicious habit that obviously tended to shorten life. If he did either, he avoided the policy. The instruction was contradictory, and could have no other tendency than to mislead the jury, or leave them in doubt as to what the law applicable to the case was. See *McEntire v. Brown*, 28 Ind. 347; *Gummers v. Pumphrey*, 24 Ind. 231; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973; *Union Central Ins. Co. v. Hollawell*, 14 Ind. App. 611, 43 N. E. 277; *Kirkland v. State*, 43 Ind. 146, 13 Am. Rep. 386; *Toledo etc. Ry. Co. v. Shuckman*, 50 Ind. 42; *Waining v. Teeple*, 144 Ind. 199, 41 N. E. 600; *Pittsburgh, etc. Ry. Co. v. Noftsgar*, 148 Ind. 101, 47 N. E. 332, 62 Am. St. 497. See also *Northwestern etc. Ass'n v. Bodurtha*, 23 Ind. App. 21, 53 N. E. 787, 77 Am. St. 414."

6—*Nelson v. Equitable Life Assurance Society*, 73 Ill. App. 133 (142 and 147).

"These instructions we think were calculated to mislead the jury, and should not have been given, even if good in the abstract as propositions of law. They are calculated to impress the jury with the idea that the defense of the appellee was complete unless the plaintiff should prove the insanity of Y. by a preponderance of the evidence, whereas we have seen that although insanity may be clearly proven, in order to fix liability on appellee the insanity must be such that the suicidal act he was about to commit would cause death or endanger life."

evidence. It is the defendant's contention that the plaintiff is not entitled to recover more than \$—, because it asserts that the contract of assurance, of which the policy is the evidence, was violated by the assured, and was not fulfilled on his part. In other words, the defendant claims either that the assured committed suicide, or that while insane he received the injuries which caused his death.

(e) But the jury are instructed that each of these is an affirmative defense against which the plaintiff is not bound in making out her case in chief to introduce any evidence at all.

(f) It is upon the defendant that the law places the burden of proving one or the other of these defenses as alleged in its special pleas, by a preponderance of the evidence, and the defendant must prove one or the other by such evidence and facts and circumstances in evidence as in your judgment outweighs the evidence of the plaintiff.

(g) The finding of the coroner's jury or inquest has been introduced in evidence, but it is not conclusive or decisive of the question whether or not the deceased, S. W., committed suicide, or of the question whether or not he was insane at the time of his death. You may give to the finding of the coroner's jury such consideration as you think it should receive in view of all the circumstances under which the finding was made. You should not determine or pass upon the question of how the deceased came to his death, nor upon the condition of his mind at the time, without considering all the evidence, facts and circumstances shown upon the trial having a bearing on the question.<sup>7</sup>

§ 3677. **Premium—Receipt—Singling Out Evidence.** In this case the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the payment of the second premium on the policy in suit, which premium was due November 28, 1900, and on which a grace of 30 days in payment was allowed, by the terms of the policy. To prove payment, the plaintiffs produced the defendant's receipt for the same. A receipt is evidence of a high grade, to be overcome only by clear and convincing testimony. On the other hand it constitutes only *prima facie* evidence of what it contains, and is entirely competent and proper for the defendant company to show that the payment in fact was not made, and that the receipt was issued by mistake.<sup>8</sup>

7—The Fidelity & Casualty Co. of New York v. Weise, 182 Ill. 496, rev'g 80 Ill. App. 499, 55 N. E. 540.

The above five paragraphs, marked (c) to (g) inclusive, were given as one instruction in a case where it was essential to the right of appellee to recover that it should appear by a preponderance of the evidence that the assured came to his death through external, violent and accidental means. The instruction is quoted in this case in 80 Ill. App. 499 (507) and approved in the appellate court. The Supreme Court, however, held that the giving of this instruction was reversible error, and, without quoting the instruction in the opinion, said:

"Self-destruction is not classed as an accident except it appears the

suicide was unconscious of the act or the physical effect thereof, or was driven to the commission of the deed by an insane impulse which he had not the power to resist. Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, aff'g 68 Ill. App. 125, 48 N. E. 59, 61 Am. St. R. 123."

8—Kleutsch v. Security Mutual Life Ins. Co., 72 Neb. 75, 100 N. W. 139 (140).

"Defendant contends that this instruction was erroneous; that it was wrong in this, that the court should not have told the jury that 'a receipt is evidence of a high grade, to be overcome only by clear and convincing testimony.' And it would seem that by this statement the court called the attention of the jury directly to this part of the

§ 3678. **Bodily Injuries—Death by Inhalation of Gas.** The jury are instructed that the policy of insurance sued on in this case does not cover injuries of which there is no visible mark on the body, the body itself in case of death not to be deemed such mark, and, therefore, if you believe from the evidence that C., the person named in the policy of insurance sued on in this case, came to his death from injuries of which there was no visible mark on the body of said C., then you must find the issues for the defendant.<sup>9</sup>

§ 3679. **Insurance on Live Stock—Representations Contained in Application.** (a) If you find from the evidence that the plaintiff made a written application to the defendant for insurance, and if you further find that any material fact or circumstances stated in writing were not fairly represented by the plaintiff, and the defendant was misled thereby, and thereby induced to deliver to the plaintiff a policy of insurance, or if any of the answers contained in such application were untrue, then, if such facts exist, your verdict should be for the defendant.<sup>10</sup>

testimony; in fact, singled it out, commented on its character and weight, and stated that it could only be overcome by clear and convincing evidence. This must have left the impression that the testimony of the defendant's witness by which they attempted to explain the existence of the receipt, how it came to be issued, and in which they stated positively that the premium which it represented was never paid, was not evidence of such a high grade as the receipt itself, and the jury might therefore well conclude that the prima facie evidence of payment, to wit, the receipt itself, was not overcome thereby. Whatever may be the rule in other jurisdictions, we have frequently held that it was error to single out and to direct the attention of the jury to any particular part of the evidence, and comment on its weight or probative force."

9—*Travelers' Ins. Co. v. Ayers*, 119 Ill. App. 402.

"Counsel for appellant next contend that death 'by involuntary and unconsciously breathing the atmosphere of the room, full of illuminating gas, while asleep in bed at a hotel,' is not with the policy, but is excluded therefrom by the provision in regard to death 'from any gas or vapor, or poison, or contact with poisonous substances.' Formerly, the clause in relation to gas, etc., in appellant's policies, was 'nor by the taking of poison, contact with poisonous substances, or inhaling of gas,' etc., and in a suit on a policy which contained that clause, the New York Court of Appeals, in *Paul v. Travelers' Insurance Co.*, 112 N. Y. 472, 3 L. R. A. 433 n., held that the clause did not exclude liability of the company, in the case of an involuntary and unconscious inhalation of gas, but only in a case in which the inhalation was the voluntary and intelligent act of the assured. In *Healy v. Mutual Acc't Association*,

133 Ill. 56, 25 N. E. 52, 9 L. R. A. 371, the court followed the New York case and cited, in holding that death caused by the inhalation of gas was caused by external and violent means. *Ib.* 563." Citing also: *Traavlers' Ins. Co. v. Dunlap*, 160 Ill. 643, 43 N. E. 765; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Healey v. Mutual Accident Ass'n*, 133 Ill. 556, 25 N. E. 52; *Paul v. Travelers' Ins. Co.*, supra; *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654; *Metropolitan Acc't Ass'n v. Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. 359.

10—*Indiana Farmers' Live Stock Ins. Co. v. Byrckett*, 9 Ind. App. 443, 36 N. E. 779 (781).

"The application for the insurance, signed by the appellee, and which was made a part of the policy, contained certain statements of the appellee, in which he stated, among other things, that the horse was in good health, that he had not been troubled with cough or nasal trouble, and that he had no periodic attacks of stiffness of the limbs. The application contained this condition: 'I warrant the foregoing application to contain a full, true, and correct description and statement of the condition, situation, and value of the property hereby proposed to be insured, and warrant the answer to be true of the foregoing questions to be true.' The appellee, in the second and third paragraphs of his reply, admitted that the horse was not well at the time the application for insurance was made. In his testimony, he said 'that he (the horse) was running at the nose a little at that time'; also, 'I told him (the agent) the horse was slightly troubled with a cough or nasal trouble.' Appellant contends that the conditions of the application are warranties, that the evidence shows a breach thereof, and that the appellant was not entitled to recover, and that the court should have



(b) If you find that this insurance was issued to the plaintiff by this defendant, both acting in good faith, and the horse was not diseased at the time that he was insured, your verdict should be for the plaintiff for the full amount of the insurance.<sup>11</sup>

### FRATERNAL AND BENEFIT SOCIETIES.

**§ 3680. Default of Sick Member—Notice of Inability to Pay.** If the jury find that the said S., now deceased, had paid his dues and assessments to defendant, and was in good standing up to and including the — day of —, and that on said date dues and an assessment were due defendant from said S., and that on and prior to said date said S. became sick and unable to pay said assessment and dues

given the instruction asked. We do not concur in the assumption that the conditions of the application are warranties. Notwithstanding the policy denominates them 'warranties,' they may be but representations. A contract of insurance, in its essence, is a mere promise to pay money on the happening of a specified loss or injury. In practice, the happening of such loss or injury is not the only condition upon which the payment depends. The payment is usually made conditional on the truth of certain statements made by the applicant. The falsity of such statements prevents the liability of the insurer from taking effect. When such statements have this effect, they are called 'warranties.' A warranty may relate to an existing fact, or it may relate to the doing or not doing of some particular act in the future. When it relates to a future act, it is promissory in its character. An express warranty is the assertion of a fact, or the undertaking to do an act, upon the accuracy or performance of which the validity of the contract depends. If it is precedent, and unperformed, the insurance does not attach. If subsequent, and unperformed, it terminates the contract. *Cooke, Life Ins. para. 12; Biddle Ins. para. 543.* A representation is a verbal or written statement as to certain facts made by the insured at the time of the formation of the contract, which constitutes an inducement for the insurer to enter into the contract. It is a part of the preliminary proceedings which lead up to the contract. *The Commonwealth Ins. Co. v. Monninger, 18 Ind. 352; Citizens' Ins. Co. v. Hoffman, 128 Ind. 370, 27 N. E. 745.* The burden of proving the breach of a warranty or the falsity of a representation rests upon the insurer. *Cooke Life Ins. paras. 14, 93, 123; May, Ins. para. 591; Wood, Ins. para. 522; Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 377; John Hancock Mut. Life Ins. Co. v. Daley, 65 Ind. 6; Northwestern Mut. Life Ins. Co. v. Hazlett, 105 Ind. 212, 220, 4 N. E. 582, 55 Am. Rep. 192; Nat. Ben. Ass'n of*

*Indianapolis v. Grauman, 107 Ind. 288, 7 N. E. 233.*

"A breach of a warranty or an untrue material representation, when established, will defeat a recovery on the policy; but the defendant must plead such defenses affirmatively, and assume the burden of proving them. *Biddle, Ins. para. 531; May, Ins. para. 181.* A warranty or a material representation is a stipulation in the contract adverse to the interest of the insured, and in the interest of the insurer. For the purposes of this case, it may not be very important whether such conditions be warranties or material representations; but we may say that when a policy of insurance contains contradictory or inconsistent provisions, or is so framed as to leave room for construction, the court will lean against that construction which imposes upon the assured the obligation of a warranty. The policy in this case, including the application, which is made a part thereof, contains provisions which are inconsistent. A policy of insurance almost identical in terms with the one at bar came before this court in a recent case, and such provisions were then held to be representations, and not warranties. *Ind. Farmers' Live Stock Ins. Co. v. Rundell, 7 Ind. App. 426, 34 N. E. 588.*

"Upon the authority of this case, the provisions which it is charged that the appellee violated are representations, and not warranties. The instruction asked is too broad in its terms. It is not limited to the facts or circumstances pleaded in the answer, but would permit the jury to take into consideration any fact stated in writing."

11—*Indiana Farmers' Live Stock Ins. Co. v. Byrckett, 9 Ind. App. 443, 36 N. E. 779 (781).*

"A majority of the court were of the opinion that the evidence on the question of the value of the horse was conflicting, and that the above instruction invaded the province of the jury; and for this reason the cause should be reversed, with instructions to grant a new trial."

on the — day of —, and that on or prior to said date he notified, in writing the clerk of the defendant's local camp at G. of the said disability, then it was the duty of said local camp to pay said assessment and dues. And in determining whether said notice was given to the clerk of said camp, if you find that B. was the clerk of said camp, and that he was in the habit of receiving his mail at the post office of G., Missouri, and that on or before the — day of —, said S. caused a notice in writing, stating his condition and inability to pay said assessment, to be properly addressed, stamped and placed in the post office for said B., these are circumstances which may be taken into consideration in determining whether such notice was received by said B., unless said inference is overthrown by the other testimony.<sup>12</sup>

§ 3681. **Restoring to Membership—Waiving Validity of.** (a) If the jury believe from the evidence that A., deceased, was sick at the time the application for his restoration to — Lodge, No. —, of the A. O. of U. W., was signed, still, if the jury further believe from the evidence that said lodge soon thereafter had notice of the deceased's sickness, and sent him money, known as sick benefits, then the jury are instructed that defendant waived any and all right to question the validity of such restoration on the ground that deceased was sick at the time said application was made for such restoration.

(b) If the jury believe from the evidence that A., deceased, was in his lifetime a member of — Lodge, No. —, of the A. O. of U. W., and was, in the month of —, suspended therefrom, and that afterward, in the month of —, was restored to membership in said lodge, on the application made by one B., and from the time of such restoration until his death was recognized as a member of said lodge, in good standing, and if the jury further believe from the evidence that after such restoration the said Lodge paid to, or on behalf of said A., sick benefits, and afterward and after the death of said A., instructed the — Lodge in San Diego to bury said A., and send bill therefor to said — Lodge, then the court instructs the jury that the defendant waived any irregularity or defect in the proceedings to restore said A. to membership of said — Lodge, and that the defendant is estopped from questioning the validity of such restoration, and plaintiff is entitled to recover in this action.<sup>13</sup>

12—*Smith v. Sovereign Camp of Woodmen of the World*, 179 Mo. 119, 77 S. W. 862 (865).

"The above instruction is erroneous in that it assumes that the assured became sick and unable to pay his assessment and dues on the 1st day of December, 1899, and that on or prior to said date he notified, in writing, the clerk of the defendant's local camp at G. of the said disability, where there is nothing said in the notice with respect to, or indicative of, the inability of the assured to pay. It is erroneous for the reason that it submits to the jury the construction of a written instrument, to wit, the notice, which was for the court, and not the jury. *Comfort v. Ballingal*, 134 Mo. 281, 35 S. W. 609, and authorities cited. Moreover, it is misleading and comments on the evidence, in that it

calls the attention of the jury to specific facts in evidence, and then tells them that 'these are circumstances which may be taken into consideration, whether such notice was received by said B., and they from the said facts, if they so find, infer that the letter was received by the said B., unless said inference is overthrown by other testimony.' *Kaiser v. South St. Louis Mutual Life Insurance Co.*, 7 Mo. App. 579; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506."

13—*Ancient Order of United Workmen v. Cressey*, 47 Ill. App. 616 (625 and 626).

"These instructions took from the jury the question of whether the certificate of good health, upon which A. obtained his reinstatement, was true.

"The contract of insurance is es-

§ 3682. **No Presumption of Suicide—Suicide by Morphine or Other Narcotics—Preponderance of the Evidence.** (a) The court instructs the jury that so strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence that suicide cannot be presumed. The plaintiffs are, therefore, entitled to recover, unless the defendant has by competent evidence overcome this presumption, and satisfied the jury by a preponderance of the evidence that the injuries which caused the death of the said C. were intentional on his part. The presumption is that death was not voluntary; and the defendant, in order to sustain the issue of suicide on its part, must overcome this presumption and satisfy the jury that death was voluntary.

(b) The jury are instructed that the burden of proof is upon the defendant to prove that C. did intentionally commit suicide, and if it appears from the evidence that the defendant relies upon circumstantial evidence alone to prove such intentional suicide, then the court further instructs you that such circumstantial evidence to be sufficient to base a finding upon, must be of such a character as to exclude with reasonable certainty any other cause of death.<sup>14</sup>

(c) Such is the love of life, that the law presumes no man will commit suicide or intentionally kill himself. Therefore the burden of proof is on the defendant to establish to the satisfaction of the jury, by a preponderance of the evidence, that B. did intentionally take a dose of morphine or other narcotic, and that it produced his death.

(d) If the facts and circumstances as proven in this case establish the fact to the satisfaction of the jury that said B. did use opiates and narcotics, but the same were not used with the intention and purpose of producing death, then the establishing of such facts would meet the requirement of the law.<sup>15</sup>

sententially one of good faith. A reinstatement obtained upon false and fraudulent representations will not be binding upon the insurer. *Supreme Council of the Royal Arcanum v. Lund*, 25 Ill. App. 492; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810."

14—*Williams v. Supreme Court of Honor*, 120 Ill. App. 263 (265).

"If the verdict and judgment were against the defendant this court would be compelled to set it aside for error against defendant in giving these instructions. They require the defendant to make proof of its ground of defense with substantially that degree of certainty which is required to be made in prosecutions for criminal offenses. Notwithstanding this undue burden placed upon defendant, the jury found for the defendant, and in our judgment the evidence warranted the verdict, even conceding that these instructions were correct."

15—*Endowment Rank of Order of K. P. v. Steele*, 107 Tenn. 1, 63 S. W. 1126 (1127).

"We think the criticism of these portions of the charge is, in the main, correct. The meaning of the word 'establish,' as applied to the

quantum of evidence, is to settle certainly or fix permanently what was before uncertain, doubtful or disputed. 11 Am. & Eng. Enc. Law, 2d Ed. 353. It is a term much more appropriate for criminal than civil cases, but even in criminal cases the facts do not have to be established so as to settle them certainly and leave no ground for dispute, but only beyond a reasonable doubt. In the case of *Eberhardt v. Sanger*, 51 Wis. 79, 8 N. W. 111, the issue was to be proven, if at all, by circumstantial evidence. The court said: "The use of the word 'establish' in the charges seems to have been specially unfortunate. The word ordinarily means to settle finally, to fix unalterably, and in this sense the instruction given would be equivalent to saying that the facts recited were not conclusive evidence of fraud. In this sense, it was peculiarly inapplicable. It was unnecessary for the plaintiff to furnish conclusive evidence, and yet from the instruction the jury might well infer that it was essential for him to do so. The question is whether these instructions, given as they were, without qualification, did not tend to mislead the jury. We are clearly of opinion, while the collateral facts and circumstances re-



§ 3683. **Suicide—Coroner's Verdict.** The jury are instructed that the coroner is a public officer acting under the sanction of an official oath on the discharge of a public duty enjoined by law, and that the inquisition of the coroner and jury is competent evidence tending to prove the cause of death, which appears upon the face of the inquisition. If the jury believe from the evidence that the coroner of C. county held an inquest over the remains of H. R. for the purpose of ascertaining the cause of his death, and rendered a finding and verdict as to the cause of such death, the jury are instructed that they should consider such finding and verdict of the coroner and jury, together with all the other evidence, facts and circumstances in the case, when you are determining the question whether or not H. R. committed suicide. The finding of the coroner's jury or inquest is, however, not conclusive upon you in determining the cause of death.<sup>16</sup>

§ 3684. **Presumption of Death from Absence for Seven Years.** If from the evidence you find and believe that prior to —, the date of the commencement of this suit, W. disappeared and has not been heard from for seven years, then, in the absence of any rebutting circumstances, he is presumed to be dead; and if you believe from all the circumstances in evidence, considering W.'s character, habits, and antecedents, and the surroundings when he disappeared, that he

cited in each might not of themselves establish fraud, yet it is quite evident they tended more or less to prove fraud; and it seems to us that the instructions should have been differently worded, or that there should have been some qualification either as to each of said instructions, or generally as to all.' See, also, 11 Am. & Eng. Enc. of Law (2d Ed.) 357, note. It is not necessary in a civil action that any fact should be 'established' (that it, 'settled certainly' or 'fixed permanently'), which may have been uncertain, doubtful or disputed theretofore. It is not required that the evidence shall be clear and plain or that it shall satisfy any reasonable man. The word 'satisfy' means 'to free from doubt, suspense or uncertainty; to set the mind at rest.' Now, it is necessary that the jury should be satisfied that there is a preponderance one way or the other, but this does not mean that it must be satisfied of the truth of the fact itself. Mr. Greenleaf, in his work on evidence (vol. 1, par. 2), says: By 'satisfactory evidence,' which is sometimes called 'sufficient evidence,' is intended that amount of proof which will ordinarily satisfy an unprejudiced mind beyond a reasonable doubt. The law does not require that any theory or contention of either party in a civil suit shall be freed from doubt, suspense, or uncertainty; that the evidence must set the minds of the jury at rest; that it must be clear and plain; that it must be established, in the usual acceptance of that term; but merely that the contention shall be supported and made out by a preponderance of the testimony, although the jury may nevertheless have some doubt or uncertainty, and

their minds may not be at rest, and the fact may not be certainly fixed. A jury may consider that a fact is shown by a preponderance of the testimony when it falls short of making it clear and plain or removing doubt from their minds; but the rule is, if the evidence is of sufficient weight to preponderate in favor of any theory or contention, that, in a civil case is sufficient. Now, the several charges in the case complained of clearly lay down the rule that the evidence in the case must be of such a character, or so clear and plain, as to satisfy any reasonable man, and remove doubt from the minds of the jury. The true statement of the rule is that, if the evidence preponderate in favor of any contention of the plaintiff or defendant, that contention may by the jury be considered as sufficiently sustained to rest a verdict upon; and it is not necessary that the evidence should go so far as to make said contention clear and plain, or establish it, in a sense to make it free from doubt or uncertainty, or set the minds of the jury at rest, and convince them absolutely of the truth of the contention. After all the evidence that can be produced is introduced, the jury may still be unsatisfied,—not unconvinced. Their minds may not be at rest. They may not be freed from doubt, uncertainty and suspense. But still the jury may recognize that there is a preponderance of evidence, and on that they may base their verdict."

16—Rumbold v. Royal League, 206 Ill. 513 (517-8), 69 N. E. 590.

"We regard this instruction as misleading, argumentative and unfair to plaintiff in error."

died prior to —, and that notice and proof of death were furnished by plaintiff within a reasonable time after said W.'s death, or within such time as by the officers of the defendant company she was instructed that they should be furnished, as hereinafter explained, then your verdict should be for the plaintiff in the sum of \$—— with interest from —.<sup>17</sup>

17—*Winter v. Supreme Lodge K. P. of the World*, 96 Mo. App. 1, 69 S. W. 662 (664-65).

"Here we have to deal with the rule of evidence (whatever may be its proper name) that after a man has been absent from home and unheard of for seven years the fact of his death may be found upon that showing. When such absence includes departure from Missouri, our statute creates such a presumption in the absence of contrary proof. Rev. St. 1899, § 3144. In the law of bigamy a similar rule obtains, in certain circumstances, to protect a new marriage formed by a spouse deserted by such an absentee as the rule defines. Id. § 2168. The statute last cited is probably traceable to a British prototype which has been said to have furnished the suggestion for the modern rule or resumption on this subject. Best, Pres. p. \*191; Lawson, Pres. Ev. (2d Ed.), p. 254; Thayer, Ev. 319. Another Missouri statute provides a method intended to secure administration upon estates of such absentees. In another jurisdiction an act with similar features has undergone a severe ordeal. *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

"We have nothing now to do with the validity of that statute. We mention it only to refer to the evident drift of legislative purpose, which postpones the steps of such a proceeding until seven years after the disappearance,—a much later time than was prescribed by the Code of Napoleon, which made provision for a similar process beginning at the end of four years. Rev. St. 1899, § 265; Code Napoleon, Bk. 1, tit. 4, 115.

"We refer to these pieces of legislation to indicate how firmly has taken root in our law the idea that a presumption of death arises from an unbroken and unexplained absence of seven years. The particular rule, however, defined by section 3144 (Rev. St. 1899), which does not by its terms quite reach the case at bar, has been definitely held in Missouri not to lessen the force of the general rule of evidence on the subject as disclosed by decisions expounding the common law. *Flood v.*

*Grownney*, 126 Mo. 262, 28 S. W. 860; *Biegler v. Supreme Council*, 57 Mo. App. 419. Many careful commentators on the rule of presumption in question have taken pains to demonstrate that it is little more than a measure established by experience which shall make out a prima facie case when an issue of the death of an absentee has arisen. Thayer, Ev. 323, 336; 1 Greenl. Ev. (16th Ed.) § 41; Wharton Ev. (3d Ed.) § 1275.

"The remark in the case at bar in the above instruction touching the 'absence of any rebutting circumstances,' in connection with the statement that Mr. W. 'is presumed to be dead,' eliminated the probative force of the circumstances which gave ground for a different inference than that of death. The remark intensified the error, and bound the jury more firmly to the proposition that they were to accept the death of the insured as a fixed fact, if they found he had been absent and unheard of during seven years. The true rule to be deduced from the authorities is that the inference of death arising from an unexplained absence of seven years is not a conclusive inference. It yields to the influence of a conflicting presumption of the same class and of more specific character, as, for example, the presumption of innocence in the conduct of the party in question, illustrated by cases where these two presumptions have been found to antagonize. *Rex v. Inhabitants of Harborne*, 2 Adol. & E. 540; *Lancaster v. Insurance Co.*, 62 Mo. 129. The deduction which may be drawn from the absence of a person for seven years without tidings supplies the place of more specific proof of death. It warrants a jury in finding the fact of death, after due consideration of all the other facts in evidence, but it is not a conclusion which the jury are obliged to draw in the face of proof which furnishes ground for other inferences. It should not be stated to the jury as a rule of law imposing an imperative obligation upon them in a case like this. *Mut. Ben. Life Insurance Co. v. Martin*, 108 Ky. 11, 55 S. W. 694; *Rochford v. Jackson*, 1 Wyatt, W. & A. B. 23."

## CHAPTER CXXXIX.

### INTOXICATING LIQUORS—CIVIL.

See Approved Instructions, Chapter LVI, Vol. I.

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| <p>§ 3685. Liability for the sale of intoxicating liquors to one already a drunkard.</p> <p>§ 3686. Liability of saloon-keepers for illegal sales to husband—Release of same by wife.</p> <p>§ 3687. Mere sale or gift of intoxicating liquor insufficient—Intoxication must be shown.</p> <p>§ 3688. Degree of intoxication im-</p> | <p>material so long as it directly caused the injury.</p> <p>§ 3689. Intoxication need not be the sole cause of injury—Contributing and assisting cause, sufficient.</p> <p>§ 3690. Acts or statement of the intoxicated person cannot be used in defense of the action.</p> <p>§ 3691. Poverty of plaintiff—When a matter for consideration.</p> |
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§ 3685. **Liability for the Sale of Intoxicating Liquors to One Already a Drunkard.** The court instructs the jury for plaintiffs that the habits of G. prior to ——— are immaterial; and if you believe that said G. bought liquor of the defendants, and that the purchase and use of such liquor damaged these plaintiffs, then you should find in their favor for the amount of such damage, even though you should further believe that said G. was an intemperate man before.<sup>1</sup>

§ 3686. **Liability of Saloon-keepers for Illegal Sales to Husband—Release of Same by Wife.** In this case if the defendant saloon-keepers to avoid liability in this case to the plaintiff because of the paper offered in evidence by them which they term a release, upon this question of release the defendant saloon-keepers take the burden of proof; that is, they must show by a preponderance of the evidence that the said paper was signed by the plaintiff, Mrs. W., with the knowledge that she was at the time releasing her right of action against defendants for wrongful sales or gifts of intoxicating liquors to her husband, W., and unless it is shown by a preponderance of the evidence that she did execute said release with that understanding or knowledge then such paper would in no way be binding upon her in this suit, unless you further believe from the evidence that she actually signed the release in evidence as a release of her present cause of action or authorized her signature to be signed thereto as such re-

<sup>1</sup>—Uldrich v. Gilmore, 35 Neb. 288, 53 N. W. 134 (135).

The court said that "the fact that the husband and father drank intoxicating liquors to excess prior to May 1, 1888, the date of the saloon license, will not preclude the plaintiffs from maintaining their action. Under the statute, every person who furnishes intoxicating liquors to another, although he may be a drunkard is liable for all the damages

which result therefrom. While the fact of the intemperate habits of G. prior to, and at the time of, the sales in controversy, does not relieve the saloon keepers from responsibility, yet such fact may properly be considered as affecting the measure of damages. The instruction was prejudicial, and should not have been given. Dunlavey v. Watson, 38 Ia. 398; Rouse v. Melsheimer, 82 Mich. 172, 36 N. W. Rep. 372; Black. Intox. Liquors, § 324."



lease after the release had been read to her and she signed the same without further question and as a release of her cause of action by reason of her husband's intoxication caused in whole or in part by Cazaleen, then she is bound by the same, no matter what was said to her to induce her to sign it. The important question is, did she then know it was intended as a release and if she did, she is bound thereby.<sup>2</sup>

**§ 3687. Mere Sale or Gift of Intoxicating Liquor Insufficient—Intoxication Must be Shown.** The court instructs the jury that if you believe, from the evidence, that the plaintiff has been injured in her means of support by the sale or gift of intoxicating liquor to said ——— by said ——— during the time charged in the declaration, and if the jury further believe that the conduct of said ——— in this regard was wanton and in willful disregard of plaintiff's rights, then the jury may give, in addition to the actual damage to her means of support which the jury may believe, from the evidence, under the instructions of the court, plaintiff had sustained, such further sum as in their sound discretion the jury may believe will be an example to deter others in like circumstances.<sup>3</sup>

**§ 3688. Degree of Intoxication Immaterial so Long as It Directly Caused the Injury.** The court instructs the jury that it is not every degree of intoxication in a case of this kind that entitled the plaintiff to recover, but the intoxication must be to such an extent that her husband was so under the influence of intoxicating liquor that his judgment, memory and reasoning was impaired to such an extent that he did not know the nature and reasonable consequences of his own act, and the jury must believe from the evidence that the injury was the result of the intoxication before they can find a verdict for the plaintiff.<sup>4</sup>

2—Davis v. Weatherly, 119 Ill. App. 238 (240, 241.)

In this instruction "the jury are told, among other things not clearly stated, that the burden is upon the defendants to show that appellee signed the release with the knowledge that she was releasing her right of action against the defendants. The vice of this instruction is apparent. Having signed, executed and delivered the release, appellee is presumed to have done so with knowledge of its contents and import, and may not even be heard to say that she did not understand it. It is a contract in writing and in an action at law parol testimony is not permissible to vary its terms or meaning. The writing must speak for itself and its legal effect as a release and a complete bar, can be avoided in an action at law in only one way, and that is to prove that appellee's signature to it was obtained by fraud or that it was without consideration. As already stated the burden of such proof is upon appellee. The instruction is subject to serious criticism in other respects. It is awkwardly worded, argumentative, ambiguous and aside from an erroneous statement of the

law, was calculated to mislead the jury."

3—McMahon et al. v. Sankey, 133 Ill. 636 (641), 24 N. E. 1027.

The court said that "the objection is made to this instruction that it authorized the jury to give damages in case the plaintiff was injured in her means of support by the sale or gift of intoxicating liquor to her husband, S., whereas it was necessary for the jury to find that the injury was caused by the intoxication of S. and that such intoxication was produced by the liquor sold or given to him by M. The instruction is undoubtedly erroneous in the respect here indicated, and, if it stood alone, its erroneous character might require a reversal. As a matter of course, intoxication produced by the liquor sold or given, and not mere gift or sale of the liquor must be the cause of injury to the means of support."

4—Tipton v. Schuler, 87 Ill. App. 517 (518).

The court held that "to entitle the plaintiff to recover, it was not necessary that the proof show that the intoxication of her husband at the time of receiving the injury was such that his judgment, memory and

**§ 3689. Intoxication Need Not be the Sole Cause of Injury—Contributing and Assisting Cause, Sufficient.** (a) In considering the causes of the injury you will take into consideration all the evidence in the case, and if you should find that the injury was in fact produced by causes other than the drinking intoxicants furnished by defendant saloon keepers, then you will find against the plaintiff, and in favor of all of the defendants.

(b) The jury is instructed that the fact that the plaintiff did drink beer or whiskey, or both, that afternoon and evening, does not in itself establish the fact that the injury which the plaintiff received, was the result of such drinking. Before the plaintiff can recover you must find that the injury which he complains of was the result of the intoxication, if you should find from the evidence that there was intoxication, and not of other causes.<sup>5</sup>

**§ 3690. Acts or Statements of the Intoxicated Person Cannot be Used in Defense of the Action.** There have been witnesses upon the stand here who have testified to statements made by the injured man soon after it was made; and I say to you, you have a right to consider that testimony. I refer now to the testimony of the two doctors, as to the statements that he made, the young man made, while in front of M.'s store, that he had received nothing to drink at K.'s, the defend-

reasoning was so impaired that he did not know the nature and reasonable consequences of his own acts. The degree of intoxication necessary for recovery is essentially a question of fact; and an instruction which attempts to settle or comprehend the state of intoxication necessary in order to fix the liability of the defendant is clearly foreign to the province of the judge presiding. It is well-known that the effect of alcohol upon the mental and physical energies of a number of persons is not proportionate, but may be widely different. It deadens the judgment, memory and reasoning of some whose powers of locomotion are apparently unimpaired; while it inspires the mental faculties of others, it leaves them helpless physically. In other cases or any case, the degree or nature of intoxication is immaterial if it is clear that the intoxication directly caused the injury complained of. In the case under review, the plaintiff's husband may have been in possession of judgment, memory and reasoning, cognizant of the consequences of his acts, knowing the danger of placing himself upon the track, and yet have been in that state of drunken recklessness or benumbed physical condition as to allow an impulse to place himself upon the track to overcome his natural prudence. This is very similar to some cases of freezing to death, where the person may well know that his only hope of safety lies in steadily walking, and that to sit down or lie does mean certain death, and will be so under the influence of the cold that he prefers death to the effort of moving on. *Smith v.*

*People*, 141 Ill. 452, 31 N. E. 425, the Supreme Court says:—"But even if there was intoxication in part or partial intoxication, yet if such intoxication was sufficient to have caused the death of the deceased, we are unable to see why the case is not within the purview of the statute."

<sup>5</sup>—*Wiese v. Gerndorf*, — Neb. — 106 N. W. 1025.

"These instructions are open to the same objection made to the instruction discussed in *McClennan v. Hein*, 56 Neb. 600, 77 N. W. 120, in the latter part of the second instruction the jury are plainly told that before the plaintiff can recover they must find that the injury of which he complained of was the result of the plaintiff's intoxication. In the words of the opinion above referred to, this is erroneous, in that it states a rule by which there was excluded from the consideration of the jury the intoxication of the plaintiff as a contributing and assisting cause of the injury, and conveyed to that body the idea that the intoxication, if determined to exist, must be shown to be the primary or main and governing cause. This is contrary to the established doctrine in this state. Under the provisions of our statute it is not necessary that the liquor furnished by the defendant be the sole or even the principal cause of the alleged injury. *McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429; *Cornelius v. Hultman*, 44 Neb. 441, 62 N. W. 891; *Grand v. Houston*, 64 N. W. 245, 45 Neb. 813, 29 L. R. A. 851; *Sellers v. Foster*, 27 Neb. 118, 42 N. W. 907."

ants. You have a right to weigh it in the light of the probabilities of such statements being made at the time. You have a right to weigh and determine whether it strikes you, and meets your minds and consciences, as being probable and true, and, if you believe it, you have a right to act upon it; and I say to you here, if you find that such statements were made by the young man, under conditions when he was fairly in possession of his faculties, and knew what he was saying, it would be a circumstance strongly against him in this case, or the claim put forward here that he did purchase liquor there, because men are never supposed to make statements, when they are deliberately made, directly in opposition and opposed to their own interest.<sup>6</sup>

**§ 3691. Poverty of Plaintiff—When a Matter for Consideration.** You are further instructed that you have a right to take into consideration the poverty of the plaintiff if shown by the evidence, the earning capacity of her husband, so far as shown by the evidence, the squandering of his earnings as a result of his intoxication, so far as shown by the evidence, the fact, if shown by the evidence, that the defendants were notified not to sell intoxicating liquors to the husband of the plaintiff, and all other facts and circumstances adduced on the trial, so far as they bear upon the issues of this case, and give such facts and circumstances such weight as in your judgment they deserve.<sup>7</sup>

6—*Van Alstine v. Kaniecki*, 109 Mich. 318, 67 N. W. 502 (503).

The court said that "the test, should be whether this testimony could be received for any other purpose than impeaching testimony. Whatever right to sue in this action the plaintiff has is by virtue of 3 How. Stat. § 2283f. The right is personal to her. Young A. could not himself sue. *Brooks v. Cook*, 44 Mich. 618, 7 N. W. 216, 38 Am. Rep. 282.

The plaintiff's right of action depended upon the facts, and belonged to herself, and was not derived from her son, though growing out of his acts. *Kehrig v. Peters*, 41 Mich. 478, 2 N. W. 801. We think this testimony was hearsay, and should have been received only for the purpose of impeachment. *Catlin v. Railroad Co.*, 66 Mich. 364, 33 N. W. 515."

7—*Corkings v. Meier*, 112 Ill. App. 655 (656).

"The issues to be decided by the jury were whether the defendants had sold or given intoxicating liquors to plaintiff's husband; whether they had thereby produced his intoxication; whether because of such intoxication appellee had been injured in her means of support, and if so, how much, and whether the

act of defendants in selling or giving liquor to her husband was so wanton and willful and in such disregard of her rights as to entitle her to exemplary damages. On the questions as to whether the defendants did sell or give plaintiff's husband intoxicating liquors and whether such liquors caused his intoxication, in whole or in part, plaintiff's poverty, and whether she had notified defendants not to sell him liquors, could have no bearing whatever; yet this instruction informs the jury that they may take these facts into consideration in determining the defendant's guilt. These matters might properly be considered in determining whether appellee was injured in her means of support by the intoxication of her husband, and whether she would be entitled to exemplary damages, but the instruction does not inform the jury to this effect, but leaves it to them to determine for themselves to what extent plaintiff's poverty bears on the issues involved in the case, and the same with reference to her notice to defendants not to sell her husband intoxicating liquors. Also, a less serious objection to this instruction is, that it assumes there was evidence showing that plaintiff's husband squandered his earnings as a result of his intoxication."



## CHAPTER CXL.

### LANDLORD AND TENANT.

See Approved Instructions, Chapter LVII, Vol. I.

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| <p>§ 3692. Tenant holding over—Agreeing to stay if certain improvements are made.</p> <p>§ 3693. Right of landlord to enter for condition broken—Forfeiture of lease.</p> <p>§ 3694. What is a covenant to repair.</p> <p>§ 3695. Action for repairs by landlord through failure of tenant to keep in repair—Measure of damages.</p> <p>§ 3696. Leasing premises out of repair or in dangerous condition—Whether duty of landlord to keep in reasonably safe condition.</p> <p>§ 3697. Not estopped to deny use of premises by voluntary payment of rent.</p> | <p>§ 3698. Lease of premises for gambling purposes.</p> <p>§ 3699. Release of tenant by assignment of lease—Acceptance of rent.</p> <p>§ 3700. When tenant is bound to recognize paramount title.</p> <p>§ 3701. Tenancy at will—Implied agreement.</p> <p>§ 3702. When trespass <i>quare clausum fregit</i> cannot be maintained against owners.</p> <p>§ 3703. Tenant claiming set-off for work done on premises under an agreement.</p> <p>§ 3704. Right of landlord to evict—Eviction in wanton unwarrantable manner—Punitive damages.</p> |
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**§ 3692. Tenant Holding Over—Agreeing to Stay if Certain Improvements Are Made.** (a) If the jury believe that the defendants agreed to keep the premises if certain improvements were made, and that said improvements were not made, the failure to make the improvements, and the failure of defendants to agree to keep them without the improvements were made would not bind defendants to a yearly contract.

(b) If the jury believe that the defendants remained on the premises hoping to have the improvements made, and, finding that the improvements would not be made, they abandoned the premises, you should find for the defendants.<sup>1</sup>

(c) If the jury find from a preponderance of the evidence that on ———, when the written lease expired, the tenants were demanding certain improvements before a new lease was made, and had notified plaintiff's agent that such new lease would not be made without certain improvements, and the agent had the matter under consideration,

<sup>1</sup>—Abeel v. McDonnell—Tex. Civ. App.—, 87 S. W. 1066.

"They are to the effect that, if the jury believe that the defendants agreed to keep the premises only if the improvements were made and that the improvements were not made, then the defendants could not be held liable. If the defendants remained in possession, and there was no agreement upon the part of the landlord or his agent to make the

improvements, or that the defendants could remain in possession under a monthly contract, or until it could be determined whether the landlord would make improvements, then the mere notification or statement upon the part of the defendants that they would only keep the premises if the improvements were made would not relieve them from liability for rent for the full year."

and had not at the time declined to make the improvements, then the tenants, under such circumstances, by merely holding the house after such time would not become tenants for another year, and if you so find, your verdict will be for the defendants.<sup>2</sup>

(d) If the jury believe from the testimony that the defendants notified the plaintiff before or at the time the lease expired that they would not keep the premises except on a month to month rent, they will find for the defendants.<sup>3</sup>

§ 3693. **Right of Landlord to Enter for Condition Broken—Forfeiture of Lease.** (a) The court instructs the jury as a matter of law, that if the jury believe from the evidence that the plaintiff violated the terms and conditions in the lease under which he occupied the premises in question, under the defendants, then by the terms of the lease the defendant had a right to forfeit the said lease and remove the plaintiff or his employes and property, using no unnecessary force, and under such circumstances the plaintiff can not recover in this action.

(b) The court instructs the jury that the plaintiff is only entitled to recover the actual damage he has sustained, as may be shown by the evidence, which was the direct result of the wrongful conduct of the defendants, if the jury believe from the evidence that the defendants were not warranted in declaring the lease forfeited by reason of the default of the plaintiff, *if the same was forfeited, unless the defendants acted wantonly and wilfully in removing the goods of the plaintiff and taking possession of the space mentioned in the lease.*<sup>4</sup>

2—Abeel v. McDonnell, supra.

"This charge, as framed, is not accurate. The mere holding of the matter of improvements under consideration by the agent of appellant could not, as a matter of law, be said to be a fact sufficient to induce the appellees to believe that their request would be complied with. The charge instructs the jury that the mere matter of consideration of the proposition by the agent which he had not declined, would be sufficient excuse for the appellees to hold possession under the terms submitted by them. The question to be submitted to the jury should be, not that these facts alone should, as a matter of law, entitle them to hold possession under the new terms, but whether their proposition submitted to the agent, together with his conduct, was sufficient to induce them to believe that their terms would be accepted and the improvements made. If they submitted these terms to the agent, and his conduct was such as would induce them to believe that it would be accepted and the improvements made, their continued occupancy for a reasonable time for the agent to comply with the terms ought not necessarily be held to bind them for the entire year."

3—Abeel v. McDonald, supra.

"The objection," said the court, "to this charge is that, in the absence of an agreement between the landlord and the tenants as to a

change in the contract, the instruction exonerates the defendants from liability merely upon notice to the plaintiff that they would only rent thereafter from month to month, and it is contended that, if they held over without the consent of the landlord as to the change in the contract, the bare fact of notifying the landlord would not relieve them from liability if in fact they held over and continued to occupy the premises. In our opinion, the court committed an error in giving this charge. It should have been coupled with the proposition that the defendants would be released only upon an agreement entered into as to changing the term under which they would hold, or an acquiescence on the part of the landlord or his agent, with the proposed terms submitted by the tenants. The appellants undertook to correct the error by a charge which was requested and given by the trial court, but this fact does not relieve the charge of its error. Practically the jury upon this issue was confronted with two conflicting charges."

4—Schaefer v. Silverstein, 46 Ill. App. 608 (609 & 610).

"The modification of the defendants' instructions noted was also error. The italicized words amount in substance to telling the jury, as a matter of law, that an express forfeiture of the lease, by the appellants, constituted a condition precedent to their right to remove ap-

**§ 3694. What is a Covenant to Repair.** Now, gentlemen, in regard to the covenant to keep the premises in repair, we must keep in mind the character of the premises, and their condition, and all the surroundings. We cannot, perhaps, lose sight of the fact, or any fact that has a direct bearing upon what would be reasonable and usual. A different rule would prevail with a farm than with simply a dwelling house upon a village lot in this: that we must keep in view the size of the farm, the amount of fences upon the farm, the condition of the fences when the tenant took possession of the farm to work, and the character of the buildings, and the use to which they were subjected necessarily, reasonably; and, keeping in view all of these facts, you are to determine from the evidence in this case, did the defendant keep these premises in reasonable repair during the continuance of his lease? If a fence blew down, or got down in any manner, it might not be the duty of the defendant to put it up immediately the next morning, or, if a window light was broken out of the barn, to immediately place it in; but he would be required to keep the fences and the buildings in such reasonable repair as ordinarily prudent farmers do—that is, to use the same diligence that ordinarily prudent farmers use in keeping their buildings in repair.<sup>5</sup>

**§ 3695. Action for Repairs by Landlord Through Failure of Tenant to Keep in Repair—Measure of Damages.** (a) The jury are further instructed that, in determining what is ordinary wear referred to in the lease introduced in evidence herein, you must look to the surrounding circumstances in connection with the making of said lease, the use for which the premises were leased, the fact that said lease permitted said premises or portion thereof to be sub-let, the age of the building, and all the circumstances connected therewith and known to the parties.

(b) The jury are instructed that the lease introduced in evidence, and on which the recovery, if any, must be had, provides that the defendant B. should make certain alterations in the premises described in said lease, and should return said premises to the plaintiff herein in as good condition as they were when received by defendant B. with said alterations added, ordinary wear excepted. If you find, from the evidence, that defendant B. did not so return said premises, the measure of damages for failure to so return them, is the reasonable cost of putting said premises in as good condition as they were received by defendant B., with said additions, less ordinary wear, and

pellee's goods from their premises. Such is not the law. The right to re-enter, upon covenant broken, existed independently of an express forfeiting of the lease. The right of appellants to possession was not dependent upon their having declared a forfeiture of the lease, but existed, if at all, because of a lawful termination of the lease by any act, or omission, of the appellee, constituting a breach of covenant. In support of these propositions we refer to *Mueller v. Kuhn*, 46 Ill. App. 496, wherein the cases in this state are cited; and see *Fabri v. Bryan*, 80 Ill. 182."

5—*Vincent v. Crane*, 134 Mich. 700, 97 N. W. 34.

"We think it quite possible that the jury may have been misled by this instruction. It is undoubtedly true that the defendant would have a reasonable time after any injury to the premises, such as is suggested in the charge, to put the same in repair; but the test made by the contract is not that they should be kept in such reasonable repair as ordinarily prudent farmers use, but that they shall be kept in such repair and condition as when taken."



that the measure of damages is not what it would cost to put them in as good condition as they were when received by defendant B.<sup>6</sup>

(c) You are instructed, as a matter of law, that if the defendant B. failed to keep the said premises or the additions thereto in first class repair, or failed to replace all parts and things thereunto belonging, or that may have become broken, injured or destroyed during his possession of the premises, otherwise than by fire or the unusual actions of the elements, or if the said defendant B. has failed to make repairs and renewals to said premises while in his possession necessary or advisable necessary to keep the same both inside and outside with all additions thereto from deteriorating in value and condition, or to do such things in that behalf as a judicious owner of the premises would do for the benefit of the same, and by reason of his neglect or failure in that regard the plaintiff has been obliged to and has expended divers sums of money for labor and material in that behalf, then you must allow by your verdict to the plaintiff the amount or amounts expended by him.<sup>7</sup>

**§ 3696. Leasing Premises out of Repair or in Dangerous Condition—Whether Duty of Landlord to Keep in Reasonably Safe Condition.** The duty of the landlord, when he rents premises, to use all reasonable care to see that the premises have not so fallen into decay or become so dangerous that a person occupying the same is liable to be injured. It is further the duty of the landlord to comply with all statutory regulations, such as furnishing suitable fire escapes, and to use due diligence to put and keep them in reasonably safe condition; and if the landlord, when renting premises, rents them with fire escapes which he knows to be dangerous or should and could have known to be so by the exercise of reasonable care, or if he fails to use reasonable diligence to keep fire escapes erected on the building in repair, he is liable for the injuries resulting from their defective and unsafe condition, to a tenant making a legitimate and proper use of them, and in the exercise of ordinary care.<sup>8</sup>

6—*Barnhart v. Boyce*, 102 Ill. App. 172 (177).

"These instructions were calculated to mislead the jury, if they were not erroneous, in giving undue prominence to the provisions in the lease as to repairs, except ordinary wear, to the exclusion of the many other special provisions of the lease which bear on appellee's duty as to repairs."

7—*Barnhart v. Boyce*, *supra*.

"This instruction asked by plaintiff was, in our opinion, properly refused, because it in effect tells the jury that they might allow for repairs and renewals which, under the lease, should have been made by defendant, the amounts expended by defendant therefor without reference to whether such amounts were fair and reasonable or otherwise."

8—*Gallagher v. Button*, 73 Conn., 172, 46 Atl. 819 (820).

"The general rule is that under such a contract the lessee takes the risk as to the condition and quality of the hired premises, and that the landlord is not liable to the tenant for injuries sustained by reason of

the defective condition of the building leased. By such a lease the lessee purchases an estate in the premises rented, and the rule of caveat emptor applies; making it ordinarily the duty of the lessee, as such purchaser, to make such examination of the premises as is required in order to ascertain whether the premises have 'so fallen into decay or become so dangerous that a person occupying the same is liable to be injured.' *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 439; *Edwards v. Railroad Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 748; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. 469; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85; *Wood, Landl. & T.* (2d Ed.) p. 833. In the absence of any special covenant or agreement, ordinarily repairs upon such part of the leased premises as are in the exclusive possession and control of the tenant must be made by the tenant, if he desires them to be made, and he cannot require the landlord to

§ 3697. **Not Estopped to Deny Use of Premises by Voluntary Payment of Rent.** You are further instructed if you believe from the evidence that the defendant voluntarily paid the plaintiff \$—— as rental for premises and property used by him, the defendant, each year for the first three years of his occupancy, then he, the defendant, is estopped by such payments from defending in this action on the ground that he did not have the use during said three years of all the property described in the lease.<sup>9</sup>

§ 3698. **Lease of Premises for Gambling Purposes.** (a) If you find from the evidence that the lease described in the declaration was executed by the parties thereto, and that the defendant entered into a contract to guarantee the payment of the rent in said lease provided, and that said rents have not been paid as in said lease promised, then you must find for the plaintiffs and against the defendant, unless the defendant has proved by a preponderance of the evidence, both that the lessees, at the time the lease was made, intended to put the premises to a use forbidden by law, and also that the plaintiffs in making the said lease knew of the said illegal intent on the part of the lessees, and participated and shared therein, and entered into the lease in question with the design and intention of enabling or assisting the lessees to accomplish their illegal purpose.

(b) The court instructs you that even if it appears from the evidence that the plaintiffs at the time of the execution of the lease in question knew that the lessees intended to put the premises to an illegal use, nevertheless, the lease would be a valid contract and enforceable at law unless the plaintiffs also intended, at the time the lease was executed, to aid and further the illegal purpose of the lessees, and executed the lease with that intent.<sup>10</sup>

(c) The court instructs the jury that, although the lease sued on contained express covenants against using the premises for gamb-

make them during the term of the lease. *Hatch v. Stamper*, 42 Conn. 8; *Clancy v. Byrne*, 56 N. Y. 133, 15 Am. Rep. 391.

"The language of the charge above quoted erroneously places wholly upon the lessor the duty of exercising reasonable diligence, at the time of the leasing of the premises, to discover dangerous defects, and not at all upon the lessee; and the statement of the charge which follows is to the same effect. The court said: 'If, however, the defects are not or were not discoverable by the exercise of reasonable diligence, \* \* \* then the landlord is not liable. \* \* \* He is only liable for a failure in his duty to exercise reasonable care and diligence.' From these instructions the jury must have understood it to be the law that a landlord, who, without fraud or misrepresentation, rented a house manifestly so defective and out of repair as to be unsuited for occupancy, would be liable for an injury resulting, from such defective condition of the building, to a tenant, who at the time of the leasing either knew, or could easily have learned, of its

condition, but who afterwards, while occupying it, used reasonable care to avoid being injured."

<sup>9</sup>—*Munson v. Herzog*, 109 Ill. App. 302 (308).

"Manifestly this is not the law. The tenant had the right to pay the rent as it fell due, and to bring an action to recover damages for a breach of the covenants of the lease by the lessor, or to recoup or set off damages in an action brought by the lessor, as was sought in this case."

<sup>10</sup>—*McDonald v. Tree*, 69 Ill. App. 134 (135, 136 and 137).

"The mischief intended to be prevented by the statute was not covenants by lessees that they would (not) conduct gambling as a business but the gambling itself; and one of the means of preventing that mischief is to punish the landlord who lets to a tenant premises which the tenant wants for gambling, and the landlord knows it, and knows, with all the certainty that future events can be known, that if he demises, the premises will be used for gambling. An intention by the landlord to aid or assist the tenant to violate the law is not a prerequisite to his own guilt."

ling purposes, still, if you believe, from the evidence, that the lessee intended to use them for that purpose, and the plaintiffs knew at and before the time of the execution of the lease said lessee wanted or intended to use the premises for gambling, then the plaintiffs cannot recover and you should find for the defendant.<sup>11</sup>

**§ 3699. Release of Tenant by Assignment of Lease—Acceptance of Rent.** The court instructs the jury, as a matter of law, that the acceptance of rent by the landlord from a sub-tenant, or the assignment of the lease by the original tenant, does not release the original tenant from the payment of rent during the period covered by the lease, unless it clearly appears that it was the intention of the parties that the first tenant should be discharged, and that the landlord should look to the new tenant for the rent which afterwards accrues; and in this case, if you believe, from the evidence, that the defendant, G., assigned his lease or sub-let the premises, and that the plaintiff, R., accepted rent from the new tenant, such acceptance of rent by R. from the new tenant would not, of itself, as a matter of law, relieve G. from the payment of rent.<sup>12</sup>

**§ 3700. When Tenant is Bound to Recognize Paramount Title.** The court further instructs the jury that if they believe, from the evidence, that defendant is a tenant of the said property holding under a lease from any person other than the plaintiff, and if they shall further believe, from the evidence, that she was not a party to the trust deed of the property through which the plaintiff claims title, and that she claims no rights through any of the parties thereto, then the said defendant is under no obligation to recognize the plaintiff as owner nor is she subject to the provisions of said trust deed.<sup>13</sup>

**§ 3701. Tenancy at Will—Implied Agreement.** (a) The court instructs the jury that in order to constitute the defendant a tenant at will it is not necessary that the jury find that there was an express contract between the plaintiff and the defendant, or the person under

11—Frank v. McDonald, 86 Ill. App. 336 (340).

"This instruction is fatally defective, and its defense is not attempted by counsel for appellee. It is not enough to defeat the lease that Williams (the lessee) should have intended to use the premises for gambling purposes, and that appellants knew that he 'wanted' to do so. Appellants might have known that Williams intended to so use the premises, and for the purpose of preventing him from carrying out such intention inserted the express covenants against it, and intended to enforce them, and told him so. The question at issue here is not what Williams 'wanted,' but whether in fact the premises were rented to Williams to be used for gambling purposes."

12—Goldstein v. Reynolds, 190 Ill. 124, rev. 86 Ill. App. 390, 60 N. E. 65.

"It will be noted the instructions so procured to be given by the defendant in error does not refer to the defense of release by express agreement, but is devoted entirely

to the object of advising the jury as to the principles of law applicable, under the evidence in the case, to a defense of a surrender of the lease."

The instruction seems to be inapplicable in this case, for omitting the defense of release by express agreement, which the evidence tended to show. The Supreme Court does not criticize it otherwise.

13—Anderson v. McCormick, 129 Ill. 308 (317), 21 N. E. 803.

"The unsoundness of the proposition contained in this instruction is too apparent to require extended discussion. Whether the defendant is bound to recognize the plaintiff as owner depends upon whether he has the paramount title, and not upon whether she was a party to the deed of trust. If that deed conveyed the fee, it was binding not only upon all the parties to it but upon all the world, and the defendant cannot set up as against the title derived by the plaintiff through said deed of trust a lease to her from a party not shown to have the paramount title."



whom the defendant claims, that he could occupy the premises in controversy as the tenant of the plaintiff, but the jury are instructed that an implied agreement to occupy would be sufficient; and if the jury find from the evidence that the defendant occupied the premises in controversy for the period of several months, and that the plaintiff knew of such occupancy, and made no objection thereto, then from such facts the jury may find that the defendant occupied the premises with plaintiff's consent, as a tenant at will of the plaintiff.

(b) The court instructs the jury that if they find from the evidence in this case that during the time the defendant occupied the premises in controversy the plaintiff, by its officers or agents, knew of such occupancy and made no objection thereat, and attempted to collect rent from the defendant, and that the plaintiff and defendant disagreed as to the amount of rent the defendant should pay for the use of such premises, then the jury would be authorized from such facts to find that the defendant occupied said premises with plaintiff's consent, and as a tenant of the plaintiff, and, if they so find, the verdict should be in favor of the defendant.

(c) The court instructs the jury that if they find from the evidence that the plaintiff, by and through its agent, agreed that the defendant might occupy the premises sued for if he would pay rent, for the time he had occupied the same, at the rate of one dollar per month, and also that he was to pay one dollar a month for the future rent of said premises, and that he was given until the following Monday to pay his rents, and that said agent was authorized by plaintiff to make such agreement, and that before said Monday this suit was brought, the verdict should be in favor of the defendant.<sup>14</sup>

14—Center Creek Min. Co. v. Frankenstein, 179 Mo. 564, 78 S. W. 785 (786).

"The law applicable to the facts of the case is stated by the text-writers: In Taylor on Landlord and Tenant (8th Ed.) § 21, as follows: 'The mere occupancy of property does not necessarily imply the relation of landlord and tenant, for if no rent has been paid, and no concurrent acts of the parties, or other circumstances, exists from which consent to a tenancy on the part of the owner can be inferred; or if the consent was conditional and has since been forfeited—as tenancy cannot arise from mere occupation; and if a man gets possession of a house without the privity of the owner, although the parties may afterwards enter into a negotiation for a lease, but differ about the terms and the negotiation goes off; or, if, after being let into possession under an agreement to sign a written lease and find surety for the rent, he does neither—no species of tenancy is created, but the occupant in either case becomes a mere trespasser.' And in 18 Am. & Eng. Encycl. of Law (2d Ed.) states the law as follows: 'If one enters upon the land of another without right, and not in subordination to the title of the owner, he is a mere trespasser, and the relation of landlord and

tenant is not created between such occupant and the owner, so as to authorize either the former to claim the rights of a tenant, or the latter to claim the rights of a landlord. After a person has entered upon land without right, the relation of landlord and tenant may of course subsequently arise by implication, and it has generally been held that such relation arises when the occupant admits the title of the owner of the land, and agrees to hold in subordination to his title. Still, mere negotiations between the occupant and the owner, which have no result, and which do not amount to a recognition of the owner as landlord, will not create the relation of landlord and tenant.'

"Applying these principles to the instructions given for the defendant on the evidence in this case, each of them will be found to be erroneous. By the first above quoted, the jury are told that from the mere occupancy of the premises by the defendant for several months, i. e., from about January 1 to the ninth of May, 1900, without objection, and with the knowledge of the plaintiff, the plaintiff's consent to such occupancy could be implied, and the relation of landlord and tenant created, although the undisputed evidence of both parties was that such occupancy was without the consent

§ 3702. **When Trespass Quare Clausum Fregit Can Not be Maintained Against Owner.** (a) The court instructs the jury that if the jury believe from the evidence that the plaintiff was in the actual possession of the meat market and dwelling apartments in question, and occupied the same, and the defendants, or any of them, forcibly and against his will, entered the same, the defendants or defendant so entering the same committed a trespass.

(b) The court instructs the jury that if they believe from the evidence that any of the defendants forcibly and against the will of the plaintiff entered the premises of the plaintiff, or authorized their entry, said defendant or defendants were not justified in so entering the premises in question, or authorizing their entry, even though you should believe from the evidence that the plaintiff was behind in his rent. The law provides a method by which the landlord can recover possession of premises peaceably, where a tenant is behind in his rent, and the landlord is not authorized to forcibly enter and take possession of the tenant's premises, or authorize any one else to do so before the expiration of the lease, and against the will of the tenant.<sup>15</sup>

§ 3703. **Tenant Claiming Set-off for Work Done on Premises under an Agreement.** The court instructs the jury that the defendant can not be allowed the alleged set-off of \$—— unless he has shown by the evidence that he fully complied with the terms of the agreement by which he was to receive said \$——; that is, husk the corn then partly husked and haul all the oats raised upon said farm of plaintiff for the year ——, but the jury may allow to the defendant such proportion of said \$—— as the evidence shows the defendant has performed of the work named in said contract, and which the plaintiff has received the benefit of, if the evidence shows any such.<sup>16</sup>

of the plaintiff, that no communication was ever had between them in any manner whatever prior to the 9th of May, and that no rent had ever been paid; and there was no evidence of any concurrent act or circumstance tending to show such consent. This proposition is absurd as applied to the evidence in the case; and to imply consent from mere knowledge and silence, when there is no obligation to speak, is equally absurd as an abstract proposition. There is no such facile mode as this of converting a trespasser into a tenant without the consent of the owner.

"By the other two instructions a relation of landlord and tenant between the parties is predicated upon the negotiations testified to by the defendant between him and the agent which might have resulted in a contract by which the plaintiff would have become a tenant of the plaintiff if he had appeared at the office of the agent on the Monday morning following the interview and performed the conditions agreed upon, but which resulted in nothing by reason of his failure to so appear and perform those conditions then or at any time thereafter; therefore no tenancy could be im-

plied from those negotiations. Hence these instructions are both erroneous."

15—Mueller v. Kuehn, 46 Ill. App. 496 (498).

The court said that "the principal vice in each of the instructions consists in the assumption of the first, and the expression of the second, that a landlord may not re-enter and retake possession of his premises withheld by a tenant in possession after the determination of a lease, except by process of law.

"It would put an end to the enjoyment of property to hold that trespass quare clausum fregit could be maintained against the owner, with right of possession, who merely takes possession of what is his own. Hoots v. Graham, 23 Ill. 81; Ostadag v. Taylor, 44 Ill. App. 469; Frazier v. Caruthers, 44 Ill. App. 61; Eichengreen v. Appell, 44 Ill. App. 19, and cases there cited; Brooke v. O'Boyle, 27 Ill. App. 384; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Dec. 133."

16—Gross v. Schroeder, 70 Ill. App. 625 (627).

"This instruction we think is contradictory in its terms; the first part of it correctly states the law as we understand it, but the last part is opposed to the first and nullifies it."

§ 3704. **Right of Landlord to Evict—Eviction in Wanton, Unwarrantable Manner—Punitive Damages.** (a) The court instructs the jury that if they believe, from the evidence, the plaintiff was in the lawful possession of the premises in question, and if they further believe from the evidence that while in such possession, the defendants ousted and evicted the plaintiff, and removed his goods from the shelves and cases without lawful right to do so, then the jury will find the defendants guilty, and assess the plaintiff's damages at such a sum as the jury may believe from the evidence he has sustained, if any.

(b) The court further instructs the jury that if they believe, from the evidence, the defendants ousted or evicted the plaintiff in an unlawful manner, and that they did so in a wanton, illegal and unwarrantable manner, then the jury are instructed that they may give the plaintiff punitive damages, not only to compensate him but to punish the defendants.<sup>17</sup>

(c) The court instructs the jury that, if they find from the evidence that the plaintiff was in the actual and peaceable possession of the premises in question in this suit on and before ———, then, as a matter of law, the plaintiff's possession is presumed to be rightful until the contrary is shown; and no one, not even the owner of the said property himself, had a right to go upon said premises, and forcibly eject said plaintiff therefrom, or remove his property, if from the evidence, the jury believe any property was so removed against the plaintiff's will, unless the plaintiff had authorized such entry and removal.

(d) If the jury find from the evidence that defendant G. at the time of the alleged trespass by direction of defendant L., either with or without force entered into the rooms occupied by the plaintiff, and did then and there against the will of said plaintiff forcibly remove said plaintiff's property from said rooms, and did forcibly dispossess said plaintiff from said rooms, and did take possession of said rooms against the will of said plaintiff, either by force, threats or fraud, then, and in that case the jury should find the defendants guilty; and if the jury further believe from the evidence that the plaintiff was by such acts damaged in person or property or in business, then the jury in assessing damages to be awarded to plaintiff, may not only take into consideration such damages as they believe from the evidence he actually sustained, but may also, if they further believe the acts of said G., and those assisting him were wanton, forcible, insulting and in reckless disregard of the plaintiff's rights, add to said actual damages so proven, if any, such sum as they think proper as exemplary damages.<sup>18</sup>

17—*Schaefer v. Silverstein*, 46 Ill. App. 608 (609 & 610).

"The instructions given for the plaintiff were erroneous in leaving the law of the case to the jury.

"That a landlord may put out with force, a tenant holding under a lease containing a clause of re-entry for covenant broken upon the happening of a breach of such a covenant, and the termination thereby of the tenancy, is no longer a question. An

owner may employ force to reclaim what is his own."

18—*Leiter v. Day*, 35 Ill. App. 248 (250).

"These instructions were almost equivalent to directing the jury to find for the appellee; for though there was some testimony that the plaintiff yielded voluntarily to a demand for possession, yet, as between landlord and tenant, only a sanguine



attorney would expect the jury to so find.

"The defendant L. was not present at the eviction, but had employed the defendant G. to take possession of the premises. By so doing, if the eviction was wrongful, he made himself liable for all actual damages to the appellee. But if he acted in good faith, without malice, with reasonable prudence, in the exercise of what he believed to be a legal right, this would be the extent of his liability. It is probable that a liberal estimate by the jury of the

actual damages in such a case would not be disturbed, but the damages must be ostensibly actual. *Hawkes v. Ridgway*, 33 Ill. 473; *T. P. & W. R. R. v. Patterson*, 63 Ill. 304; *Miller v. Kirby*, 74 Ill. 242.

"A ratification of a trespass is not a ground for vindictive damages. *Grund v. Van Vleck*, 69 Ill. 478; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169. The second instruction as well as others upon ratification not quoted, runs counter to the doctrine of these cases."

## CHAPTER CXLI.

### LIMITATIONS—STATUTE OF.

See Approved Instructions, Chapter LVIII, Vol. I.

§ 3705. If process could be had on defendant or his general agent, statute of limitations will run, although plaintiff did not know of their residence in the state.

§ 3706. Advances made by agent for principal—Continuous agency—When the statute begins running.

§ 3707. Absence from the state sufficient to constitute a residence—Mere visits and temporary period of absence not deducted, although protracted.

§ 3708. Possession of logs—Title by limitation.

§ 3705. If Process Could be Had on Defendant or His General Agent, Statute of Limitations Will Run, Although Plaintiff Did Not Know of Their Residence in the State. The court instructs you that if you shall find from the evidence that between the date of the alleged purchase and warranty of the machine in question and the time of the commencement of this action the defendant had one or more general agents located in this state, and that plaintiff knew such facts, or by the exercise of ordinary prudence and diligence he could have ascertained such fact, then, and in that case, you are justified in finding that during the time defendant's said general agents were located in the state, and the plaintiff knew, or by the exercise of ordinary prudence and diligence could have known, such fact, that during such time, for the purpose of this suit, the defendant was a resident of this state. But even though you shall find that during said time or a part of such time the defendant did have a general agent or agents located in the state, but that, owing to such fact not being generally known, plaintiff did not know of it, and by the exercise of ordinary prudence and diligence could have known of it, then, and in that case, the mere fact that defendant did have a general agent or agents in the state would not constitute defendant a resident of this state for the purpose of this action.<sup>1</sup>

§ 3706. Advances Made by Agent for Principal—Continuous Agency—When the Statute Begins Running. (a) The court instructs the jury that, where there is a continuing agency in which the

<sup>1</sup>—Winney & Sandwich Mfg. Co., 86 Ia. 608, 53 N. W. 421 (423), 18 L. R. A. 524.

The court said that this "instruction in effect holds that, though defendant might have an agent in the state, employed in the general management of its business, yet, if such fact was not known to plaintiff, and he could not have ascertained it by the exercise of proper care and diligence, then the statute of limitations

would not run against plaintiff's cause of action. In other words, the running of the statute is made to depend upon plaintiff's knowledge or lack of knowledge of the fact of the existence of a general agent in the state. We do not think that this is the law. The running of the statute in such a case must depend on the fact of residence of the defendant in such a sense that service of process could be made upon it."

agent advances money for the use of the principal, the statute of limitations does not begin to run from the date of the said advances, but only from the termination of the agency, in a suit by the agent against the principal for such advances.

(b) The court further instructs the jury that so much of the account sued on in this case as accrued and became due more than three years before the institution of this suit, unless based on some promise or obligation of the defendant company is barred by the statute of limitations, unless the agency of the plaintiff's was a continuing one, in which case the statute of limitations does not begin to run until the termination of the agency.<sup>2</sup>

§ 3707. **Absence From the State Sufficient to Constitute a Residence—Mere Visits and Temporary Periods of Absence Not Deducted, Although Protracted.** If A. went out of the state at various times merely for brief and temporary periods to attend to his business or to visit friends, and again returned without prolonging his stay for any considerable time, then such periods of absence should not be deducted from the five years. But for visits or periods of absence which should be prolonged for any considerable time, showing that his business was not merely temporary, then such times of absence should be deducted from the five years. In order to justify you in deducting time of absence from the State of different periods of time, the evidence ought to satisfy you that such periods of absence were extended so long as to justify the belief that he was not out of the State for a mere temporary business or social visit.<sup>3</sup>

2—*Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720 (721).

"As a general proposition, where there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run against advances lawfully made by the agent in the prosecution of the undertaking or agency, or against compensation for the services of the agent, until the termination of the undertaking or agency. The law looks upon the employment as an entire contract, and regards the claim for disbursements and compensation as an entire demand, to which the right does not accrue until the completion of the service or the termination of the employment or agency. But, although the employment or agency is a continuing one, yet if the agent had the right to require payment for advances or compensation for services prior to the termination of the agency, or if the advances were repudiated by the principal as unauthorized or not required to be made by the nature of the employment or agency, the statute begins to run from the time the agent had the right to demand payment for his services or for advances, or, if the advances were repudiated as unauthorized, from the time of such repudiation. The statute begins to run whenever the right of action accrues, and such right accrues whenever the agent has the right to demand payment of his principal, and

if refused to apply to the proper tribunals for relief. So, that, although the agency be a continuing one, if the agent has the right, prior to the termination of the agency, to demand payment of his compensation or for advances, the statute begins to run from the time he had the right to make such a demand."

3—*Pells v. Snell*, 130 Ill. 379 (383), 23 N. E. 117.

"The instruction above recited seems to hold that the sufficient and only test by which to determine whether A. was residing out of the state within the meaning of the statute, was to be found in the length of his absence, wholly irrespective of the fact of whether he in fact retained his residence in the state, as the evidence for the defense tended to show, or whether he established for himself any fixed abode or dwelling place in another state either permanently or otherwise. To this view, we are unable to give our assent. Mere absence from the state, however protracted, is not sufficient to constitute a residence elsewhere. A person continually travelling from place to place in other states or foreign countries, even if he has abandoned his residence here, cannot be said to have acquired a residence or be residing in any other place. Residence necessarily involves the idea of a local habitation or place of abode, and unless such abode is established or acquired, no length of absence can



§ 3708. **Possession of Logs—Title by Limitation.** It is also a rule of law that if the logs are afloat, and the owner or proprietor allow them to stay drifted upon the shore on the property of any man who owns along the river for eighteen months, without doing anything by way of removing them, he would forfeit his right or his ownership in that property. That is the law.<sup>4</sup>

be held to constitute residence abroad. In several of the other states, whose statutes of limitations are identical, so far as the provision under consideration is concerned, with our present statute, it has been held that occasional temporary absences from the state, however long continued, if they were not of such character as to change the party's domicile, are not to be deducted in computing the statutory term fixed for the limitation of an action. Such was the rule laid down in *Massachusetts in Collector v. Halley*, 6 Gray 517, and *Langdon v. Doud*, 6 Allen 424, 83 Am. Dec. 641, the statute of that state providing that the time of a defendant's absence should be deducted in case 'he is absent from and resides out of the state.' The statute of the State of Vermont was in the same words, and the same construction was put upon it in *Hackett v. Kendall*, 23 Vt. 275, and *Hall v. Nasmith*, 28 Vt. 791. The same construction has been put upon the same language in *Maine. Drew v. Drew*, 37 Me. 389. See also *Ford v. Babcock*, 2 Sandf. 518; *Wheeler v. Webster*, 1 E. D. Smith 1; *Harden v. Palmer*, 2 E. D. Smith 172; *Gilman v. Coutts*, 27 N. H. 348.

We would not be understood as adopting the doctrine of the decisions above cited to the extent of holding that there must be an actual change of the party's domicile in the strict legal sense of that word, that is, an abandonment of his domicile in this state and the acquisition of a domicile elsewhere, to bring him within the meaning of our statute of limitations, all we intend to hold being that he must acquire a fixed and permanent abode or dwelling place out of this state at least for the time being. We are of the opinion that the instruction given to the jury in this case was erroneous."

4—*Log Owners Booming Co. v. Hubbell*, 135 Mich. 65, 97 N. W. 157.

"The statute does not mean that the title to the property is forfeited by allowing it to remain for eighteen months upon the land. It is doubtful if such a provision would be constitutional. Such title is only lost when the landowner has taken proceedings thereunder to sell the logs. If this instruction of the court were correct no proceedings would be necessary for a sale of the logs, and that part of the statute would be useless."

## CHAPTER CXLII.

### MALICIOUS PROSECUTION.

See Approved Instructions, Chapter LIX, Vol. I.

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| <p>§ 3709. Discharge as prima facie evidence — Underscoring words.</p> <p>§ 3710. Voluntary dismissal of case as prima facie evidence of want of probable cause—Burden of proof.</p> <p>§ 3711. Probable cause—Prosecution undertaken for public purpose.</p> <p>§ 3712. Probable cause—Justification for beginning criminal proceedings.</p> <p>§ 3713. Probable cause — Omitting malice in the instruction.</p> <p>§ 3714. Willful overstatement in an affidavit as evidence of malice.</p> | <p>§ 3715. Action of malicious prosecution against a partner—Liability of a co-partner.</p> <p>§ 3716. False imprisonment—Probable cause—Arrest must have been in pursuance of direction given by defendant.</p> <p>§ 3717. Plaintiff's release from prison, obtained by defendant, does not waive claim for damages.</p> <p>§ 3718. Directing an arrest upon suspicion—Sufficient probable cause—Malice.</p> <p>§ 3719. Plaintiff retained under a void warrant of arrest.</p> <p>§ 3720. Arrest for vagrancy—Validity of ordinance consistent with the statute.</p> |
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**§ 3709. Discharge as Prima Facie Evidence—Underscoring Words.**  
 The court instructs the jury that the discharge by a magistrate of a person accused of crime upon preliminary examination is prima facie evidence of want of probable cause.<sup>1</sup>

<sup>1</sup>—Philpot v. Lucas, 101 Ia. 478, 70 N. W. 625 (626).

"It is insisted that the court erred in underscoring the words 'prima facie.' We said in State v. Cater, 100 Ia. 501, 69 N. W. 883, that it was not proper to underscore words in instructions; that the effect might be to give such words undue weight, and thus to prevent the jury from giving due weight and consideration to other parts of the charge. The words underscored in the instruction under consideration are usually italicized in legal treatises and in judicial opinions, and hence it may be said that they are not embraced within the rule in State v. Cater. It is insisted that the portion of the instruction set out is an erroneous statement of the law, as applicable to the facts of this case. This was not a case of one accused of crime upon a preliminary examination. It was a case where, upon information filed before a justice of the peace, the plaintiff was accused of an offense not indictable, but triable before the justice. Therefore the charge, though correct as applied to a case of one accused of a crime

upon preliminary information (Hidy v. Murray, 101 Ia. 65, 69 N. W. 1139), was inapplicable to the case at bar, where the crime as charged, petit larceny, was triable by the justice. Appellee contends that there could be no prejudice on account of this error, as the same rule of law is applicable to the case of one discharged on a hearing upon a preliminary information as to one discharged upon a trial for a crime which was triable by the justice of the peace. But such is not the law. It may be that the justice who tried the plaintiff was satisfied from the evidence that the defendant had probable cause for instituting the criminal proceedings. But that was not what he was to determine upon that trial. Having the power to try the plaintiff, it was his duty to find him not guilty, and to discharge him, unless he was satisfied beyond a reasonable doubt as to his guilt. Sitting as a magistrate, and conducting a preliminary examination, he would have the very question of probable cause to try, and the evidence is on the side of the prosecution alone, as a rule, and ex parte.

§ 3710. **Voluntary Dismissal of Case as Prima Facie Evidence of Want of Probable Cause—Burden of Proof.** (a) The court instructs the jury that in an action for malicious prosecution, the fact that the plaintiff was discharged by the examining magistrate without a hearing on the merits throws the burden of proving probable cause on the defendant.

(b) The dismissal of the prosecution alleged in the complaint without a trial is competent not only for the purpose of showing an end of the prosecution, but in addition it establishes a prima facie case of want of probable cause for the prosecution of the plaintiff.

(c) You are instructed further that the presumption exists that there was probable cause, and that the defendants acted without malice and in good faith in instituting the criminal prosecution, and that presumption stands until the plaintiff shows by a preponderance of the testimony that there was a total absence of probable cause and that the prosecution was malicious and if the plaintiff has failed to prove to your satisfaction by a preponderance of testimony the total lack of probable cause and malicious institution of prosecution, then your verdict must be for the defendants. In connection with this instruction however I charge you that proof that the plaintiff was discharged at the preliminary hearing without a trial on the merits constitutes prima facie proof of the want of probable cause and throws the burden of disproving it upon the defendants.<sup>2</sup>

§ 3711. **Probable Cause—Prosecution Undertaken for Public Purpose.** (a) The jury are instructed that if they believe from the evidence that the prosecution of the plaintiff as shown by the evidence was not undertaken by the defendant for a public purpose, then the defendant had not probable cause.<sup>3</sup>

*Brant v. Higgins*, 10 Mo. 728. Probable cause does not depend upon the guilt of the accused party in fact, but upon the honest and reasonable belief of the party commencing the prosecution. In the case at bar, the question determined by the justice was the guilt or innocence of the plaintiff of the crime charged. If he had been sitting as a committing magistrate, he would have determined, not the guilt or innocence of the plaintiff, but whether the facts were such as tended to show that the plaintiff was probably guilty of the commission of a public offense. We need not extend this discussion, as the rule of law is well settled that the discharge of a defendant in a criminal prosecution does not raise even a presumption of want of probable cause. As some of the authorities put it in such a case, the acquittal affords no evidence that such charge was preferred without probable cause. 14 Am. & Eng. Enc. Law, p. 65; *Newell Mal. Pros.* 294; *Griffin v. Chubb*, 7 Tex. 603, 53 Am. Dec. 85; *Heldt v. Webster*, 60 Tex. 207; *Williams v. Vanmeter*, 8 Mo. 339; *Griffis v. Sellars*, 2 Dev. & B. 492, 31 Am. Dec. 422; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505; *Thompson v. Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10

Am. St. 322; *Townsh. Sland. & L.* 709, and cases cited; 2 *Greenl. Ev.* para. 455; *Cooley, Torts* (2d Ed.) pp. 214, 215. See also *Stone v. Crocker*, 24 Pick. 81 (Mass.).

2—*Barhight v. Tammany*, 153 Pa. 545, 23 Atl. 135, 38 Am. St. 853.

"From these instructions," said the court, "it will be observed that the trial court took the view that the showing on the part of the respondent that the prosecution against him was voluntarily dismissed placed the burden of showing probable cause therefor upon the appellants. Assuming that a voluntary dismissal is equivalent to a discharge by the committing magistrate, there are cases which maintain this view. *Hidy v. Murray*, 101 Ia. 65, 69 N. W. 1138."

3—*Benson v. Bacon*, 99 Ind. 156 (159).

"In support of this instruction, the appellee quotes from the text of a standard author the following: 'Probable cause \* \* \* is understood to be such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives,' and from a note to the text he quotes the following, 'The plaintiff must show that the conduct of the defendant was such as to lead to the inference that the prosecution was



(b) If the jury believe from the evidence that the defendant C. prosecuted F. from a fixed determination of his own, based upon some injury which he believed F. had done him, or because F. had failed to pay the debt which was due him, and not for the purpose of seeing that justice was done and society protected, then you should consider such facts in determining whether there was probable cause for instituting such facts in determining such criminal prosecution, and also whether or not it was malicious.<sup>4</sup>

(c) The court instructs the jury, that the prosecution of a person criminally, with any other motive than that of bringing the parties to justice, is a malicious prosecution, and if the jury believe, from the evidence, that the defendant procured the arrest of the plaintiff with any other motive than that of honestly bringing the plaintiff to trial for a crime committed by said plaintiff, then the jury will find for the plaintiff, and assess his damages at such sum as they believe from the evidence, will be just and right.<sup>5</sup>

§ 3712. Probable Cause—Justification for Beginning Criminal Proceedings. (a) The information that will justify the making of a

not undertaken from public purposes." 2 Greenl. on Ev. sec. 454.

"If it be shown that there was probable cause for the prosecution, then the defense is made out, although it may not be proved that the prosecution was undertaken for a public purpose. It is not necessary to show facts constituting cause, and in addition to showing such facts also show that the motive which influenced the defendant in setting the prosecution on foot was to promote the public good. If the facts within the knowledge of the defendant were such as would have induced a prudent man acting for the public good and not influenced by illwill or malice to institute the prosecution, then there was probable cause, and if probable cause, then the defendant cannot be liable, even though he may have been influenced by illwill. The fact that there was illwill or malice may no doubt be considered in determining whether there was or was not probable cause, but from the fact alone that the prosecution was not undertaken from public motives, want of probable cause cannot be inferred as a matter of law. Professor Greenleaf says that 'The want of probable cause is a material averment,' and that 'It is independent of malicious motive, and cannot be inferred as a necessary consequence from any degree of malice which may be shown.' 2 Greenl. Ev. sec. 454."

4—Clark v. Folkers, 1 Neb. (unof.) 96, 95 N. W. 328 (329).

The court said that "this is an erroneous statement of the law. Both malice and want of probable cause must be proved, and often the same evidence tends to prove both propositions. Malice may be inferred from want of probable cause, but the want of probable cause cannot

be inferred from malice. To tell the jury that, in determining the question whether there was probable cause for instituting criminal proceedings, they should consider whether C. prosecuted F. for the purpose of collecting a debt, or for any other malicious purpose, is misleading."

5—Smith v. Hall, 37 Ill. App. 28 (29).

The court said that, "this was error. To sustain an action for malicious prosecution, want of probable cause and malice must both be shown. If there was probable cause, then there is a defense to the action, no matter how much malice or illwill animated the prosecution. A prosecution may be in fact malicious, and may be for the purpose of injuring the person against whom it is brought, and gratifying the hatred or revenge of the prosecutor, and yet, if probable cause existed, there can be no recovery in the action of malicious prosecution. Israel v. Brooks, 23 Ill. 575. Appellee attempts to defend the instruction, on the ground that it is taken from the language of the opinion of the Supreme Court in Krug v. Ward, 77 Ill. 603. The court was then speaking of a prosecution had for the purpose of procuring the surrender of the prosecutor's note. The context in which the sentence is used shows that the court had no idea of holding that proving a wrong motive without also showing want of probable cause, would sustain an action for malicious prosecution."

It is said: "The prosecution of a person, with any other motive than that of bringing the guilty party to justice is a malicious prosecution in law \* \* \* and the evidence showing that the prosecution was without probable cause the case was fully made out."

criminal complaint against another for the purpose of having him arrested must be of such character and obtained from such sources that business men generally, of ordinary care, prudence and discretion, would feel authorized to act upon it under similar circumstances. And in this case, if the jury believe from the evidence that the defendant made the alleged affidavit before the police judge for the arrest of the plaintiff, and that she was arrested in consequence thereof, then it is a question of fact to be determined by the jury from the evidence whether the defendant, when he made the complaint, acted upon such information as a man of ordinary care, prudence, and discretion would have felt warranted in acting upon under similar circumstances.<sup>6</sup>

(b) The court instructs you that if, when the defendant inquired for the children, if he so did, he was informed in good faith by the mother that she had the children, and if they wished to return with him they could do so; but if they did not, he would have to walk over her dead body to get them. This is a fact you may consider as tending to show want of probable cause.<sup>7</sup>

§ 3713. **Probable Cause—Omitting Malice in the Instruction.** If you believe from the evidence that the plaintiff did unlawfully and maliciously injure defendant's house substantially as charged in the complaint filed against her in the justice court referred to in said second count, or if you believe from the evidence that the facts and

6—Jensen v. Halstead, 61 Neb. 249, 85 N. W. 78 (79).

"There was undoubtedly error committed by the court in the first part of this instruction. The jury were confined to a certain class of men of ordinary care and prudence, to-wit, to business men. Now, the law knows no distinctions relative to men of prudence and discretion. The rule applies to all men of ordinary care and prudence, regardless of their calling in life, of their mental attainments, or lack of them. A juror might believe that the defendant had acted in the respects pointed out with a degree of care equal to what would be expected of a lawyer, a physician, a laborer, a mechanic, or a minister of the gospel, of ordinary care and prudence, but not with a degree of prudence and discretion to be expected from a business man of that character; hence there was error in giving the instruction, although the latter part of the same instruction may have stated the rule correctly, for the jury were justified in assuming that the court referred in that part to the same class of persons referred to in the first part—to business men, rather than to men generally of ordinary prudence and discretion. At best, the instruction is misleading, for one portion of the jury may have followed the first part of the instruction, and another the latter. The error, too, is of a character that cannot be cured by giving another instruction correctly. In a great many cases this court has announced

the rule that an instruction which misstates the law can not be cured by another instruction which states it correctly, since the jury would be left in doubt as to which was correct. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568; Carson v. Stevens, 40 Neb. 112, 58 N. W. 845; Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077; Barr v. State, 46 Neb. 647, 65 N. W. 190."

7—Cottrell v. Cottrell, 126 Ind. 181, 25 N. E. 905 (906).

The court said that "the instruction was calculated to mislead the jury. They readily conclude therefrom that, in case they found the facts named in the instruction, they might disregard all the other evidence in the case, and find that there was an absence of probable cause. Had the court, in recognition of its right to determine, as a question of law from the facts proven, the presence or absence of probable cause, informed the jury that the facts stated in the said instruction proved a want of probable cause, in disregard of the other evidence in the case, it would have been error; and the instruction as given was equally, if not more, objectionable. It was the duty of the court to state, in hypothetical form, the material facts which the evidence tended to establish, and give them positive instructions as to whether, upon the state of facts assumed, there was probable cause. And if there was conflicting evidence, it was the duty of the court to charge the law upon the conflicting theories."

circumstances then known, and upon which the complaint was filed in said court and said cause prosecuted were such as to cause the belief in a reasonably prudent man's mind, acting on such facts and circumstances, that the plaintiff in this case or defendant in that case was guilty of the malicious destruction of property as charged against her, then you should find for the defendants; but if you believe from the evidence that plaintiff, Mrs. J., was not guilty as above alleged and as substantially charged in said justice court, and if you believe from the evidence that the facts and circumstances upon which the complaint was filed and said cause prosecuted in said justice court were not such as to cause the belief in a reasonably prudent man's mind, acting on such facts and circumstances as shown in the evidence that the plaintiff was guilty of the crime of malicious destruction of property, then you should find for the plaintiff, and assess her recovery as hereinafter instructed.<sup>8</sup>

§ 3714. **Willful Overstatement in an Affidavit as Evidence of Malice.** The court instructs the jury that the willful overstatement in the affidavit for capias of amount of timber taken by plaintiff off of land by plaintiff in former suit is competent evidence of malice on the part of the defendant in this action for malicious prosecution.<sup>9</sup>

8—Pritchett v. Johnson, 5 Neb. (unof.) 49, 97 N. W. 223 (224).

The court said that "it will be noticed by this instruction the jury was, in effect, told positively that the defendant in error should recover if they believed she was not guilty, and that the plaintiffs in error did not have probable cause to believe her guilty, omitting entirely the essential element of malice, which, by the repeated holdings of this court, must be alleged and proven before a plaintiff can recover in an action for malicious prosecution. In Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282, the court held 'to entitle the plaintiff to recover in such an action, he must prove a want of probable cause, malice of the defendant, and that the criminal prosecution is ended.' In that case the evidence of want of probable cause was stronger by far than the evidence of want of such cause in the case before us, yet the lower court was reversed because of the giving of the following instruction: 'If you find that the prosecution against the plaintiff was commenced without probable cause, excuse or justification, you will find for the plaintiff; and in assessing her damages, if any have been proven, you may consider the labor, expense and trouble, if any, to which she has been put in freeing herself from the charge made against her; also her mental sufferings, if any, injury to her reputation, if any. But you should not in any event, give greater damages, if any, than the plaintiff has actually sustained, as shown by the evidence; and you should allow nothing by way of punishment.' In Hagelund v. Murphy, 54 Neb. 545, 74 N. W. 956, it is held 'to sustain a judgment for malicious prosecution, the plaintiff

must show by a preponderance of evidence that the prosecution which the defendant caused to be brought against him has been determined; that the defendant had no reasonable or probable cause for believing the plaintiff guilty of the offense for which he caused him to be prosecuted, and that in instituting and carrying on the prosecution the defendant was actuated by malice,' and Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Peterson v. Reisdorph, 49 Neb. 529, 68 N. W. 943; Ross v. Langworthy, 13 Neb. 492, 14 N. W. 515; Rider v. Murphy, 47 Neb. 857, 66 N. W. 837; Fry v. Kaessner, 48 Neb. 133, 66 N. W. 1126, are cited as sustaining the holding. The vice of the instruction in this case is one that cannot be cured by other instructions stating the law correctly, because there would be an irreconcilable conflict between an instruction correctly stating the law and the one given. Under the rule announced in City of South Omaha v. Hager, 66 Neb. 803, 92 N. W. 1017 and 95 N. W. 13, and supported by decisions therein cited, the giving of this instruction is reversible error which may be taken advantage of by plaintiff in error without request for other instructions properly covering the law in this regard."

9—Steadman v. Keets, 129 Mich. 669, 89 N. W. 555 (556).

"The request involves clearly a statement of fact, viz. that the affidavit contained an overstatement of the amount of timber taken. This was not a fact conclusively proven. It was a question for the jury. If the request had been to instruct the jury that if they found such overstatement it was competent evidence of malice, the request should have been given."



**§ 3715. Action of Malicious Prosecution Against a Partner—Liability of a Co-partner.** The court charges the jury that one partner is not liable for a malicious prosecution instituted by his copartner, unless he advises, directs or participates therein even though the prosecution be purported to be instituted for some wrongful or criminal act with relation to property belonging to the firm.<sup>10</sup>

**§ 3716. False Imprisonment—Probable Cause—Arrest Must Have Been in Pursuance of Direction Given by Defendant.** If the jury believe from the evidence that no felony had in fact been committed, and that defendant maliciously and without probable cause, directed the arrest of plaintiff by the policemen, they must find for the plaintiff, and in assessing plaintiff's damages, may take into consideration the injury to his feelings caused by his arrest and imprisonment, and it is not necessary to prove by witnesses the amount of such damages. The jury may assess damages as they deem proper not exceeding the amount claimed in the plaintiff's complaint.<sup>11</sup>

**§ 3717. Plaintiff's Release from Prison, Obtained by Defendant, Does Not Waive Claim for Damages.** In this connection, however, you are instructed that, if the defendant had lawfully arrested the plaintiff, he was entitled to a reasonable time within which to bring him before a magistrate or court for trial, and that it was his duty in the meantime to continue him in custody; and you are further instructed that while the plaintiff was entitled to a speedy consideration of his case by a judicial officer, and while the defendant had no right to determine the extent of his guilt or innocence, yet if the defendant, before trial of the plaintiff could be had, became satisfied of his innocence, and offered to release him, and the plaintiff willingly accepted such release, he then cannot complain that he has suffered damages by reason of the failure of the defendant to place him upon trial before a court or magistrate.<sup>12</sup>

10—Noblett v. Bartsch et al., 31 Wash. 24, 71 Pac. 551 (552), 96 Am. St. 886.

The court held the rule to be "that a partner as such, is not liable for a malicious prosecution instituted by his copartner unless committed in the course of and for the purpose of transacting the partnership business. As a prosecution for larceny is not within the scope of a business of a mercantile partnership (the business engaged in by the appellants) there could be no presumption of participation by all of the partners, and it was necessary that this fact be proven. Marks & Co. v. Hastings, 101 Ala. 165, 13 So. 297; Gilbert v. Emmons, 42 Ill. 143, 89 Am. Dec. 412; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169."

11—Rich v. McNery, 102 Ala. 345, 15 So. 663 (667), 49 Am. St. 32.

"The above charge given for the plaintiff while it protects defendant against a recovery if he acted without malice, or with probable cause, yet authorizes a recovery against him if he directed the arrest of plaintiff by the policemen, whether those officers acted in pursuance of

such direction or entirely by their own volition. As we have already said, if they were not moved or induced to make the arrest and imprisonment by the direction or request of defendant, it is immaterial whether he gave such direction or request or not, or if he did, how malicious may have been his motive in giving it, or how palpable the want of probable cause. We remark, further, that if the defendant did no more than accuse the plaintiff of the theft and give information to the officers of the fact upon which he based the accusation, upon which accusation and information the officers acted, of their own volition, without command, direction or request of the defendant, then defendant is not liable in this action, although he may have acted maliciously and without probable cause in making the accusation and giving information.

"The charge is also erroneous in assuming that the plaintiff suffered injury to his feelings. Whether he did or not was a question for the jury, not the court."

12—Stewart v. Feeley, 118 Ia. 524, 92 N. W. 670 (672).

§ 3718. **Directing an Arrest Upon Suspicion—Sufficient Probable Cause—Malice.** (a) If the jury believe from all the evidence that defendant procured, ordered or directed the arrest of plaintiff, and that he was arrested, then I charge you that if defendant did this merely upon suspicion that plaintiff had stolen a ring from his store, and without reasonable cause to believe that plaintiff was guilty thereof, then defendant is liable in this action in such a sum as you may believe from all the evidence that he has been injured not exceeding \_\_\_\_\_ (\$\_\_\_\_\_) dollars.

(b) If you believe from all the evidence in this case that defendant procured, ordered and directed the arrest of plaintiff and that he was arrested at defendant's request, then if you believe that in fact, no ring was stolen from defendant's store, and that consequently plaintiff was not guilty of having stolen the same, then I charge you that defendant is liable in this suit and your verdict should be for the plaintiff.

(c) If you believe from all the evidence in this case that defendant appeared at the mayor's court upon the next day after the arrest of defendant, and stated to the mayor of the town of D. that he would prepare, or have prepared, a warrant for plaintiff, upon a charge of stealing a ring from defendant's store, upon the next morning, and that thereupon, and because of this, the mayor continued the examination or trial of plaintiff until the next morning,—if you believe these facts, if facts they be, then this is some evidence to which you may look in connection with all the evidence in the case, tending to show that defendant authorized and directed the arrest of plaintiff; and if you believe that he did so procure, order and direct the arrest of plaintiff without a reasonable cause to believe that plaintiff was guilty of the charge then defendant is liable in this suit.

(d) The burden of proof is upon the defendant R. to prove to the satisfaction of the jury that the ring was stolen.

(e) I charge you that the probable cause which will excuse the defendant in this case, if you believe defendant ordered and directed the arrest of plaintiff, there must have been a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty; and even this probable cause is not sufficient to avail the defendant in this cause unless you believe that a ring was in fact stolen from defendant's store.

(f) Unless the jury are reasonably satisfied that the ring was in fact stolen, then it is immaterial whether R. had probable cause for believing that the plaintiff had committed the theft.<sup>13</sup>

"This was erroneous in that plaintiff's release, under the circumstances, would not amount to a waiver of any claims for damages."

13—Rich v. McNery, 102 Ala. 345, 15 So. 663 (667), 49 Am. St. 32.

"We have seen," said the court, "that the plaintiff took upon himself to allege that the defendant caused him to be arrested and imprisoned on a charge of larceny, maliciously and without probable

cause. We construe the larceny charged to mean grand larceny under our statutes as the pleader has not alleged it to have been of a smaller scale. The pleas and replications, as we interpret them, do no more than put these allegations in issue. On the trial it appeared that the arrest was made by police officers of Decatur and plaintiff, while testifying, was permitted to state, against the objection and ex-

§ 3719. **Plaintiff Retained Under a Void Warrant of Arrest.** (a) The court charges the jury that the fact that O. appeared on the day set for trial and employed counsel to prosecute the plaintiff will not amount to a ratification of the arrest and detention of the plaintiff by the constable, unless she had full knowledge of all the facts leading up to the arrest and detention.<sup>14</sup>

(b) If the jury believe from the evidence that the defendant signed the warrant intending to sign the affidavit, and that he then left the paper with the justice of the peace, with instruction to issue a warrant and deliver the same to the constable, and that such justice of the peace failed to issue the warrant and instead delivered the paper signed by O. to the constable, and the latter then arrested the plaintiff, then the jury cannot find for the plaintiff, unless they should believe from all the evidence that O. ratified the act of the constable in arresting and detaining the plaintiff.

(c) If the jury believe from the evidence that O. signed the warrant by mistake, intending to sign the affidavit, then, unless he ratified the action of the constable in arresting and detaining the plaintiff with full knowledge of the facts, they must find for the defendant.<sup>15</sup>

(d) The court instructs you that while the law is that a person is not guilty of the charge of false imprisonment, where the arrest and imprisonment are made under the color of legal process, yet, although the process may have been issued regularly, by a competent officer, the jury are instructed that the person who procures such process, for the purpose of having another arrested and imprisoned, and makes a false affidavit for that purpose, knowing it to be false, in order to obtain an advantage, or to force the person arrested, to

ception of defendant that R. meaning defendant, had accused him of stealing a ring. There was no error in this ruling. All that was said by the officers while making the arrest was admissible as *res gestae*. Besides, there was evidence tending to show that they acted by command and procurement of the defendant, and if the jury believe that evidence, all that the officer said or did in furtherance of such command could be considered as evidence against him. The court tried the case upon the theory that the existence of malice and want of probable cause actuating the defendant to cause the arrest, if he did cause it, were immaterial. We have shown that they were material by reason of being alleged. It was incumbent on plaintiff to satisfy the jury of both. All the charges therefore given for the plaintiff were erroneous in view of this principle."

<sup>14</sup>—*Oates v. Bullock*, 136 Ala. 537, 33 So. 835 (837), 96 Am. St. 38.

"If O. did not know that the justice had issued a warrant without signing it, nor that plaintiff had been arrested under this void writ

—and the evidence afforded abundant ground for a conclusion on the part of the jury that he did not—his preparation to carry on the prosecution at the trial could not be contorted into a ratification of plaintiff's unlawful arrest by the constable. *Burns v. Campbell*, 71 Ala. 271, 290. Above charge requested by the defendant should not have been given."

<sup>15</sup>—*Oates v. Bullock*, *supra*.

"It is elementary that any person who procures the issuance of a void warrant is liable in damages to the person named therein, and who is arrested under the authority it is supposed to import. It is equally well settled that a person who makes a proper and sufficient complaint before a magistrate for the purpose of having a proper and sufficient warrant of arrest issued thereon for the person complained against is not liable for false imprisonment, when the magistrate, without fault on the part of the complainant, in fact issues a paper intended to be a warrant, but which is void on its face, and the person charged is arrested and restrained of his liberty thereunder."



surrender his possession, is guilty of the abuse of process, and can not justify under such process.<sup>16</sup>

§ 3720. **Arrest for Vagrancy—Validity of Ordinance Consistent with the Statute.** (a) It is provided by the statute law of this state that all persons wandering about, and having no visible calling or business to maintain themselves, shall be considered vagrants, and that peace officers, upon finding persons engaged in the violation of this law, may arrest them, and take them before a magistrate to be dealt with as by law provided. It is claimed on the part of the defendant that in the arrest and detention of the plaintiff he was acting under this provision of the law, and that he had at the time reasonable grounds to believe that the plaintiff was a violator of the same.

(b) The defendant sets forth in his answer, a certain ordinance of the city of B., under which he claims to have acted in the said arrest of the plaintiff. But you are instructed in this connection that said ordinance is valid only so far as it states and is consistent with the said statute of the state relating to vagrants, as above explained to you; and so far as the said ordinance may attempt to extend the said law of the state, and impose additional restrictions upon citizens, it is void and has no effect, and will afford the defendant in this case no protection for any act he may have committed in violation of law.<sup>17</sup>

16—Wilmerton v. Sample, 39 Ill. App. 60 (64).

The court said that "this instruction assumes that appellant procured the process for an unlawful use, and with intent to make an illegal use of it, without any proof whatever that such was the fact. It also assumes that appellee had made a false affidavit to procure it instead of leaving that question to the jury."

17—Stewart v. Feeley, 118 Ia. 524, 92 N. W. 670 (671).

The court said that as the "defendant did not claim to have acted under the state law, but in virtue of the specific provisions of an ordinance adopted by the council of the city of Burlington, these in-

structions were plainly erroneous. Plaintiff was not required to negative any offense save that for which he was arrested, and when the trial court injected into its instructions another and one which plaintiff was not called upon and had not attempted to meet, it committed error, for which there must be a reversal.

"The second instruction which we have quoted was also erroneous, for the reason that it was the duty of the court to tell the jury that the provision of the ordinance on which defendant relied was either valid or invalid, and not to leave it to that body to select out what it conceded under the instruction to be good and reject that which was bad."

## CHAPTER CXLIII.

### MALPRACTICE.

See Approved Instructions, Chapter LX, Vol. I.

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| <p>§ 3721. What constitutes reasonable and ordinary care, skill and diligence—The test is that which physicians in the same general neighborhood and in the same general line of practice ordinarily have and exercise in like cases.</p> <p>§ 3722. Duty of patient to co-operate with doctor—Contributory negligence.</p> | <p>§ 3723. Breach of guaranty by surgeon in performance of an operation—Action for recovery of services rendered—Burden of proof.</p> <p>§ 3724. Death hastened or accelerated by acts or omissions.</p> <p>§ 3725. Death resulting from other causes—Burden of proof.</p> <p>§ 3726. Druggists—Negligence of.</p> |
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**§ 3721. What Constitutes Reasonable and Ordinary Care, Skill and Diligence—The Test is that which Physicians in the Same General Neighborhood and in the Same General Line of Practice Ordinarily Have and Exercise in Like Cases.** (a) The defendant's negligence or want of skill in the treatment of the plaintiff's eye must be determined by all of the evidence in the case, and if the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudice that might influence the testimony of those who belonged to a different school from that of the defendant. You should also take into consideration the training and education of the defendant for his profession, the experience which he has had, and the degree of skill with which he handled the case, all bearing upon the question whether the defendant used ordinary care and skill in the treatment of the plaintiff.<sup>1</sup>

(b) If a person holds himself out to the public as a physician, he must be held to possess and exercise ordinary skill and knowledge and care in his profession in every case of which he assumes the charge, whether in the particular case he receives a fee or not. Where an injury results from the want of ordinary skill or attention in the treatment of a case, the physician is responsible for such injury. A

<sup>1</sup>—Force v. Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. 371, 22 L. R. A. 343.

The court said: "In determining what constitutes reasonable and ordinary care, skill and diligence, the test is that which physicians and surgeons in the same general neighborhood and in the same general line of practice ordinarily have and exercise in like cases. Hathorn v. Richmond, 48 Vt. 557; Utley v. Burns, 70 Ill. 162; Almond v. Nu-

gent, 34 Ia. 300, 11 Am. Rep. 147; Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363, 64 Am. Dec. 323; Leighton v. Sargent, 31 N. H. 119. In addition to this, however, regard must be had to the advanced state of the profession at the time of the treatment. Small v. Howard, supra; Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674; Smother v. Hauks, 34 Ia. 286, 11 Am. Rep. 141; Nelson v. Harrington, 72 Wis. 591, 40 N. W. 23, 7 Am. St. 900, 1 L. R. A. 719."

person who offers his services to the public in any profession or business impliedly contracts with those who employ him that he is a person of the skill and experience which is possessed ordinarily by those who practice or profess to understand the same art or business, which is generally required by those most conversant with the profession or employment, as necessary to qualify him to engage in such business or profession successfully.<sup>2</sup>

§ 3722. **Duty of Patient to Co-operate with Doctor—Contributory Negligence.** (a) The court instructs the jury that it is the duty of the plaintiff to co-operate with the defendant, and to conform to his directions, and if she did not do so, or under the pressure of pain could not do so, she cannot hold the defendant responsible, and if her failure in any degree contributed to the injurious results claimed your verdict must be for the defendant.<sup>3</sup>

(b) The court instructs the jury that unless the jury finds that all of the injury for which plaintiff seeks to recover in this action resulted wholly from the want of ordinary care and skill on the part of the defendant, \* \* \* and that the negligence or imprudence of plaintiff herself in no degree contributed thereto, your verdict must be for the defendant.<sup>4</sup>

§ 3723. **Breach of Guaranty by Surgeon in Performance of an Operation—Action for Recovery of Services Rendered—Burden of Proof.** If you find that the plaintiff as an inducement to be permitted to perform the operation for the defendant assured or guaranteed relief or the recovery of the infant from that operation, and that the defendant relied upon such statement, then you may take those facts and circumstances into consideration in determining the value of the services.<sup>5</sup> If, on the other hand, you find from the evi-

2—Thomas v. Dabblermont, 31 Ind. App. 146, 67 N. E. 463 (464).

The supreme court said that "a physician is bound to possess and exercise only the average degree of skill possessed and exercised by members of the medical profession practicing in similar localities. Baker v. Hancock, 29 Ind. App. 456, 63 N. E. p. 324; Gramm v. Boener, 56 Ind. 501; Smith v. Stump, 12 Ind. App. 359, 40 N. E. 279; Whitesell v. Hill, 101 Ia. 629, 70 N. W. 750, 37 L. R. A. 830; Becknell v. Hosier, 10 Ind. App. 6, 37 N. E. 580; Jones v. Angell, 95 Ind. 382."

3—Kiekhoefer v. Hidershide, 113 Wis. 380, 89 N. W. 189 (192).

The instruction was criticised as too favorable to the defendants.

4—Kiekhoefer v. Hidershide, 113 Wis. 280, 89 N. W. 189 (191).

"This instruction is so worded as to be improper. The jury were not bound to find for the defendant, although they failed to find that all of the injuries for which plaintiff sought to recover were due to his negligence. She was entitled to recover for such injuries as were due to that cause, although only part of those for which she sued."

5—Ladd v. Witte, 116 Wis. 35, 92 N. W. 365 (366).

The court said: "This instruction evinces such confusion of ideas as is sometimes ascribed to juries, but

seems hardly possible to the judicial mind. The slightest reflection makes apparent that the only effect of breach of either a fraudulent or innocent warranty inducing the making of a contract of employment, and payment quantum meruit is to defeat any recovery whatever thereon, except where made the basis of recoupment or counterclaim against an agreed price. It could have no possible effect to make either greater or less the actual market value of the service in fact performed. The court had already decided that there was no proof of broken warranty or unskillfulness and negligence to defeat recovery quantum meruit, and that the only question for the jury was the reasonable value—i. e., customary price—for performing the operation. The quoted instruction invited the jury into that field of meretricious compromise of convictions for damages authorizing them to commute a doubt as to plaintiff's right of recovery into a diminution of the amount to which he had absolute legal right, if he recovered at all. If this instruction guided the jury at all it necessarily guided them to injustice—to awarding an amount other than the true reasonable value of the service rendered by plaintiff. Prejudicial error therein is obvious."



dence—and there the burden of proof rests upon the defendant in establishing the fact—that the work was improperly done, it is necessary for the defendant to satisfy you of that by a fair preponderance of the evidence; as I say, on that breach of the case the burden of proof rests upon the defendant.<sup>6</sup>

§ 3724. **Death Hastened or Accelerated by Acts or Omissions.** But in considering the second issue as to the cause of the death of the plaintiff's intestate, if you find that the death of the intestate was only hastened or accelerated by the acts or omissions of the defendant as alleged, then you are instructed that in answering the third issue as to damages, you cannot award the plaintiff any more than nominal damages—that is, such small sum, as for instance, five cents or other small sum—because in such state of the case, if the death of the intestate was only hastened or accelerated by the defendant, you could only respond to this issue in nominal damages.<sup>7</sup>

§ 3725. **Death Resulting from Other Causes—Burden of Proof.** (a) The court instructs the jury, that if at the time defendant entered upon the treatment of B., on the 7th day of September, that he, B., was suffering from inflammation of the urethra, bladder and prostate gland, together with other diseases, and that such troubles were caused by the lack of the exercise of ordinary care and skill on the part of the defendant, and that his condition was such that death must take place in a short time unless medical relief was given him, then it is incumbent upon the defendant to show by a preponderance of the evidence that the death of B. resulted from other causes that were not the result of any conditions present at the time defendant ceased to treat him, and defendant assumed charge of the case.<sup>8</sup>

6—Harrington v. Priest, 104 Wis. 362, 80 N. W. 442.

A suit for services by a dentist. The court said: "There was no burden upon defendant to show affirmatively that such services were negligent or unskillfully performed, or that they were not worth the sum claimed. If his evidence in defense left the issue in doubt or uncertainty, the plaintiff could not recover."

7—Gray v. Little, 126 N. C. 385, 35 S. E. 611.

"His honor, in charging the jury, substantially followed the charge approved in Benton v. Railroad Co., 122 N. C. 1007, 30 S. E. 333, and in addition thereto instructed the jury as above. The error in that part of the charge lies in considering the act expediting death as a mere technical injury. That is not the language of the law nor of the text books on criminal matters. There are instances in the common law reports where the accelerator paid the severest penalty known to the law. We know of no decision of a final appellate court in this country declaring otherwise. We will only refer to a few of our own cases which are in point on this question: Lewis v. City of Raleigh, 77 N. C. 229; Coley v. City of States-

ville, 121 N. C. 302, 28 S. E. 482, and others cited in Womack's Digest No. 5024. Considering the verdict on the second issue, and such evidence as authorized the jury to make that response, it seems fortunate for the defendant that he is not on trial for a high criminal offense as well as to answer in an action for damages. There must be a new trial as to damages only."

8—Chase v. Nelson, 39 Ill. App. 53 (57 and 58).

"This instruction is open to two objections at least. The first one is that it is obscure and blind in its meaning and liable to be misunderstood and mislead the jury. The proof is that when defendant was called to treat B. in the first instance, he at least had retention of the urine, which of itself was a very serious and dangerous disease. The evidence also tends to show that he was afflicted with other disorders, such as hernia and great enlargement of the prostate gland. The evidence on the part of the defendant tended strongly to prove that B.'s health was in a very precarious condition if he was not in danger of an early demise. He was sixty years old. These disorders were upon him when appellant was called

(b) If the jury believe from the evidence in this case that the defendant undertook the treatment of B. for a fee, and that in treating him a catheter was broken in his urethra, and by reason of the want of exercise of ordinary care and skill the broken part of said catheter was allowed to remain in the urethra and finally to pass into the bladder of B., and that disease was thereby created that caused or contributed to the death of B., then your verdict must be for the plaintiff in such an amount as you believe the plaintiff has from all the evidence sustained, not exceeding \$——.<sup>9</sup>

§ 3726. **Druggists—Negligence of.** (a) The court instructs the jury that a druggist is not bound to exercise extreme or extraordinary care in the compounding of a prescription.

Proof that the defendant did not use the drug specified in the prescription in compounding the same, and was mistaken as to the real nature of the drug he did use is not evidence of negligence on his part and you should not infer negligence on the part of defendant from that circumstance alone.<sup>10</sup>

(b) The court instructs the jury that if A., as the agent of B., was guilty of negligence in not properly putting up and labelling the drug, still, if that negligence did not directly cause the death of X., that is, if you find that had the medicine been properly put up and labeled, she would have taken it precisely as she did take it, and

to treat him, and in his attempt to relieve him from the suffering caused by the retention of the urine, the catheter was broken in the urethra. It is clear to us that while it is possible that the breaking off of the catheter aggravated the sufferings of B. and may have hastened his death, still the proof is that defendant was not the author of his enlarged prostate gland, nor of his hernia, nor of the retention of his urine. Yet the jury are told in this instruction that 'the burden of proof is on defendant to show that the death of B. resulted from other causes that were not the result of any conditions present at the time the defendant came to treat him.'"

9—Chase v. Nelson, *supra*.

"This action is based upon the statute, Chap. 70, Sec. 1, and but for the statute could not be maintained. Under the common law no such right of action existed. The statute being in derogation of the common law should have a reasonably strict construction. Its benefits should not be extended to causes not fairly within its language or fairly inferable from its language. Thompson v. Weller, 85 Ill. 197. The statute under which this action is commenced provides that 'whenever the death of a person is caused by the wrongful act, neglect or default of another,' then such person who so caused the death shall be liable, etc. Now the plain and manifest meaning of this statute is that 'the wrongful act, neglect or default' must be the direct cause of the

death, and must also be such an act as would likely produce death, and death thereby be the consequence, sooner or later, of the wrongful act. The instruction under consideration informed the jury that if the negligence of defendant caused or contributed to the death of B., then they must find the defendant guilty. Under this instruction, no matter how remotely the negligent act of defendant may have contributed to hasten the death of B., still he would be liable notwithstanding; the jury may have been satisfied that the disease under which B. was suffering when defendant was called to treat him, would or must have resulted fatally to him. This instruction interpolated a very important word in the statute, which the legislature did not see fit to put in it. For that reason this instruction was wrong."

10—Faulkner v. Birch, 120 Ill. App. 281 (287).

"The purpose of instructions is to inform the jury what principles of law are applicable to the facts which they may find disclosed by the evidence. Instructions may not determine the weight of the entire evidence or of any part of the evidence; the weight of evidence is wholly a matter for the jury. It is not proper practice to single out a portion of the evidence and instruct the jury that such evidence is insufficient upon which to render a particular verdict. If such practice were to be indulged in, then it would be proper to single out in a second in-

died by reason thereof, then such negligence did not produce the death, and plaintiff cannot recover, and you should find for the defendant.<sup>11</sup>

struction another item of evidence and give the same instruction as to that, and so on as to every item or combination of items of evidence in the case. Such a practice instead of enlightening a jury would simply confuse and befog. The jury are to determine the issue from a consideration of the evidence in the

whole, not in parcels. There was no error in refusing the instruction."

11—Davis v Guarnieri, 45 Ohio 470, 15 N. E. 350 (355), 4 Am. St. 548.

The court said that this instruction "necessarily involved the presupposition that the failure to label the drug sold was the only act of negligence for which the defendant was called upon to answer."



## CHAPTER CXLIV.

### MORTGAGES AND LIENS.

See Approved Instructions, Chapter LXI, Vol. I.

#### MORTGAGES.

- § 3727. Mortgagor retaining possession of stock of goods used in retail trade.
- § 3728. Right to possession—Entry by mortgagee—Levy of execution no bar.
- § 3729. Sale of mortgaged property—Liability for damages.

#### LIENS.

- § 3730. Storage lien.
- § 3731. Sale under lien—Notice.
- § 3732. Agister's lien—Notice of.
- § 3733. Vendor's lien—Arises when.
- § 3734. Landlord's lien—Bona fide purchaser—Notice.
- § 3735. Mechanic's lien claim.
- § 3736. Lien on logs—Statutory.

### MORTGAGES.

**§ 3727. Mortgagor Retaining Possession of Stock of Goods Used in Retail Trade.** You are instructed that a chattel mortgage of a stock of goods used in the way of retail trade, where the mortgagor is allowed to continue in the possession of the property, and to sell the goods in the usual course of trade, is ~~in~~ law fraudulent and void as against the creditors of the mortgagor, no matter whether the parties intended any actual fraud or not, unless it is shown by the evidence to your satisfaction, that the sales so made by the mortgagor was as agent of mortgagee, under agreement to apply all proceeds of such sales on the mortgage for the benefit of the mortgagee, and that such application of proceeds of such sales was actually made; and in that event the sales would reduce the amount due on the mortgage to their full amount; and, if they amounted to as much as the mortgage, would pay off and entirely satisfy the mortgage; and, if you should find from the evidence that the plaintiff's mortgage had in this way been paid off before the commencement of this action, then you should find for the defendant.<sup>1</sup>

**§ 3728. Right to Possession—Entry by Mortgagee—Levy of Execution no Bar.** (a) The court instructs the jury that the mortgages read in evidence are valid contracts between the plaintiff's wife and the defendant, and that the plaintiff's wife therein and thereby contracted and agreed with the defendant that if she failed to pay all the instalments on the notes secured by said mortgages as the same matured the defendant might peaceably enter into the premises where the property therein described was situated and remove the same without a breach of the peace, and this right and license neither the plaintiff's wife nor any one for her had the right to revoke; and if

<sup>1</sup>—Kav v. Noll, 20 Neb. 380, 30 N. W. 269 (272 & 273).

"This instruction is objectionable

chiefly because of the want of facts in the evidence to render it applicable to the case under consideration."

you believe that, at the time the property mentioned in evidence was taken, all of said installments then due were not paid or tendered, and that the defendant's servants went to plaintiff's residence to take said property, and that plaintiff's wife admitted them, and that they took said property therefrom peaceably, then your verdict must be for the defendant, unless you further find from the evidence that her husband had notified the defendant not to take said property.<sup>2</sup>

(b) The court instructs you, as a matter of law, that the defendant lost the benefit of any lien which he may have had upon any of the property in question under the chattel mortgage in evidence, by the entry of the judgment by him against K., and by the levy of the execution issued thereon, as shown by the evidence, and that as a matter of law the chattel mortgage did not justify the defendants in seizing the goods in question, and it is your duty to find the defendants guilty.<sup>3</sup>

§ 3729. **Sale of Mortgaged Property—Liability for Damages.** The evidence all shows that the conveyance read in evidence, from B. to the defendant, was made at the request of the plaintiff, who was claiming one-half interest in the land, for the purpose of securing the defendant in the payment of the \$500 note read in evidence, made by the plaintiff to the defendant, and that the defendant accepted the same as such, and these facts make the instrument a mortgage, though in form a deed. And if you believe that it was the intention of said B., D. and U. in said transaction that the plaintiff, D., should acquire title to the land, if he should pay or cause to be paid to the defendant the amount due upon said note, you will find for the plaintiff the difference between the value of the land on the ——— (the date of the sale to G.), and the amount that was then due to the defendant on the note read in evidence, if you find such value exceeded the amount then due on such note.<sup>4</sup>

2—*Bordeaux v. Hartman Furniture & Carpet Co.*, 115 Mo. App. 556, 91 S. W. 1020 (1922).

"Notwithstanding defendant, in sending its agents to enter plaintiff's home after it had been notified not to enter, was courting resistance, yet, if no such resistance was made and the entry was peaceable, and the manner of the taking of the property was also peaceable, the defendant committed no wrong. The court would have been justified in refusing the instruction as offered, because it required that the taking should have been accompanied by a breach of the peace, in order to render the defendant liable. It was, as given, prejudicial to both parties."

3—*Barchard v. Kohn*, 157 Ill. 579 (592), rev'g 54 Ill. App. 629, 41 N. E. 902, 29 L. R. A. 803.

"We are inclined to think that the lien of the mortgage upon the property not sold under the execution was not waived by the proceedings under the execution, and that the court below erred in refusing to admit the mortgage in evidence as a justification of the act of taking possession of the property,

and in giving the jury the above instruction."

4—*Ullman v. Devereux*, — Tex. Civ. App. —, 93 S. W. 472.

"In view of the evidence tending to support appellant's allegations that appellee authorized the sale, this charge was erroneous, in that it authorized a recovery by appellee, based upon the value of the land at the date of the sale to G., rather than upon the amount actually received by appellant. If appellee authorized the sale by U., who in effect held the apparent title in trust for him, then he could in no event recover more than the proceeds of the sale less his debt. On the other hand, if, as contended by appellee, the sale was wholly unauthorized, and therefore a breach of trust by U., the measure of damage adopted by the court would be correct. This was a controverted issue in the case, and should not have been resolved by the court in favor of either party's contention. We cannot say that it affirmatively appears from the record that the consideration received by U. represented the reasonable value of the land, and that therefore the charge was harmless."

## LIENS.

§ 3730. **Storage Lien.** The court instructs the jury that if you believe, from the evidence, that the plaintiff was the owner of the goods in question, and she left the same with the defendants for storage, and that afterwards defendants sold said goods, the plaintiff would have a right to recover the value of said goods from defendants even if, before said sale, defendants published a notice in a newspaper that said goods would be sold.<sup>5</sup>

§ 3731. **Sale Under Lien—Notice.** The court instructs the jury that private warehousemen in this state may enforce their lien for storage by a sale of property stored by them, on giving to the owner thereof, if he and his residence be known to the person having such lien, ten days' notice, in writing, of the time and place of such sale, and if said owner or his place of residence be unknown to the person having such lien, then, upon his filing his affidavit to that effect, with the clerk of the County Court in the county where said property is situated; notice of said sale may be given by publishing same once in each week for three successive weeks in some newspaper of general circulation published in said county, and out of the proceeds of said sale all cost and charges for advertising and making the same, and the amount of said lien be paid, and the surplus, if any, shall be paid to the owner of said property, and if the jury finds from the evidence that the plaintiff stored with the defendant, as a private warehouseman, certain goods and chattels, and agreed to pay certain sums of money per month as storage, and that in default of making such payments for six months that said goods and chattels should be sold for said storage, and that said goods after default in the payment of the storage for six months was advertised ten days by publication once a week in some newspaper, and that notice of said sale was mailed to the last known address of the plaintiff, and that after such notice and publication the goods thus stored were sold to the highest and best bidder for cash, and that the amount realized has been first applied to the payment of the storage due up to the time of the sale, and the residue, if any, paid or tendered to the plaintiff, then in that case the jury are instructed that the plaintiff cannot recover, and they should find the defendant not guilty.<sup>6</sup>

5—Gerold v. Guttle, 106 Ill. App. 630 (634).

"The court erred in giving this instruction, if for no other reason because it entirely ignored appellants' claim for storage, and there was no other instruction given in the case that cured the error."

6—Head v. Becklenberg, 116 Ill. App. 576.

"The instruction under consideration was evidently based on the provisions of section 3. But that section is, by its terms, limited to 'all persons other than common carriers having a lien on personal property by virtue of an act entitled, 'An Act to revise the law of liens,' approved March 25th, 1874.' The lien Act referred to gives no lien to warehousemen, but only to hotel, inn and boarding house keepers,

stable keepers and agisters. Section 3 cannot be held to give a warehouseman a right to enforce his lien on goods by a sale thereof nor to sustain the instruction in question. The giving of the instruction cannot be sustained under the provisions of section 1 that 'Whenever any trunk, etc., shall remain unclaimed and the legal charge thereon unpaid during the space of six months after its arrival at the point to which it shall have been directed, and the owner or person to whom the same is consigned cannot be found on diligent inquiry, or, being found and notified of the arrival of such article shall neglect to receive the same and pay the legal charges thereon,' etc., for these provisions cannot be held to include or apply to the present case, where the goods were stored pur-



§ 3732. **Agister's Lien—Notice of.** The court instructs the jury that if they find from all the evidence that the firm of X. purchased the cattle in question on the (——) without notice of any lien that the defendant, Y., had upon said cattle, if any he had, then you will find for the plaintiffs, and return a verdict in their favor.<sup>7</sup>

§ 3733. **Vendor's Lien—Arises When.** Where one person conveys real estate to another, and all or a part of the consideration remains unpaid, the law implies a vendor's lien to secure the payment of said unpaid purchase money and it is not necessary that there should be any lien retained in the conveyance or in the note, or that there should be any contract, verbal or written, retaining such vendor's lien. If all or a part of the purchase money remains unpaid, the vendor's lien exists, under the law, to secure the payment of said money.<sup>8</sup>

§ 3734. **Landlord's Lien—Bona Fide Purchaser—Notice.** If the jury believe from the evidence before them that the defendants received cotton grown on the Y. place during the year — in payment of a mortgage indebtedness previously arising from S. to them; sold said cotton and applied the proceeds thereof to the credit of such indebtedness—then said defendants are not bona fide purchasers for a valuable consideration entitling them to a notice of the landlord's

suant to an express contract made between the owner of the goods and the warehouseman, by which the price of storage per month and the time of payment thereof were fixed. The articles of property in question were not consigned to the plaintiff, nor were they directed to her at any place, and therefore could not be articles of property 'unclaimed for six months after their arrival at the point to which they had been directed.' The facts of the case do not bring it within the provisions of said chapter 141, and the giving of the instructions in question must be held reversible error."

7—Weber et al. v. Whetstone, 53 Neb. 371, 73 N. W. 695.

"Y., having herded, fed and cared for these cattle, in pursuance of a contract with their owner, and being in possession of the cattle for such purpose, under such contract, and having performed the contract, or a part of it, was vested by statute (section 28, c. 4, art. 1, Comp. St.) with a lien upon the cattle to secure his compensation for their care; and any one who dealt with those cattle, or purchased them was bound to take notice of this lien. And Z., when he purchased the cattle of their owner, took the cattle charged with that lien. They were then in the actual possession of Y., and when Z. sold them to X., the latter took them charged with Y.'s lien. True, at that time they were not in the actual possession of Y., but had been taken from him that day by Z. by force. The rule of caveat emptor applies to one who purchases personal property; and though such purchaser may pay a valuable consideration for such property, and at

the time have no knowledge that another has a lien upon it for its feed or care, he cannot protect himself, as against an agister's lien, simply because he is an innocent purchaser of the property, without notice of the lien. The agister cannot be deprived of his lien, except by his voluntary relinquishment of it, or by some act or omission upon his part which would estop him from asserting it, as against a purchaser. He does not lose his lien upon the property simply because of the fact that it is taken from his possession without his consent, and sold to another, who has no notice of the lien. Kroll v. Ernst, 34 Neb. 482, 51 N. W. 1032. The court did not err in refusing to give the instruction."

8—Cross v. Kennedy, — Tex. Civ. App. —, 66 S. W. 318.

"The testimony given by the defendant tended to show that at the time the two notes, for \$.... each, were executed, and in lieu of which the note in suit was afterwards given, there was an agreement, express or implied, between defendant on the one hand, and an agent representing the plaintiff, on the other, that no lien should exist upon the land to secure the payment of the two notes referred to; and, in view of this testimony, the charge given by the court was misleading, because it omitted a very important proposition of law embodied in the latter part of the refused instruction, viz., 'Unless it appear from the evidence that it was intended between the parties that no lien should exist, or that the lien was understood between the parties to be waived.'"

lien on said cotton for his rent, and the plaintiff will be entitled to recover in this cause.<sup>9</sup>

**§ 3735. Mechanic's Lien Claim—One Lien Claim for Many Things.**

(a) If the court, sitting as a jury, believes and finds from the evidence that the press-brick machine mentioned in the second count of the petition was bought by defendant, the G. Company, from plaintiff under contract dated ———, read in evidence, and that the same was placed and put up by said defendant in the one and two story frame building marked "Press Room" on the plat made by V., read in evidence, then on the premises of said defendant; that the said machine was not used in the erection of said building, nor contemplated in the erection thereof, but said building was an old structure, or one that was already existing and standing on said property when defendant acquired the same; that said building was not put up or erected by defendant, but so being and existing on the ground was used and employed by defendant to house said press-brick machine—then the court declares the law to be that plaintiff is not entitled to maintain a lien for said machine against said building or the ground upon which the same is situate.<sup>10</sup>

(b) The court declares the law to be that if plaintiff furnished, sold and delivered to defendant the Gratiot Brick and Quarry Company, the brick mentioned in the first count in plaintiff's petition,

9—Foxworth v. Brown et al., 120 Ala. 59, 24 So. 1 (4).

"This charge requested by plaintiff bases the right of plaintiff to recover on the fact that defendants are not bona fide purchasers of said crop, if they received the cotton grown on the plaintiff's place during the year 1892 in favor of a mortgage indebtedness previously arising from the tenant S. to them, and sold it and applied the proceeds to such indebtedness. If they so purchased said cotton and sold it and so applied its proceeds, the instruction is, in substance, that they are liable, even if they had no notice of plaintiff's lien. Such a principle has no foundation under our present statute and the decisions construing it. Scaife v. Stovall, 67 Ala. 237; Ehrman v. Oats, 101 Ala. 604, 14 So. 361; Belser v. Youngblood, 103 Ala. 545, 15 So. 863."

10—Progress Press-Brick & Machine Co. v. Gratiot Brick & Quarry Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. 557.

The court said: "Machinery put in a manufacturing plant that is plainly (or proved to be) suitable for the transaction of the business to be carried on in the house entitles the person furnishing it to a lien, and it is wholly immaterial what the relative value of the house and the machinery may be, or whether they can be separated easily or not. A few cases will suffice to illustrate the rule: A copper kettle in a brew-house. Gray v. Holdship, 17 Serg. & R. 413, 17 Am. Dec. 680. A steam engine in a tannery. Oves v. Ogles-

by, 7 Watts 106. Engine and boiler in a manufacturing plant. Shepard v. Blossom, 66 Minn. 421, 69 N. W. 221, 61 Am. St. 431. Gas compressor and engine in a brewery. Watts-Campbell Co. v. Juengling, 125 N. Y. 1, 25 N. E. 1060. Engine in a saw mill. Morgan v. Arthurs, 3 Watts, 140. Wheels and boxes for use in a dry kiln. Meek v. Parker, 63 Ark. 367, 38 S. W. 900, 58 Am. St. 119. Steel tanks forming part of a wood-vulcanizing plant. Haskin Wood Vulcanizing Co. v. Cleveland Shipbuilding Co., 94 Va. 439, 26 S. E. 878. Bolting cloth in a flour mill. Heidegger v. Milling Co., 16 Mo. App. 327. \* \* \* And the further fact that the parts were located upon different platted lots is likewise immaterial, for the owner had obliterated the lot lines, and by his use of the property had treated the whole as one lot, and the parts as one plant, and therefore the law will treat it as such. Meinholtz v. Grodt, 4 Mo. App. 568; Kemper v. King, 11 Mo. App. 116; Wolford v. City of St. Louis, 115 Mo. loc. cit. 144, 21 S. W. 913; Lindsay v. Gunning, 59 Conn. 296, 22 Atl. 310, 11 L. R. A. 553; Appeal of Lauman, 8 Pa. St. 473; Bodley v. Denmead, 1 W. Va. 249; Edwards v. Derrickson, 28 N. J. Law 39; Linden Steel Co. v. Rough Rum Mfg. Co., 158 Pa. St. 238, 27 Atl. 895; Salt Lake Lithographing Co. v. Ibox Mine & Smelting Co., 15 Utah 440, 49 Pac. 768, 62 Am. St. 944; Premier Steel Co. v. McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876; Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744, and Hutchins v. Masterson, 46 Tex. 554, 26 Am. Rep. 286."

under one contract; and if plaintiff furnished, sold and delivered to the said defendant the press-brick machine mentioned in the second count in the petition under a separate and distinct contract, then these two matters form separate and distinct accounts for which separate liens should be filed, and this action cannot be maintained, and a lien established as herein sought to be maintained.<sup>11</sup>

§ 3736. **Lien on Logs—Statutory.** (a) If the jury believe from the evidence that the logs sued for were in the possession of the defendant, who was asserting his right to hold such possession until the stumpage and certain advances made by him were paid, and if they find the defendant had made advances to enable B. to get out the timber, then defendant was entitled to hold such possession until such stumpage and advances were paid; and, if they find that plaintiffs had not paid such stumpage and advances at the time of the commencement of this suit, then they must find for the defendant.<sup>12</sup>

(b) Gentlemen of the jury, if you believe from the evidence that B. made a contract with A. to get certain logs, and A. was to retain possession of the logs until the stumpage was paid, and should further find that A. made an agreement with B. that he was to advance B. certain moneys or provisions in getting out the logs, and the logs were to remain in his possession, and the logs were wrongfully taken out of his possession, then the plaintiffs in this case would not be entitled to recover. But, gentlemen of the jury, if that contract was made with B., and B., with the knowledge or consent of A., turned these logs over to N., and you find N. was the agent of H. Bros., the plaintiffs in this case, then, gentlemen of the jury, he would have the right to recover, provided H. Bros. offered to pay the stumpage, which is a lien within itself, and are now ready and willing to pay the same.

(c) The court charges the jury that if they believe from the evidence that the witness B. got out the piling in suit, and, with the knowledge of the defendant, delivered them, at the place agreed on, to the witness N. as agent for plaintiffs, and that plaintiffs had already partially paid B. for the piling, and that plaintiffs offered to pay defendant the stumpage due upon the piling, but that the defendant refused to take the stumpage, and took possession of the logs, and

11—Progress Press Brick & Machine Co. v. Gratiot Brick & Quarry Co., supra.

The court said: "The brick and the press-brick machine were not contracted for on the same day it is true, but they were bought and furnished as parts of one general improvement of the property. \* \* \* They must therefore be regarded as having been furnished under a single contract within the meaning of the mechanic's lien law. Page v. Bettes, 17 Mo. App. 366; Kearney v. Wurde-man, 33 Mo. App. 447; Kern v. Pfaff, 44 Mo. App. loc. cit. 35; Fulton Iron Works v. North Center Creek Mining & Smelting Co., 80 Mo. 265, and Grace v. Nesbitt, 109 Mo. 9, 18 S. W. 1118."

12—Austill v. Heironymus et al., 117 Ala. 620, 23 So. 660.

"The above charge requested by the defendant was properly refused. The charge does not predicate the conclusion upon the finding by the jury that by the agreement between defendant and B. the timber was to remain on the land, and in the possession of the vendor, until the advances had been paid for. We are of opinion that the lien given by the statute extends to the entire lot of timber, for the whole debt due for stumpage, gotten out under the contract; and, so long as any amount due for stumpage remains unpaid, the lien may be enforced upon the entire remaining lot, unless the parties, by agreement, provide otherwise."



kept them until this suit was brought, the jury ought to find a verdict for the plaintiffs.<sup>13</sup>

13—Austill v. Heironymus et al., supra.

"We are of the opinion that the first charge given at the request of the plaintiff was faulty, in two respects: We cannot see how the mere knowledge on the part of the defendant of a delivery of the poles by B. would defeat his legal right to their possession. Knowledge of delivery, without objection from which assent might be implied, might be sufficient, but mere knowledge is not

the equivalent of assent. The charge, moreover, ignores the testimony tending to show that, by the agreement, advances were paid, as well as stumpage. In its oral charge the court instructed the jury that 'if the contract was made with B., and B., with the knowledge or consent of A. turned these logs over to N. as the agent,' etc. This charge is subject to the same criticism made upon the first charge given by the court. Mere 'knowledge' is not the equivalent of assent."

## CHAPTER CXLV.

### NEGLIGENCE—IN GENERAL.

See Approved Instructions, Chapter LXII, Vol. II.

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| <p>§ 3737. Negligence defined.</p> <p>§ 3738. Gross negligence defined.</p> <p>§ 3739. Ordinary care defined.</p> <p>§ 3740. Elements necessary for a recovery.</p> <p>§ 3741. Mere accident not actionable.</p> <p>§ 3742. The negligence charged must be the approximate cause.</p> <p>§ 3743. Question of negligence one of fact for the jury.</p> <p>§ 3744. Leaving to jury which allegations in declaration are material.</p> <p>§ 3745. Recovery on proof of allegations contained in one or more counts of declaration.</p> <p>§ 3746. Singling out facts on which defendant relies to escape liability.</p> | <p>§ 3747. Nature of testimony as to actions of deceased at time of injury.</p> <p>§ 3748. Effect of contributing negligence.</p> <p>§ 3749. Ordinary care of plaintiff defined.</p> <p>§ 3750. Contributory negligence of children.</p> <p>§ 3751. Failure of infant plaintiff to use adequate care.</p> <p>§ 3752. States holding burden of proof on defendant to establish plaintiff's contributory negligence.</p> <p>§ 3753. Comparative negligence.</p> <p>§ 3754. Release obtained by fraud or misrepresentation.</p> |
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§ 3737. **Negligence Defined.** (a) Negligence means this: It means a want or lack of ordinary care and prudence. Ordinary care and prudence is such care and prudence as is exercised by the mass of mankind in their own daily affairs.<sup>1</sup>

(b) Negligence in a general sense is the failure or omission to perform any duty imposed by law for the protection of one's own person or the person of another. To some extent it should be measured by the character, risk and exposure of the business or occupation under consideration, and the degree of care of all parties is higher when the life or limbs of themselves or others are endangered than in ordinary cases.<sup>2</sup>

1—Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303 (205).

"A similar instruction was condemned in the recent case of Boulter v. Lumber Co., 103 Wis. 324, 79 N. W. 243. But to further confuse, the court, at defendant's request, and with reference to the standard by which plaintiff must act, instructed the jury that 'ordinary care and prudence means the care and prudence which persons of ordinary care and prudence exercise under similar circumstances.' This was correct, but, considered in connection with the one above, it left the jury without any very definite idea

of what 'ordinary care' really meant. In cases of this kind, the same standard of care is required of both plaintiff and defendant, and is such as the surrounding circumstances seem to require, and not such as men usually exercise in their daily affairs."

2—Louisiana W. E. Ry. Co. v. McDonald, — Tex. Civ. App. —, 52 S. W. 649 (651).

"Ordinary care is the care required under all circumstances. The definition given is not correct. Galveston, H. & S. A. R. Co. v. Gormley, 91 Tex. 399, 43 S. W. 877; Gulf C. & S. F. Ry. Co. v. Smith, 87 Tex. 349, 28 S. W. 520."

(c) Negligence is the failure to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence and intelligence would not do under the same or similar circumstances.

(d) Ordinary care is such care as a person of ordinary prudence and intelligence would use under the same or similar circumstances.<sup>3</sup>

(e) The court further instructs you that by "negligence," as used herein, is the failure to use ordinary care, and that "ordinary care" is such care as an ordinary person would usually observe under the same or similar circumstances as those under investigation.<sup>4</sup>

**§ 3738. Gross Negligence Defined.** The jury are instructed that gross negligence is defined by the law to be willful or intentional negligence.<sup>5</sup>

**§ 3739. Ordinary Care Defined.** The court instructs the jury that, whenever the term "ordinary care or in an ordinarily careful manner" is used in these instructions, that it means such care as an ordinarily prudent, careful person or persons would or should exercise or use under like conditions or circumstances.<sup>6</sup>

**§ 3740. Elements Necessary for a Recovery.** The jury should not consider the question of the amount of the plaintiff's damages until they have determined the questions: first, whether the plaintiff was guilty of any negligence or want of reasonable and ordinary care for his own safety which in any way helped or contributed to cause the accident which resulted in the injuries, if any, herein complained of; and second, whether the defendant was guilty of the negligence charged in the declaration. And unless they find, from the evidence, that the plaintiff was not guilty of any negligence or want of reasonable and ordinary care for his own safety which in any way helped or contributed to the cause of the accident which resulted in the injuries, if any, herein complained of, and that the defendant was guilty of the negligence so charged, that the verdict must be not guilty. The jurors are not to compromise between the questions of

3—Houston & T. C. R. Co. v. Gray, — Tex. Civ. App. —, 85 S. W. 838 (839).

"This court has held that such definitions of negligence and ordinary care are not accurate, but that they do not constitute reversible error. Houston & T. C. Ry. Co. v. Brown, 11 Tex. Ct. Rep. 777, 85 S. W. 44; Houston & T. C. Ry. Co. v. Kothmann, 11 Tex. Ct. Rep. 714, 84 S. W. 1089."

4—Henderson City Ry. Co. v. Lockett, 30 Ky. L. 321, 98 S. W. 303.

"The instruction is erroneous. Ordinary care is the failure to use such care as an ordinarily prudent person would usually exercise under circumstances similar to those proven in the case."

5—Jacksonville, S. E. Ry. Co. v. Southworth, 135 Ill. 250 (255), 25 N. E. 1093.

"In the refusal of this instruction there was no error. 'Negligence, even when gross, is but an omission of duty. It is not designed and in-

tentional mischief, although it may be cogent evidence of such fact.' Gross negligence is defined to be 'the want of slight diligence or care.' Chicago, B. & Q. R. Co. v. Johnson, Admr., 103 Ill. 512; 1 Shear. & Red. on Negligence, secs. 47-48-49."

6—Ashby v. Elsberry & N. H. G. R. Co., 111 Mo. App. 79, 85 S. W. 957 (959).

"The objection to the above instruction defining 'ordinary care' is in the use of the phrase 'would or should exercise.' The contention is that 'would or should' require the exercise of more than ordinary care—the exercise of such care as, in the judgment of the jury, a person of ordinary prudence should use, and not such care as ordinarily prudent persons do use in like circumstances. The instruction is open to criticism, but the defendant used the phrase 'ordinary care' in its second instruction given, without attempting a definition."



liability and amount of damages, nor are they to arrive at a verdict by chance, and even if they find the defendant guilty, they must not reach an assessment of damages by adding the amount individual jurors think ought to be awarded, and dividing the amount so obtained by the number of jurors voting, unless you thereafter believe from the evidence that such amount is warranted by the evidence, and thereafter agree upon such amount as a fair and just sum under all the evidence; and no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow jurors, and fairly considering all the evidence submitted by the court and the law as given in the instructions of the court.<sup>7</sup>

§ 3741. **Mere Accident not Actionable.** The court instructs the jury that, if the injuries received by plaintiff were merely the result of an accident upon her part, there can be no recovery.<sup>8</sup>

§ 3742. **The Negligence Charged Must be the Proximate Cause.** (a) The court instructs the jury that the mere fact that the plaintiff sometime after the accident in question gave birth to a child, and that said child was prematurely born, does not tend to prove that the accident in question was the proximate cause of said premature birth, and that there must be some creditable evidence tending to prove that the accident in question was the proximate cause of said premature birth; and if the jury further believe from the evidence that at some time after the accident in question the plaintiff gave birth to a still-born child, that the mere fact that said child was still-born does not tend to prove that the accident in question was the proximate cause of its being still-born, and that there must be some creditable evidence and, if disputed, a fair preponderance of creditable evidence, tending to prove that the accident in question was the proximate cause of the plaintiff giving birth to a still-born child.<sup>9</sup>

7—*West Chicago St. R. R. Co. v. Dougherty*, 89 Ill. App. 362 (366).

"We think it clear that the giving of this instruction was erroneous. The tendency of the instruction was to induce the jury to arrive at a verdict in the manner censured by the express words of the instruction, provided that on subsequently conferring together they could conclude that the verdict arrived at in the prohibited manner was fair and just. The instruction is a dangerous one, and to hold that the giving of it is not reversible error would be a dangerous precedent. See *Ill. C. R. R. Co. v. Able*, 59 Ill. 131; and *Dunn v. Hall*, 8 Blackf. (Ind.) 32; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Harvey v. Rickett*, 15 Johns. (N. Y.) 87. The sole answer of appellee's counsel to the instruction is 'that the conservative amount of the verdict under the evidence and facts in this case gives ample assurance that this was not a quotient verdict.' After a careful reading of the evidence, we cannot concur in this view. The trial court required a remittitur of \$3,000, evidently thinking the verdict excessive."

8—*Campbell v. City of Stanberry*, 105 Mo. App. 56, 78 S. W. 292 (295).

"Under this instruction, even if the defendant was guilty of negligence, and but for which the accident on plaintiff's part would not have happened, or if the injury was the joint result of defendant's negligence and an unavoidable accident on plaintiff's part, there could have been no recovery, even though plaintiff was guilty of no contributory negligence. It was not, therefore, a correct expression of the law in a case of this kind. *Vogelsang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Voegel v. West Plains*, 73 Mo. App. 588. By it the negligence of the defendant, which the evidence tended to prove, was eliminated, and the case was left to stand as if the injury had been self-inflicted."

9—*Strehmann v. Chicago*, 93 Ill. App. 206 (210).

"The court by the instruction singled out one fact in evidence, viz., the birth of the still-born child, not stating other facts in evidence, and informed the jury that such fact considered alone did not tend to prove that the accident was the

(b) The proximate cause is the efficient cause from which the injury follows, in unbroken sequence without any intervening cause to break the continuity.<sup>10</sup>

(c) The court instructs the jury that, if they believe, from the evidence, that deceased had a disease of the heart, and that he died of the disease, then the jury will find the defendant not guilty, although they may further believe, from the evidence, that the accident served to quicken the action of that disease and to hasten his death.<sup>11</sup>

§ 3743. **Question of Negligence One of Fact for the Jury.** The jury are instructed that the questions of care or want of care, and the negligence or want of negligence of the defendant and the deceased, are questions of fact for the jury to decide under all the evidence in the case and all facts and circumstances as shown by the evidence.<sup>12</sup>

§ 3744. **Leaving to Jury Which Allegations in Declaration Are Material.** (a) The court instructs the jury that if they believe

proximate cause of it. It has been held in numerous cases that the singling out and giving undue prominence to a single fact or several facts in an instruction is calculated to mislead the jury and is improper. *Grube v. Nichols*, 36 Ill. 92-98; *McCartney v. McMullen*, 38 Ill. 237-240; *Calef v. Thomas*, 81 Ill. 478-483; *Hewett v. Johnson*, 72 Ill. 513; *Cushman v. Cogswell*, 86 Ill. 62; *Frame v. Badger*, 79 Ill. 441; *Protection Life Ins. Co. v. Dill*, 91 Ill. 174."

10—*Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325 (326).

"The correct definition of proximate cause has been so frequently given by this court in recent years that an inaccurate definition now seems hardly excusable. *Deisenrieter v. Kraus-Merkel Co.*, 97 Wis. 279 (286), 72 N. W. 735; *Feldschneider v. C. M. & St. P. Ry. Co.*, 122 Wis. 423, 99 N. W. 1034. The definition given by the trial judge was incorrect and had been frequently condemned by this court."

11—*O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13 (19), aff'd 198 Ill. 125, 64 N. E. 767.

"There was medical evidence to the effect that the deceased was affected with valvular disease of the heart, as nearly all men are, and that such disease may become fatal on the receipt of a shock to accelerate its fatality. Upon this evidence the appellant asked and the court refused to give to the jury the above instruction. *Bishop on Non-Contract Law*, section 41, defines a remote cause to be one which some independent force merely takes advantage of to accomplish something not the probable or natural effect thereof. The question whether an act or omission is a proximate cause is a question for the jury under a proper definition of all the legal elements that go to make up such a cause. *Bishop on Non-Contract Law*, sec. 455; 1 *Shear. & Red. on Negligence*, 4th ed., sec. 55; *Pullman P. C. Co. v.*

*Laack*, 143 Ill. 242, 32 N. E. 285. The instruction does not undertake to define what a remote or what a proximate cause is. It is not necessary that the falling of a large section of slate roof against or upon the deceased was the entire cause of his death. *Bishop on Non-Contract Law*, secs. 39 and 518. Although deceased might not have lived many years or even days, if the slate from the roof of the room in which he was working had not fallen upon him, yet if by so falling it produced a shock from which he did not rally, it must be said that the falling of the slate was as certainly the proximate cause of his death as the shooting of a bullet into his body followed by death would have been. Bare possibilities in a civil case cannot be permitted to overcome probabilities that are almost certain. The instruction, had it been given, would have opened into a field that has no boundaries, and it was properly refused."

12—*Chicago, B. & Q. R. R. Co. v. Greenfield*, 53 Ill. App. 424 (429).

"It is true that the questions, whether the deceased exercised ordinary care, and whether the defendant was negligent, were questions of fact to be decided by the jury in the case, but they were to be decided under the guidance of the court in its instructions according to the established rules of law regulating the rights and duties of the parties and defining care and negligence. The only tendency of this instruction would be to impress upon the jury their supremacy upon those questions. It could not in any way aid the jury in applying any rule of law to the facts, or indetermining upon a proper verdict, but might be readily understood as a declaration of their independence on those questions. It was unnecessary, could serve no good purpose, and was misleading in its character."

from the evidence that the defendants, or either of them, were guilty of the wrongful act, neglect or default, substantially as charged in either count of the declaration, and that the same resulted in the death of A. B., and that the plaintiff was, at the time of the injury, in the exercise of ordinary care for the safety of A. B., and was afterward appointed administratrix of his estate, then the plaintiff was entitled to recover.<sup>13</sup>

(b) Under the issue joined, before the plaintiff can recover, he must establish all the material allegations of his petition by a preponderance of the evidence, according to the rules set forth in these instructions.<sup>14</sup>

§ 3745. **Recovery on Proof of Allegations Contained in One or More Counts of Declaration.** (a) If you find that they were negligent in any of the particulars set out in the declaration and contended for by the plaintiff, you should find the defendant company liable, provided you find that the plaintiff sustained an injury.<sup>15</sup>

(b) If the jury believe from all the evidence and under the instructions of the court that the plaintiff has made out his case as laid in the declaration or any count thereof, they must find for the plaintiff.

13—*Lumaghi v. Gardin*, 53 Ill. App. 667 (668 and 669).

"In *Wabash W. Ry. Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, it was held that a defendant has the right to insist that the grounds upon which the plaintiff seeks to recover shall be clearly and concisely stated, and that the case made in the declaration shall be proven as alleged.

"The use of the word substantially in the instruction given for appellee in this case, authorizes or licenses the jury to disregard this rule of law. It submits to the jury a question of law, and permits them to determine how far the evidence of appellee may depart from the allegations of the declaration without defeating her right of recovery; that the determination of this question is the province of the court, and not of the jury, seems unquestionable.

"The word substantially, when used in an instruction with reference to what must be proved, is commented upon in *Taylor v. Beck*, 13 Ill. 376, in the following language: 'An agreement to deliver a thousand bushels of wheat would not be legally performed by the delivery of 900 bushels only. The contract in this case to deliver an entire lot of broom brush, would not be properly complied with by the delivery of nine-tenths of the crop. And yet, in either case, a jury very likely would, under the generality of this instruction come to the conclusion that the contract had been sufficiently executed. The law, it is true, does not regard trifles, and it may be that, on this principle, the failure of the plaintiff to deliver an inconsiderable quantity of the brush would not affect his right to recover upon the contract. So in the case

of the contract to deliver wheat a trivial deficiency in quantity would not be regarded; but the case should have been put to the jury on this ground, and not upon the ground whether there had been, in the opinion of the jury, a substantial performance of the contract.' This case is referred to and approved in *Estep v. Fenton*, 66 Ill. 467.

"An instruction is erroneous which leaves it to the jury to decide what allegations in the declaration are material. *Davies v. Cobb*, 11 Bradw. 587. See, also, in this connection, as bearing upon the same point the following authorities: *Moshier v. Kitchell*, 87 Ill. 18; *Phenix v. Castner*, 108 Ill. 207; *Austine v. People*, 110 Ill. 248; *Rockford Insurance Co. v. Warne*, 22 Ill. App. 19."

14—*Williams v. Iowa Cent. Ry. Co.*, 121 Ia. 270, 96 N. W. 774 (775).

"This instruction is objectionable for two reasons: It leaves the jury to determine for themselves what allegations of the petition are material, and it imposes upon plaintiff a greater burden than he was required to bear."

15—*Alabama Mid. Ry. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794 (796).

"We think this charge was entirely too sweeping, and that the exception taken to it is good. As before stated, some of the allegations of negligence would not, even if proved, have authorized a recovery against the defendant. Yet, under this charge, if the jury found any one of them to be true, the defendant would be liable. To state the proposition is to argue it. Further than this, the charge left the jury free to find for the plaintiff, because of any such act of negligence, although such act may not have in any wise contributed to the plaintiff's injury."



(c) If the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in his declaration or any count thereof, then you can find the defendant guilty.<sup>16</sup>

§ 3746. **Singling Out Facts on Which Defendant Relies to Escape Liability.** (a) The court says to the jury that if they believe from the evidence that the decedent, A. B., just before he was injured, lay down on a plank, one end of which rested on the boiler of the steamboat ———, and went to sleep on said plank while the boiler was filled with steam, and that in the position he occupied he was directly in line of or under the safety valve which was on said boiler, and that while he was asleep he was injured by the escape of steam from said safety valve, then plaintiff cannot recover in this action if the jury shall believe that the position in which the defendant placed himself was a dangerous position, and that he voluntarily placed himself in said position, and that he knew, when he placed himself close to the nozzle of said safety valve, that he was in a position of danger, or that he could have known it by the exercise of ordinary care.<sup>17</sup>

(b) The jury are instructed that if they believe, from the evidence, that the plaintiff voluntarily and unnecessarily placed himself in a well-known place of danger to life or body, but for which position he could not have received the injuries complained of, and that

16—Ill. *Terra Co. v. Hanley*, 214 Ill. 243, rev'g 116 Ill. App. 359, 73 N. E. 373.

The supreme court said: "The evidence offered upon behalf of the defendant tended to show that the plaintiff assisted in the construction of said scaffold, and knew, as well or better than the defendant, its condition, and it is urged by reason of these facts he assumed the risk of being injured by its fall. The evidence upon the question of whether the plaintiff knew, or ought to have known, the condition of said scaffold and its liability to fall was conflicting, and the evidence of the defendant fairly tended to support the view that the risk of being injured by the falling of the scaffold was assumed by the plaintiff. The defendant therefore had the right to have the jury instructed upon the question of the assumed risk. (*Chicago Union Traction Co. v. Broudy*, 206 Ill. 615, 69 N. E. 570.) The instructions complained of are peremptory in form, and informed the jury if they found, from the evidence, that the plaintiff had made out his case as laid in his declaration or any count thereof, they should find in favor of the plaintiff. The effect of said instructions was to eliminate the question of the assumed risk from the case, as it is not averred in either count of the declaration, expressly or by implication, that the plaintiff did not assume the risk of being injured from the falling of the scaffold, or that he did not know or have reason to know of its defective condition at the time it collapsed and fell. The jury, if they followed either of said

instructions, might have found the averments of one or both counts of the declaration to have been fully established by the evidence and based their verdict thereon, although they believed, from the evidence, the plaintiff assumed the risk of being injured by the falling of said scaffold. *Herdman Harrison Milling Co. v. Spehr*, 145 Ill. 329; *Swift & Co. v. Ruskowski*, 167 Ill. 156, 47 N. E. 362.

"In *Illinois Central R. R. Co. v. Smith*, 208 Ill. 608, 70 N. E. 628, in an instruction the court stated the substantial facts averred in the declaration, and informed the jury that if they found those facts to be true then the plaintiff would be entitled to recover. The question of assumed risk was involved in the case, and it was said the instruction was erroneous as it ignored the question of the assumed risk, and it was held, where an instruction amounts to a direction to find for the plaintiff if the jury believed the facts stated in the instruction to have been proven, the instruction must embrace all the facts essential to a recovery and not ignore the facts which would defeat a recovery if true."

17—*Travelers' Ins. Co. v. Clark*, 22 Ky. L. 902, 59 S. W. 7 (9).

"This instruction is objectionable, because it authorized the jury to find for the defendant even though insured may have been entirely unconscious of the danger to him which might arise from steam escaping from the safety valve. It is also objectionable as it singles out the facts on which appellant relies to escape liability."

he was injured in consequence of such exposure, even through gross negligence of the defendants, if the action of the latter was not wanton or willful, that such conduct on the part of the plaintiff would be so negligent as to preclude a recovery herein.<sup>18</sup>

§ 3747. **Nature of Testimony as to Actions of Deceased at Time of Injury.** The court instructs the jury that the plaintiff is not required to produce direct and positive testimony showing just what the deceased was doing at the instant he received the injury causing his death; that the law requires only the highest proof of which the particular case is susceptible, and the jury may take into consideration with other facts, the instincts and presumptions which naturally lead men to avoid injury and preserve their lives.<sup>19</sup>

§ 3748. **Effect of Contributory Negligence.** In order to hold the defendants liable in this case, and entitle plaintiff to recover, it must further appear to your satisfaction that the deceased, A. B., was without fault.<sup>20</sup>

§ 3749. **Ordinary Care of Plaintiff Defined.** (a) The jury are instructed that it is peculiarly their province to determine from all the facts before them, whether the plaintiff was in the exercise of ordinary care under all the circumstances, and the jury are instructed that, if the evidence shows that plaintiff had but a short time in which to determine as to what was best to be done, that he had no time in which to deliberate as to the question of danger to himself, that he was an ordinarily and commonly prudent man, endeavoring to save his property from destruction, in short to determine from all the evidence whether or not the plaintiff acted and did as an ordinarily prudent man might reasonably be expected to have acted and done under the circumstances.<sup>21</sup>

(b) The degree of care required of the plaintiff to entitle him to recover is simply such as should reasonably be expected from

18—*Hartrick v. Hawes*, 202 Ill. 334, aff'g 103 Ill. App. 433, 67 N. E. 13.

"This instruction was erroneous, as telling the jury that a certain state of facts constituted negligence as a matter of law, whereas the question of what was negligence was a question of fact for the jury. The court modified the instruction by striking out the word 'unnecessarily' and inserting 'negligently'; as modified, it stated the law correctly."

19—*Pittsburgh, C. C. & St. L. R. Co. v. Dahlin*, 67 Ill. App. 99 (101).

"The question submitted to the jury was not so much what the deceased was doing at the 'instant he received the injury causing his death' as under what circumstances it was that he came to be at a place where the injury he received was, at that place and 'instant,' inevitable." The accident took place at a railway crossing.

20—*Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991 (993).

"It is urged that this shifted the burden of proof, and told the jury that the plaintiff must affirmatively establish lack of contributory negli-

gence. We do not so understand it. It amounted to nothing more than a declaration to the jurors that, even if they found defendant negligent, still plaintiff could not recover if the deceased herself had been guilty of contributory negligence. The instruction, however, could well have been made more specific in this regard."

21—*Galesburg El. M. & P. Co. v. Barlow*, 98 Ill. App. 334 (336).

"This instruction is incomplete, and it is evident that something was intended to be added to it. As it now reads, it is in a measure meaningless. It, however, evidently intends to call attention to a particular part of the evidence, by way of argument, to the jury, as to the manner in which the question of ordinary care on the part of appellee was to be determined. It also apparently seeks to determine the question of ordinary care on the part of appellee solely by the length of time he had to deliberate as to the danger of his surroundings, leaving out altogether the question as to whether appellee was guilty of negligence in stretching his cable across the street or in his manner of operating it."

an ordinarily prudent person in his situation—that is to say, reasonable care. If he exercised such degree of care, though he may have been guilty of some negligence or want of caution, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence.<sup>22</sup>

(c) The jury are instructed as a matter of law that ordinary care and prudence is the exercise of that care which every person of common prudence bestows upon his affairs and concerns, and a person of ordinary prudence bestows the highest degree of vigilance and care upon his own affairs when danger surrounds him or he apprehends impending disaster. The plaintiff was bound to exercise that degree of care, and if by that degree of care on his part the accident might have been avoided, the plaintiff cannot recover in this case.<sup>23</sup>

(d) The court instructs the jury that the degree of care which the plaintiff was called upon to exercise in this case, in order for him to recover, in case you believe from a preponderance of the evidence that he was injured by the defendant's negligence, is what is termed in the law, ordinary care—that is, such care as an ordinary careful and prudent man would have exercised under like circumstances; and if you believe, from the evidence in this case, that the plaintiff at the time of the injury in question exercised such care as an ordinary careful and prudent man would have exercised under like circumstances, and that he was injured by the negligent conduct of the defendant, as charged in the plaintiff's declaration or some count thereof, then in that state of the proofs your verdict should be for the plaintiff in such amount as you believe him entitled to from a preponderance of the evidence, not exceeding the amount claimed in his declaration.<sup>24</sup>

22—Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049.

"This prayer of the plaintiff we think was granted in error. In defining the degree of care required of the plaintiff it wholly ignored the question of deafness of the plaintiff, which would subject him, as we have already said, to the necessity of more diligently using his faculty of sight. After the word 'situation' something should have been added which would draw the jury's attention to his deafness to which the plaintiff testified. Besides this defect, in attempting to conjoin with that definition of care required of him the idea that, though he may have been somewhat negligent, still, he might recover, if, by the exercise of reasonable care, the defendant's servant could have avoided the accident, the prayer becomes self-contradictory in making him both reasonably careful and somewhat negligent; and in that paragraph of the prayer he does not correctly put the rule of liability in cases of mutual negligence. With respect to the criticism of appellant's counsel upon the concluding sentence of the plaintiff's first prayer, we think that, if

that prayer stood by itself, without any qualifications by other instructions it would be misleading; but, qualified as it is by the second and third prayers of the defendant, we should hesitate to reverse for that defect if there were no other errors to reverse on."

23—W. C. St. R. R. Co. v. McNulty, 166 Ill. 203 (205), aff'g 64 Ill. App. 549, 46 N. E. 784.

"This instruction in effect told the jury that the plaintiff was bound absolutely to exercise the highest degree of vigilance and care. It assumed that he knew that danger surrounded him, or that he apprehended impending disaster, when that was a question of fact for the jury to determine from the evidence in the case."

24—Wabash R. R. Co. v. Jensen, 99 Ill. App. 312 (315).

"We think it was prejudicial error for the court by this instruction to limit the time when appellee should have been in the exercise of ordinary care to the time he was injured, when, under the circumstances disclosed by the evidence, he should have exercised such care before as well as at the time he was injured."



**§ 3750. Contributory Negligence of Children.** (a) If the jury believe and find, from the evidence, that plaintiff, while in the exercise of ordinary care for a boy of his age, was injured by and in consequence of the negligence of the defendant, as charged in the declaration, then you should find the defendant guilty.

(b) If you believe and find, from the evidence, that plaintiff was exercising ordinary care for a boy of his age, and that the wagon of defendant which struck plaintiff could have been stopped by the driver of the defendant in charge of the wagon, by the exercise of ordinary care on his part, in time to prevent injuring the plaintiff after he (the driver) became aware or might have become aware (by the exercise of ordinary care) of plaintiff's imminent danger of being struck, then you should find the defendant guilty.<sup>25</sup>

**§ 3751. Failure of Infant Plaintiff to Use Adequate Care.** The court instructs the jury that it is necessary that it appear from the evidence that the plaintiff was in the exercise of ordinary care, before he can recover; but what is ordinary care is a question for the jury to determine from all the facts and circumstances in evidence in the case. If you believe from the evidence that the plaintiff was a minor of the age of fourteen years, or thereabouts, at the time he was injured, you have the right to take that fact into consideration in determining whether or not he was exercising ordinary care. The law required of him such care only as could and would reasonably be expected from a person of his age, knowledge and experience, under all the circumstances of the case; that is, the degree of care which he was required to exercise was ordinary care, in view of his age, knowledge and experience, and all the other facts and circumstances appearing from the evidence.<sup>26</sup>

**§ 3752. States Holding Burden of Proof is on Defendant to Establish Plaintiff's Contributory Negligence.** (a) The jury are further instructed that the burden of proof rests upon the plaintiff to show, by a preponderance of evidence, that he himself used ordinary care in driving along the street at the time when the accident happened, and to further prove by a preponderance of evidence that he was not guilty of any negligence which contributed to the injury complained of and upon the failure so to do, you will find for the defendant.<sup>27</sup>

25—III. I. & M. Co. v. Webber, 196 Ill. 526 (528), rev'g 89 Ill. App. 368, 63 N. E. 1008.

"This instruction directed the jury to return a verdict for the plaintiff if they found he was in the exercise of ordinary care for a boy of his age (ten years) and the defendant was negligent, and the injury resulted. That was not a correct rule of law, since the question of care was not to be determined alone by the plaintiff's age, but also by his intelligence, experience and ability to understand and comprehend dangers and care for himself."

26—Swift & Co. v. Rutkowski, 67 Ill. App. 209 (210), rev'g 167 Ill. 156, 47 N. E. 362, for error in regard to another instruction.

"There is no such thing as the ordinary care of an infant. An infant is required to exercise such

care as is to be expected from one of his age, intelligence and experience. The foregoing instruction, while not such as to warrant a reversal of the judgment, was not a correct statement of the law."

27—Omaha v. Ayer, 32 Neb. 375, 49 N. W. 445 (448).

"Until the case of Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113, there was no settled rule recognized by this court in regard to the party upon whom rested 'the burden of proof of contributory negligence;' but the rule was settled in that case by the adoption of the following syllabus by the court: 'In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being upon the defendant.'"

(b) The burden of proof is on defendant to prove that plaintiff is chargeable with contributory negligence by the preponderance of the evidence.<sup>28</sup>

(c) You are instructed that if the evidence and circumstances point just as strongly to the negligence of the deceased as to its absence, the plaintiff cannot recover, and you should return a verdict for the defendant.<sup>29</sup>

(d) Then if you find the defendants were negligent in both or either one of the matters I have stated to you, then, in order to entitle the plaintiff to recover, it must appear from the evidence in this case that he was not chargeable with negligence on his part which contributed to his injury.<sup>30</sup>

§ 3753. **Comparative Negligence.** (a) If the jury find from the evidence that the plaintiff was guilty of any negligence, however slight, which contributed to the alleged injury complained of, then the jury must find their verdict for the defendant, unless the jury further find from the evidence that the defendant was guilty of negligence, which in comparison with plaintiff's, was gross.<sup>31</sup>

28—*International & G. N. R. Co. v. Lewis*, — Tex. Civ. App. —, 63 S. W. 1091 (1092).

"We think appellee's own testimony in this case subjects him to more than a suspicion of negligence, and is sufficient to raise the issue as to whether or not the injury might not have been prevented by the use of ordinary care on his part. Upon this state of facts, it was error for the court to instruct the jury that the burden was on defendant to show contributory negligence. By such charge the jury might have understood that they were not to consider the presumption of negligence arising from the plaintiff's evidence, and, unless the defendant's evidence showed contributory negligence on plaintiff's part, they might find for the plaintiff on this issue. That such charge is erroneous is well settled. *Gulf C. & S. F. Ry. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 29 L. R. A. 538; *St. Louis, S. W. Ry. Co. v. Martin*, 2 Tex. Ct. Rep. 643, 63 S. W. 1089."

29—*Schweinfurth v. Cleveland C. & St. L. Ry. Co.*, 60 Ohio 215, 54 N. E. 89 (90).

"The above instruction is at variance with the well-established rule in this state that the burden is upon the defendant to make out the defense of contributory negligence, unless the plaintiff's evidence raises the presumption of such negligence, when he is required to overcome that presumption. If, upon the whole evidence, contributory negligence, such as would defeat a recovery, be not shown by a preponderance of the evidence, and the negligence of the defendant be so shown, the action may be maintained. Each party starts free from negligence, and each therefore primarily assumes the burden of proving the negligence of the other. This instruction is not less erroneous

than would be a charge that if the whole evidence pointed as strongly, but not more so, to the negligence of the defendant, as to the absence of such negligence, the plaintiff would be entitled to recover, there being no contributory negligence shown."

30—*Parsons v. Lyman*, 71 Minn. 34, 73 N. W. 634 (635).

"This was an instruction that, before plaintiff would be entitled to recover, the jury must find affirmatively that he was not chargeable with negligence which contributed to the injuries of which he complained. Stating that, before plaintiff could recover, 'it must appear from the evidence in the case that he was not chargeable with negligence on his part which contributed to his injury,' had the effect of shifting the burden of proof from defendants to the plaintiff upon the subject of contributory negligence. It was equivalent to directly charging the jury that it was incumbent upon the plaintiff, before he could recover, to establish by a preponderance of evidence that there was no negligence on his part which contributed to his injuries. This instruction was manifestly erroneous, for the law is that contributory negligence is a defense, and, as such, must be established by a preponderance of evidence. The burden of proof in this matter was with the defendants, not upon the plaintiff."

31—*City of Beardstown v. Smith*, 52 Ill. App. 46 (48), *aff'd*, 150 Ill. 169, 37 N. E. 211.

"If from this the jury should understand, as they well might, that 'any negligence, however slight,' includes a degree which might still consist with ordinary care, they would be materially misled as to the law; and if they would understand by it a degree of negligence greater, however slightly, than would con-

(b) The jury have the right under the law to compare the negligence of the plaintiff and defendant in a case like the one at bar, and in this case, although the jury may believe, from the evidence, that although the plaintiff was not wholly without negligence, yet if you further believe from the evidence that the defendant was guilty of gross negligence, whilst the plaintiff was only guilty of slight negligence, then such slight negligence on the plaintiff's part will not prevent a recovery in this case.<sup>32</sup>

(c) The jury are instructed that, if they believe, from the evidence, that the defendant was guilty of negligence as charged in the declaration, and that such negligence on the part of the defendant's servants was willful and wantonly reckless, showing an utter disregard for the life of the deceased, although you may further believe from the evidence that the deceased was guilty of negligence which contributed to the injury, and that such negligence was slight, and did not amount to a want of ordinary care, then you should find the defendant guilty. It is not necessary that the action of the defendant shall be shown by the evidence to have been willful in the sense that it was intentional on the part of the defendant or its servants, but you must believe, from a fair and impartial consideration of all the evidence in this case, that the death of the said A. B. was the proximate result of such a want of care and disregard for the rights of others as justifies the presumption of willfulness or wantonness on the part of the defendant, while the deceased himself was in the exercise of ordinary care.<sup>33</sup>

sist with ordinary care, the instruction asked was worse than useless to the defendant who asked it—being less favorable to it than were those asked and given for the plaintiff—all of which were to the effect that in that case the plaintiff would not be entitled to recover for any degree of mere negligence on the part of the defendant, however gross, comparatively or absolutely, which is clearly the law. And that is just the dilemma which must confront every instruction that attempts to invoke the rule of comparative negligence, as it is claimed the Supreme Court introduced and for a long time maintained it. Counsel cite no case in defense of this instruction later than that of the *Town of Grayville v. Whitaker*, 85 Ill. 439. We do not see how it can be defended against the reasoning and judgment in *Chicago B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512, and the cases following it. We think the instruction was rightly refused."

32—*Toledo, St. L. & K. C. Ry. Co. v. Cline*, 135 Ill. 41 (44), 25 N. E. 846.

"The jury were told by the court in this instruction that 'in this case' the jury have the right under the law to compare the negligence of the plaintiff and defendant, \* \* \* although the jury may believe from the evidence that the plaintiff was not wholly without negligence.' This was equivalent to informing the jury as a matter of law that the plaintiff had exercised ordinary care.

It is true that the instruction concluded by saying that if the jury further believed, from the evidence, that the defendant was guilty of gross negligence while the plaintiff was only guilty of slight negligence, then such slight negligence would not prevent a recovery. But the instruction started out with the assumption that the plaintiff used ordinary care, which necessarily implied his negligence was but slight, and then proceeded, the clauses being transposed, whilst the plaintiff was only guilty of slight negligence, yet if they believed, from the evidence, that the defendant was guilty of gross negligence, then such slight negligence would not prevent a recovery. In other words, the jury would naturally and most likely conclude that the only question of fact for them to determine in favor of the plaintiff, in order to entitle him to a verdict was, that 'the defendant was guilty of gross negligence.'

33—*Wabash R. R. Co. v. Larrick*, 84 Ill. App. 520 (521).

"A similar instruction was given in the case of *Chicago & Alton R. R. Co. v. O'Neil*, 172 Ill., 527 (531), 50 N. E. 216, in an action which charged that 'the several acts of the defendant set out as the cause of the killing were done negligently, recklessly, wantonly and willfully.' It may be conceded as possible that proof of appellee's declaration might also prove the case presented by this instruction, but it must then be also conceded that appellant, if such



(d) Even if you should believe, from the evidence, that the plaintiff's intestate was guilty of some negligence, yet, if you further believe from the evidence that his negligence did not materially contribute to the injury, and that he was injured and killed through the carelessness and negligence of the defendant, as charged in some count of the declaration, then your verdict must be for the plaintiff.<sup>34</sup>

(e) You are further instructed that even if you find from the evidence that the plaintiff was guilty of some negligence contributing to the injury testified about, and was not free from negligence on his part, this will not prevent him from recovering in this action, if he is otherwise entitled to recover, provided that you believe, from the evidence, that the defendant was guilty of gross negligence contributing to the injury testified about, so that the negligence of the plaintiff, if any, was slight in comparison with that of the defendant, if any, and the negligence of the defendant, if any, was gross in comparison with that of the plaintiff, if any, and that such negligence of the defendant, if any, produced the injury complained of.<sup>35</sup>

a case was charged against it in the declaration, might interpose a distinct defense; consequently that it was entitled to notice of reliance on such an action before it should be required to answer. That the case so set out in the instruction is a separate and distinct cause of action and foreign to the issue is patent; for it imputes to the acts of appellant as alleged and proved a form of negligence variant from that imputed to those acts in the declaration; and which forms of negligence are now too well differentiated in a legal sense to become confused in a case where only one is charged. If it was intended by the instruction to say that slight negligence is not necessarily incompatible with due and ordinary care, the form of expression is not adapted to a plain statement of that proposition, and would be misleading. In *Illinois C. R. R. Co. v. Sanders*, 166 Ill. 270 (281), 46 N. E. 799, the court say: 'It is a familiar rule that instructions should be predicated on the evidence in the case, and we are also of the opinion that they should be confined to the issues in the case.' In *Ebsery v. Chicago C. Ry. Co.*, 164 Ill. 518, 45 N. E. 1017 and cases there cited, and also *Chicago & E. I. R. R. Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. 259, it is the expression of the court that a party must recover, if at all, on and according to the case he has made for himself in his declaration. The trend of these views as expressed is then that the giving of an instruction susceptible of the criticism imposed on the one under discussion is erroneous in a case where the evidence is conflicting and the issues sharply drawn. So, when it is considered that the jury was asked to apply this instruction to the facts of this case, and that they did so, the court is constrained to believe that it was misleading."

<sup>34</sup>—*Chicago & A. R. R. Co. v. Kelly*, 75 Ill. App. 490 (495).

"The legal proposition involved in this instruction is that the plaintiff in an action on the case for negligence may recover, notwithstanding his own negligence contributed to the injury, provided it did not materially so contribute. The doctrine of comparative negligence is no longer the law in Illinois. To entitle the plaintiff to recover in this kind of an action, he must have been in the exercise of ordinary care at the time of receiving the injury. He could not be in the exercise of ordinary care and at the same time guilty of negligence that contributed to the injury. The injury must be attributable to the defendant's negligence, and to that alone. *Calumet I. & S. Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *Pullman P. C. Co. v. Laack*, 143 Ill. 242, 32 N. E. 285; *Lake S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905."

<sup>35</sup>—*Willard v. Swansen*, 126 Ill. 381 (384), 18 N. E. 548.

"Where the injury is not willful, the law is well settled that a party cannot recover for an injury received, unless it appears from the evidence that he exercised ordinary care, such care as a reasonably prudent person would always adopt for the security of his person. This doctrine was announced at an early day in this court in *Galena & C. N. Ry. Co. v. Jacobs*, 20 Ill. 488, and has been reiterated in numerous cases since. (*Chicago B. & Q. R. R. Co. v. Johnsen*, 103 Ill. 517). The fact that defendant may have been guilty of gross negligence does not of itself authorize a recovery. A duty always rests on the injured party to exercise ordinary care, and unless that duty has been observed, a recovery cannot be had, in other words, ordinary care is an essential element on the part of the injured party to authorize a recovery, but that element was omitted from the instruction, and the jury were in substance told that the plaintiff, al-

(f) The court instructs the jury, that while a person is bound to use reasonable care to avoid injury, he is not held to the highest degree of care and prudence of which the human mind is capable; and to authorize a recovery for an injury, he need not be wholly free from negligence, provided his negligence is but slight and consistent with such slight acts of negligence as an ordinary prudent and cautious man would be guilty of under the same circumstances.<sup>36</sup>

(g) The court instructs the jury that negligence is the failure to use due care, and may be either slight or gross, depending upon the circumstances of each particular case; and if the jury shall believe from the evidence that plaintiff and defendant are both guilty of negligence, but that the negligence of the plaintiff was slight, and that of the defendant gross in comparison therewith, then the jury should find for the plaintiff, if they believe from the evidence that such gross negligence resulted in the injury to the plaintiff complained of.<sup>37</sup>

(h) The jury are instructed that even though they believe from the evidence that the deceased was negligent, and that such negligence contributed to the accident, yet, if you further believe from the evidence that the negligence of the deceased which contributed to the accident was slight, and if you further believe from the evidence that the defendant was also guilty of negligence contributing to the accident, and that such negligence on the part of the defendant was gross, then upon the question of negligence, the jury should find for the plaintiff.<sup>38</sup>

(i) If the plaintiff himself was guilty of negligence, and the railroad company was guilty of negligence, then you may take into consideration the amount of negligence on each side. If the deceased was guilty of negligence, you may then diminish the recovery which the widow would be entitled to in proportion to the default of the defendant to that of the deceased.<sup>39</sup>

though guilty of some negligence, might recover if the negligence of the defendant was gross and the negligence of the plaintiff was slight in comparison with the negligence of the defendant. We do not regard this as a correct proposition of law."

36—*Peoria v. Walker*, 47 Ill. App. 182 (192).

The court cites in condemning this instruction *C. B. & Q. Ry. Co. v. Johnson*, 103 Ill. 512; and *Calumet I. & S. Co. v. Martin*, 115 Ill. 358, 3 N. E. 456.

37—*City of Rock Falls v. Wells*, 59 Ill. App. 155 (158).

"This was an attempt to state the doctrine of comparative negligence which is no longer the law of this state. *Lake S. & M. S. R. R. Co. v. Hessons*, 150 Ill. 546, 37 N. E. 905. And it was not a correct statement of the doctrine, since it not only admitted the hypothesis that plaintiff was in the exercise of ordinary care, but stated that she need not use due care. Slight negligence was one of the grades defined as a failure to use due care, and the jury were told that she might recover although guilty of such negligence. The failure to use due care constitutes a

grade of negligence higher than that which is termed slight, and bars a recovery."

38—*Chicago B. & Q. R. R. Co. v. Greenfield*, 53 Ill. App. 424 (430).

"This instruction directed a finding for the plaintiff on the question of negligence in case the jury should find the facts as stated, and it omitted the essential element that the deceased was in the exercise of ordinary care for his own safety at the time he was killed. The jury were not authorized to find for the plaintiff unless the fact had been proven, and the instruction was bad in directing such a finding irrespective of that question. The rule of comparative negligence has never changed or modified the general rule requiring proof that an injured person was in the exercise of ordinary care for his own safety. *Calumet I. & S. Co. v. Martin*, 115 Ill. 358, 3 N. E. 456."

39—*Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551 (554).

"Without further explanation, this charge was error. Under it, if the jury believed that both the company and the deceased were equally negli-

§ 3754. **Release Obtained by Fraud or Misrepresentation.** (a) The court instructs the jury that if you believe, from a preponderance of the evidence in this case, that the plaintiff has proven her case as laid in the declaration herein, then you should find the issues for the plaintiff, unless you further believe from the evidence in this case that the plaintiff, after she received the injury in question, intentionally and understandingly released the defendants from liability for the same.

(b) The court instructs the jury that if they believe from the evidence in this case that the release offered in evidence by the defendants was obtained of the plaintiff by representations or acts of the agents of the defendants or either of them, which induced in her mind the belief that it was only for the purpose of giving the defendants asking for the same her name, so that they might answer any inquiries that might be made concerning her safety, and was not understood and intended by her as a discharge of the defendants from the claim which she had, or might have, against them on account of her said injuries, then it is not a bar to this suit, and you should find for the plaintiff as to the release.

(c) The court instructs you that the release offered in evidence by the defendants is a complete bar to this action, except as to damage, if any, done to plaintiff's baggage, unless the plaintiff has proved by a preponderance of the evidence that defendants or their agents, officials or employes, procured plaintiff to sign the release by fraud or by a trick or device whereby the plaintiff was made to believe that she signed some other paper or instrument different from the one which she actually did sign, and which is offered in evidence in this cause.<sup>40</sup>

gent, then they could still find for the plaintiff. As a matter of law, the plaintiff cannot recover for injuries inflicted by the negligence of an agent of a railroad company in the operation of its trains, if both the agent and the person injured are equally negligent at the time the injury was sustained."

40—C. & A. Co. v. Jennings, 114 Ill. App. 622 (625-626).

"Under the pleadings in this case we think the giving of the above instructions one and two for plaintiff was error. The question presented under the plea of release was, did the defendants, by fraud and covin practiced by them upon the plaintiff, procure the release. The first instruction wholly ignores that question. The only matter submitted to the jury by it was, did she intentionally and understandingly release the defendants. No reference whatever is made to anything done or said by defendants.

"Another objection to this instruction is that the burden of proving that she intentionally and understandingly released the defendants is cast upon the defendants. The instruction directs the jury that if they find plaintiff has proven her case as laid in her declaration then they will find for her unless they further believe she intentionally and

understandingly released. Under this language the defendants are required to prove by a preponderance of the evidence that she did, in that state of mind, release. This is directly contrary to the legal requirement. The plaintiff was required by the law to prove by a preponderance of the evidence that she was in some manner defrauded, cheated, cozened, over-reached by the defendants and thereby she executed the release. She was required to prove by a preponderance of the evidence both her cause of action as laid in her declaration and that the release was obtained by fraud and covin before she was entitled to recover. If the plaintiff did not intentionally and understandingly release the defendants as stated in the first instruction, and if such want of intention and understanding was purely by reason of mistake or misunderstanding on her part, then surely she has no remedy at law; her remedy, if any, is in equity to set aside the release, but under the first instruction she is entitled to recover in this case whether her want of intention and understanding was the result of her own mistake or was caused by the fraud of defendants. It is no answer to the objection to this instruction to say that the jury were correctly in-



(d) If the jury find, from the evidence in this case, that the paper release read in evidence was signed by the plaintiff when he was in such a mental condition through pain and sickness that he could not and did not comprehend or understand its contents; and if the jury further believe from the evidence that defendant's agent took advantage of plaintiff's said condition, if you find it existed, to induce him to sign said paper, and that said agent, owing to plaintiff's said mental condition, induced plaintiff to sign said paper without understanding its contents, intending thereby to defraud the plaintiff, then said paper release is no defense to this action.<sup>41</sup>

(e) The court instructs the jury that if you believe from a preponderance of the evidence in this case that the plaintiff has proven her case as laid in the declaration herein, then you should find the issues for the plaintiff, unless you further believe from the evidence in this case that the plaintiff after she received the injury in question intentionally and understandingly released the defendants from liability for the same.<sup>42</sup>

structed in defendants' instruction given in the third paragraph. The two instructions, No. 1 for plaintiff and No. 3 for defendant, are absolutely contradictory and irreconcilable. The jury were left free to choose between them; they could not follow both. The second instruction for plaintiff above quoted is vicious for the same reason as above stated regarding the third. It contains the same elements of understanding and intention of the plaintiff as to releasing the defendants. No representations, no words or acts are stated. What were the representations or acts which plaintiff claims induced the belief? To whom were the representations made? The instruction is silent."

41—Robertson v. Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130.

"Defendant says this instruction is erroneous, because it proceeds upon the theory that plaintiff was in such mental condition through sickness that he could not and did not comprehend or understand the contents of the release. Plaintiff testified that he was in pain and was suffering from his injuries.

"The instruction is too narrow. It does not comprehend all the evidence tending to prove fraud in the obtention of the release, but it submitted nothing to the jury that was not in evidence. Its fault is that it did not submit all the facts tending to prove fraud and imposition. Of this fault, defendant is in no position to complain. The further criticism is made that the instruction does not require the jury to find that the money obtained was ever returned to defendant or tendered to it. In *Och v. Railway Co.*, 130 Mo. 45, 31 S. W. 966, 36 L. R. A. 442, the court approvingly quoted the following language from *Cleary v. Mun. El. L. Co.*, 65 Hun. (N. Y.) 621, 19 N. Y. Supp. 951: 'The rule undoubtedly is that where a party

seeks to rescind the contract on the ground of fraud or imposition, he must tender a return of what he has received under it before he can maintain an action at law; and, in an action in equity, he must at least tender a return by his bill of complaint.' That it is the settled rule that one who would shirk the disadvantages of a contract, not void as against public policy, or prohibited by statute, must restore or offer to restore what he has received under the contract, is established by the authorities cited in the *Och* case, and by prior and subsequent decisions of the appellate courts of this state. An answer was filed in the case, in which the release is pleaded as a bar to the action. Plaintiff filed a reply to this plea, alleging that the release was obtained by fraud and imposition, and offering to pay back the \$10.00; but the question of tender was nowhere alluded to on the trial. It is not in the evidence, in the instructions, or in the motions for a new trial. It was entirely lost sight of by counsel on the trial. A trial court is entitled to some consideration, and should not be put in the wrong for failing to do that which it was never asked to do, or be convicted of error for failing to rule on a point that was never called to its attention. The fact of non-tender was not used on the trial, and cannot be brought forward to overthrow the judgment. *Estes v. Nell*, 163 Mo. 387, 63 S. W. 724."

42—*Chicago & A. Ry. Co. v. Jennings*, 114 Ill. App. 622 (627).

"What she in her mind intended and understood was entirely immaterial. The material matter was, what were the facts surrounding the transaction? Her intention and understanding are to be determined from a consideration of these facts and cannot in law be founded on any other basis. By her replication

she says that she executed the release. She cannot be heard to say that she did not do so intentionally except by making proof that she was defrauded into doing it by the defendants. The presumption of law is, that she did intentionally and knowingly release the defendants. Still another objection to this instruction is that the burden of proving that she intentionally and understandingly released the defendants is cast upon the defendants. The instruction directs the jury that if they find plaintiff has proven her case as laid down in her declaration then they will find for her, unless they further believe she intentionally and understandingly released. Under this language the defendants are required to prove by a preponderance of the evidence that she did in that state of mind release. This is directly contrary to the legal requirement. The plaintiff was required by the law to prove by a pre-

ponderance of the evidence that she was in some manner defrauded, cheated, cozened, over-reached by the defendants and thereby she executed the release. She was required to prove by a preponderance of the evidence both her cause of action as laid in her declaration and that the release was obtained by fraud and covin before she was entitled to recover. If the plaintiff did not intentionally and understandingly release the defendants as stated in the third instruction, and if such want of intention and understanding was purely by reason of mistake or misunderstanding on her part then surely she has no remedy at law; her remedy if any is in equity to set aside the release, but under the third instruction she is entitled to recover in this case whether her want of intention and understanding was the result of her own mistake or was caused by the fraud of defendants."

## CHAPTER CXLVI.

### NEGLIGENCE—MASTER AND SERVANT.

See Approved Instructions, Chapter LXIII, Vol. II.

#### LIABILITY OF MASTER FOR SERVANTS.

- § 3755. Master only liable for acts of servants within scope of his employment.
- § 3756. Liability of master and servant for injury through X-ray apparatus.
- § 3757. Accident to child through inattention of driver—Liability of master.

#### LIABILITY OF MASTER TO SERVANT—IN GENERAL.

- § 3758. Master's duty toward servants.
- § 3759. Liability when relation of master and servant has ceased for the day.
- § 3760. Reasonable care required only for safety of employee.
- § 3761. Negligence of master must be proximate cause of injury.
- § 3762. Effect of habitual violation of rules by employees.
- § 3763. Whether full knowledge by foreman of plaintiff's perilous position essential for recovery against master.
- § 3764. Right of servant to rely on assumption that there is no danger in obeying order of master.
- § 3765. Employment of minor in dangerous position.
- § 3766. Instruction of minor by master.
- § 3767. Wound as direct cause of disease from which servant dies.
- § 3768. General instruction as to plaintiff making out his case.

#### REASONABLY SAFE PLACE FOR WORK.

- § 3769. Master must furnish reasonably safe place and surroundings.
- § 3770. Changes due to prosecution of work.
- § 3771. Injury through defect in staging.

- § 3772. Injury by falling on flight of defective stairs.
- § 3773. Injury through a shear leg of derrick falling.
- § 3774. Placing hot-water barrels in dangerous position—Plaintiff stepping in when frightened by dog.
- § 3775. Absence of safeguards around vat in packing house.
- § 3776. Improper construction of runnings to vessel.
- § 3777. Injury to miner through defective roof in mine.
- § 3778. Failure to inspect mine in the morning.
- § 3779. Failure to put posts in neck of old rooms of mine.
- § 3780. Wilfully neglecting to furnish props.
- § 3781. Place of employment for shot-workers in mine.
- § 3782. Method of lowering rails into mine.
- § 3783. Providing foundations for lumber stacks.

#### SAFE AND SUITABLE APPLIANCES.

- § 3784. Master's duty to provide safe appliances and keep them in proper repair.
- § 3785. Negligence in furnishing reasonably safe machinery "as charged in the declaration."
- § 3786. Condition of state when shown to exist, presumed to continue until rebutted by evidence to contrary.
- § 3787. Master not liable for latent defects.
- § 3788. Master does not insure absolute safety of appliances.
- § 3789. Inspection of tools and appliances by servant.
- § 3790. When appliances may be deemed to be safe.
- § 3791. Increasing danger through arrangement of set screw.
- § 3792. Injury by nut on shaft continually coming off.
- § 3793. Injury through defective pulley.



- § 3794. Spike maul flying off handle.
- § 3795. Defective rope in shaft of mine.
- § 3796. Use of various kinds of hitches on dirt dumpers.
- § 3797. Injury while handling water pipe and sand bucket.
- § 3798. Placing caps and digments packed in sawdust in uncovered box on tender of engine.

## FELLOW-SERVANTS.

- § 3799. Fellow-servants.
- § 3800. Elements necessary to constitute relationship of fellow-servants.
- § 3801. Failure of master to employ a sufficient number of servants.
- § 3802. Who are fellow-servants a question of fact for the jury.
- § 3803. Responsibility of master for incompetency of fellow-servants.
- § 3804. Subsequently required knowledge of servants' incompetency by master.
- § 3805. Duty of servant to inquire as to competency of fellow-servants.
- § 3806. Fellow-servants in mine.
- § 3807. Runner and helper on mining machine fellow-servants.
- § 3808. Negligence of fellow-servants.
- § 3809. Who are vice-principals.
- § 3810. Responsibility of master for negligence of vice-principal.
- § 3811. Superior authority does not always destroy relationship of fellow-servants.
- § 3812. Servant's right to assume master has used reasonable care in selection of fellow-servants.
- § 3815. Circumstances to be considered on question of assumption of risks.
- § 3816. Servant being directed to do work not in line of his regular employment.
- § 3817. Servant's knowledge of facts which would make his own act dangerous.
- § 3818. Slipping on floor and injuring hand in machinery.
- § 3819. Assuming risk as to caving in of bank.
- § 3820. Loosening of dirt in sand bank by foreman.
- § 3821. Insecure condition of blocking and scaffolding under gas pipe.
- § 3822. Defective material in lever.
- § 3823. Operating furnace without a screen.
- § 3824. Assumption of risk in leaving down bridge.
- § 3825. Continuing work after insufficient repair of appliances.
- § 3826. Continuing work in dangerous place after notice of defect to master.
- § 3827. Continuing in employment after promises of master to repair machine.
- § 3828. Refusal of master to repair appliance.

## CONTRIBUTORY NEGLIGENCE.

- § 3829. Contributory negligence of servant.
- § 3830. In order to be defense negligence of servant or fellow-servant must be proximate cause of injury.
- § 3831. Burden of proof as to contributory negligence — Rule that it is on defendant.
- § 3832. Voluntarily doing work in more dangerous of different possible ways.
- § 3833. Voluntarily assuming dangerous position in front of truck.
- § 3834. Continuing work at obviously dangerous machine.
- § 3835. Contributory negligence of minors.
- § 3836. Working with split, frayed, raveled or untwisted rope.
- § 3837. Comparative negligence.

## RELEASES.

- § 3838. Release of right of action by servant.

## ASSUMPTION OF RISK.

- § 3813. Servant assumes all risks ordinarily and naturally incident to particular service in which he is engaged.
- § 3814. Burden of proof as to assumption of risk not incident to employment.

## LIABILITY OF MASTER FOR SERVANTS.

§ 3755. Master only Liable for Acts of Servant Within Scope of His Employment. The court charges the jury that in order to find a verdict for the plaintiff in this case, they must find that the said

C. alleged in the complaint to be an employe of the defendant, acted within the scope of his employment in committing the alleged assault and battery upon the plaintiff, and if they shall find from the evidence that the said C. departed therefrom in committing said assault and battery, they must find their verdict for the defendant.<sup>1</sup>

**§ 3756. Liability of Master and Servant for Injury Through X-ray Apparatus.** The court instructs the jury that if they find, from the preponderance of the evidence, that S. was the owner of the X-ray laboratory in question, and that F. was employed by said S. to run said laboratory and operate the X-ray apparatus for him, and that said F. was merely the agent or employe of said S. in running the said laboratory and business, and that F. was on the day in question, while exposing the X-ray to the foot and ankle of the plaintiff, then acting within the scope of his employment, and if you further find from a preponderance of the evidence, that defendant F. was guilty of negligence as charged in the declaration, then you will be warranted in finding both defendants guilty.<sup>2</sup>

**§ 3757. Accident to Child Through Inattention of Driver—Liability of Master.** The court instructs the jury that the law is that no one is responsible for an injury caused purely by inevitable accident while he is engaged in a lawful business, even though the injury was the direct consequence of his own act and the injured party was at the time lawfully employed, and in all respects free from fault, and in this case, if the jury believe from the evidence that defendant's driver was driving slowly and cautiously through the alley in which the accident occurred, and that his attention was turned in another direction so that he did not see the child, and that the child ran from the yard into the wagon being driven by defendant's driver, and that said injury was received in this way, then there can be no recovery in this case, and your verdict must be for the defendant.<sup>3</sup>

#### LIABILITY OF MASTER TO SERVANT—IN GENERAL.

**§ 3758. Master's Duty Toward Servants—Master Liable to Servant, When.** The court instructs the jury that it was the duty of

1—Case v. Hulsebush, 122 Ala. 212, 26 So. 155 (157).

"The above instruction was faulty and misleading. It postulates that the said C. must have acted within the scope of his employment in committing the alleged assault and battery to render the defendant guilty. It should have hypothesized that it was necessary to appear that he committed the act within the scope of his employment and in the accomplishment of objects within the line of his duties, or, that it was committed in and about the business or duties assigned him by his employer. The words 'within the scope of his employment' as employed in the charge, without more, were not without confusing and misleading tendencies. L. & N. R. R. Co. v. Whitman, 79 Ala. 328; Mobile & O. R. R. Co. v. Scales, 100 Ala. 374, 12 So. 917."

2—Schmidt v. Balling, 91 Ill. App. 388 (389).

"Besides having no support in any allegation in the declaration, this instruction, which proceeds from the theory that a principal and his servant are liable jointly in an action in case for the torts of the servant while acting in the scope of his employment, is in direct opposition to the law as laid down in Herman Berghoff Brewing Co. v. Prybylski, 82 Ill. 361."

3—Trott v. Wolfe, 35 Ill. App. 163 (164).

"The wagon at the time was being driven by the son of the appellant, aged fifteen, and the man who was the regular driver sat on the right hand reading. Negligence is a question of fact for the jury, and they are to say whether the attention of the driver being turned in another direction so that he could not see the child, is an excuse or not."

the defendant to use reasonable care to avoid subjecting plaintiff to perils not obvious to the employment and which were unknown to the plaintiff, and if you believe from the preponderance of the evidence that the defendant did not use reasonable care to protect the plaintiff from peril not obvious to the employment, and that by reason of such lack of reasonable care on the part of the defendant, and plaintiff, while in the line of his employment, and while exercising due care for his own safety, was injured as alleged in the declaration, by reason of such perils, which was not obvious to the employment and unknown to the plaintiff, but which was known to the defendant, or by the use of ordinary care should have been known to it, if the evidence establishes that, then the defendant is liable and you should so find by your verdict, unless you believe from the evidence that such damages, if any, have been released or settled.<sup>4</sup>

**§ 3759. Liability when Relation of Master and Servant Has Ceased for the Day.** If the jury believe from the evidence that the defendant knew, or by the exercise of reasonable care could have known, that the step of the wagon in question was not reasonably safe for the plaintiff to get on and off said wagon in doing the ordinary business required of him, and if the jury further believe from the evidence that the defendant undertook to fix or repair said step but did it in such a poor and unworkmanlike manner as to still leave it unsafe for plaintiff to get on and off said wagon, and that thereby the plaintiff was injured while he himself was exercising all due care and caution as defined in instructions, then the jury are instructed that the defendant is liable for such injury, if any, as they believe from the evidence the plaintiff has sustained by reason of such defective step. Provided you shall further find from the evidence that the plaintiff did not, at the time of the injury, know the real condition of said step.<sup>5</sup>

**§ 3760. Reasonable Care Only Required for Safety of Employees.** The court instructs the jury as a matter of law, that the defendant was not required to guard B. from dangers which the defendant did not create, or of the existence of which the defendant had no knowledge or means of knowledge in the exercise of ordinary care on its part.<sup>6</sup>

4—Wiggins, F. Co., v. Hill, 112 Ill. App. 475 (478).

"The instruction is erroneous and misleading. By it the jury are authorized to consider all the perils to which the plaintiff was exposed in and about the business, whether they were necessarily incident thereto or otherwise."

5—Wink v. Weiler, 41 Ill. App. 336 (341, 342).

"The instruction assumes that the defendant owed to the plaintiff a duty, namely, the exercise of reasonable care to see that the step of the wagon was reasonably safe for the plaintiff to use. Such duty depended entirely upon the plaintiff's being, at the time he was injured, in the service of the defendant. In omitting to add such a qualification, the instruction was erroneous."

"The relation of master and servant having ceased for the day, the

duty of the defendant charged in the declaration, no longer existed. Wright v. Rawson, 42 Ia., 329, 35 Min. Un. Rep. 275; Belford v. Canada Shipping Co., 35 Hun. 347; Sinclair v. Berndt, 87 Ill. 174; Baird v. Pettit, 70 Penn. St. 477."

6—Brennan v. El. Instal. Co., 120 Ill. App. 461 (474).

"This instruction might well be understood to tell the jury that they should find the defendant not guilty (a) if they found that the fatal current which killed B. was not of its creation, and they should likewise find it not guilty, if (b) they found that it had in the exercise of ordinary care no knowledge or means of knowledge that that current would be turned on while deceased was on the pole. It is manifest that the first of these alternatives does not state the law. It is quite probable that the conjunction 'and' not 'or'



**§ 3761. Negligence of Master Must be Proximate Cause of Injury.**

(a) If the defendant was guilty of negligence with regard to him in the doing of the work in and about the doing of the work he was employed to do, then it is liable for damages resulting from the negligence if he was himself without fault.<sup>7</sup>

(b) If you believe from the evidence that D., after he saw the peril of L., if he so saw it, listlessly and inadvertently and negligently failed to resort to the proper use of all preventive means at his command to save L. from injury, you must find for the plaintiff unless you further find that L., after he became conscious of danger, was not free from negligence in attempting to save himself from injury.<sup>8</sup>

**§ 3762. Effect of Habitual Violation of Rules by Employees.** The court instructs the jury that if they believe from a preponderance of the evidence in this case, that the defendant made and posted notice of certain rules that had been adopted by the company for the safety of its employees; and if the jury further find from a preponderance of the evidence that the rules were knowingly habitually violated, and that by reason of such violation the plaintiff in this case was injured, that in such state of the proofs the defendant cannot shield itself from liability under the "fellow-servant rule."<sup>9</sup>

as it appears nor 'nor' as counsel for appellee suggest—was the word which the learned trial judge really meant to use to connect the two clauses of the construction. If the defendant had neither created the danger nor, in the exercise of the care required of it, had any knowledge or means of knowledge of its existence, then the conclusion that it was not under obligation to protect Brennan from it would follow; but as it stands the instruction is plainly bad. And we think, moreover, that to avoid misleading the jury it would have been better, even had the instruction taken on otherwise the proper form, for the court to have indicated in it that the care required was to be measured by the usual and known risks of the employment. For the error contained in this instruction the judgment should, in our opinion, be reversed and the cause remanded for a new trial. We are of the opinion that in a case of such conflicting testimony it is an error which cannot be overlooked."

7—Decatur C. W. & Mfg. Co. v. Mehaffey, 128 Ala. 242, 29 So. 646 (651).

"In the case of Western Ry. Co. v. Mutch, 97 Ala. 196, 11 So. 894, 21 L. R. A. 316, it was said by this court quoting from 16 Am. & Eng. Enc. Law p. 436: "To constitute actionable negligence there must be not only casual connection between the negligence complained of and the injury suffered, but the connection must be by natural and unbroken sequence, without intervening efficient causes, so that but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the

direct and immediate efficient—cause of the injury." That portion of the oral charge of the court in the following language: 'If it, (the defendant) was guilty of negligence with regard to him in the doing of the work, in and about the doing of the work he was employed to do, then it is liable for the damages resulting from the negligence, if he was himself without fault—does not correctly state the law as laid down in the case of Railway Co. v. Mutch supra, and, standing alone, unexplained, would be error, but, when taken in connection with other portions of the oral charge which instructed the jury to the effect that if there existed other efficient cause or causes intervening between the alleged negligence and the injury, the plaintiff could not then recover, the portion excepted to as above set out was relieved of reversible error."

8—Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. 573 (578).

"This charge given for the plaintiff was erroneous, in that it failed to postulate that the negligence of the engineer therein hypothesized produced the injury complained of. The negligence therein hypothesized, if true, may not have caused the death of the deceased."

9—Himrod C. Co. v. Clingan, 114 Ill. App. 568 (573, 574).

"This instruction tells the jury, in substance, that although the defendant had posted rules for the safety of its employees, yet if such rules were knowingly and habitually violated, then it could not shield itself from liability under the fellow-servant rule. It is not sufficient to deprive the master of the protection of a rule that it should have been knowingly and habitually violated.

§ 3763. **Whether Full Knowledge by Foreman of Plaintiff's Perilous Position Essential for Recovery Against Master.** If you find that the plaintiff was injured in any other manner, or by any cause which was not in obedience to the express order, if any, of the defendant's foreman, Mr. O., with full knowledge of plaintiff's situation at the time, then you will find for the defendant company.<sup>10</sup>

§ 3764. **Right of Servant to Rely on Assumption that There is no Danger in Obeying Order of Master.** (a) The court instructs the jury that when the master orders a servant to perform his work, the servant has a right to assume that the master, with his superior knowledge of the facts, would not expose him, the servant, to unnecessary perils; the servant has a right to rest upon the assurance that there is no danger, which is implied by such an order.

(b) The primary duty of the servant is obedience, and he cannot be charged with negligence in obeying the order of the master unless he acts recklessly in so obeying. Whether the plaintiff was directed by the foreman to work at the particular kind of work, and at the particular place where he was working at the time when he was injured, are questions of fact for the jury to determine from the weight of the evidence. And if you believe, from a preponderance of the evidence, that the foreman ordered the plaintiff to work at the particular work he was doing when injured, then whether he acted recklessly in obeying the foreman's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury.<sup>11</sup>

§ 3765. **Employment of Minor in Dangerous Position.** (a) If, on the other hand, you should find from the evidence that the child was of that character and possessed of such intelligence that it knew of the danger itself, that it was familiar with the danger of such work, the danger surrounding it, and that the negligence of the defendant did not contribute to the injury, then it would be your duty to find for the defendant.<sup>12</sup>

The master must either have had actual knowledge, or it must appear that by the exercise of ordinary care he would have known of such violations. *Brookside C. M. Co. v. Dolph*, 101 Ill. App. 172; *Chicago & W. I. R. R. Co. v. Flynn*, 154 Ill. 448, 70 N. E. 332. The only rule in evidence was one requiring employes to keep off the haulage ways during working hours. It had nothing to do with the hooking or unhooking of the switch, nor with the fellow-servant rule. The instruction was necessarily misleading."

10—*Pledger v. Texas Ry. Co.*, — Tex. Civ. App. —, 68 S. W. 516 (517).

"We think the charge was calculated to convey to the mind of the jury that full knowledge by the foreman of plaintiff's perilous situation was essential in order for plaintiff to recover, and we are of the opinion that the charge was erroneous, and for this reason the judgment will be reversed."

11—*McArthur Bros. Co. v. Nordstrom*, 87 Ill. App. 554 (555).

"It is not the law as stated in this instruction that the giving of

an order generally to go to work and do something that is part of the general work in hand, which is not, in the doing of it, an increase of the hazard of the general job, implies an assurance to the employe that there is no danger in the doing of it, irrespective of how the employe may perform what he is told to do. \* \* \* This instruction is not good law."

12—*Fries v. American L. P. Co.*, 141 Cal. 610, 75 Pac. 164 (165).

"This instruction is clearly erroneous. If the negligence of the defendant did not contribute to the injury, that was an end to the liability of the defendant, under all circumstances, and without regard to other considerations. If, however, the child, as in the instruction premised, was of sufficient intelligence to be able to comprehend, and did in fact comprehend, the danger surrounding its occupation, then no negligence could be imputed to defendant, if it did not give the employe instructions upon that point. The insertion of the clause, 'and that the negligence of the defendant did not contribute to the injury,'

(b) You are instructed that, in determining whether plaintiff exercised ordinary care, it is proper for you to take into consideration the nature of the service he was performing when injured, his knowledge or lack of knowledge of the work, the nature of the casing machine upon which he worked, whether simple or complicated, whether plaintiff's attention was required to be constantly concentrated on his work or not, whether but one place was required to be watched by him while working said machine to avoid danger, if there was danger, or numerous places, whether his work consisted of the repetition of one act or numerous acts, whether the instruction he received by defendant when he began work on said machine, if you find he received instruction, tended to aid him in safely working at said machine, or to confuse him, and all the facts and circumstances surrounding the case; and if you are satisfied from all the evidence that the work at which the plaintiff was employed at the time he was injured was dangerous, and that, on account of his youth and inexperience, he did not understand or comprehend its dangerous character, and you further find that while working upon said machine, at the time said injury occurred, plaintiff exercised such ordinary care and prudence as would ordinarily be exercised by persons of plaintiff's age, intelligence, and experience under like circumstances and conditions, then you will be warranted in returning a verdict for the plaintiff, and in assessing for him such damages as you think him justly entitled to.<sup>13</sup>

§ 3766. **Instruction of Minor by Master.** (a) If you find from the evidence that the plaintiff was a minor when he applied for and obtained the position of train hand, and that he was inexperienced in that service, and the defendant's agent knew it; and if you find that to couple cars was a part of his duty and that it was attended with danger, the defendant would not have a right to put him at that work without notifying him of the danger, and giving instructions as to how to avoid it.<sup>14</sup>

imports a wholly erroneous conception into the instruction. Having regard to the tender years of a minor employe, its capacity for understanding, and its opportunities to understand, if, with knowledge of the dangers, it voluntarily encounters the risk, and through its own negligence, is injured, the employer is not responsible, whether he has instructed the child as to those dangers or not. *Rodgers v. Railway Co.*, 67 Cal. 608, 8 Pac. 377; *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160; *Bailey's Master's Liability for Injuries to Servant*, p. 114. Moreover, even if the negligence of the defendant did 'contribute to the injury,' yet if plaintiff, having regard to his tender years and his capacity and opportunities for understanding, was himself negligent, there can be no recovery. *Studer v. Railway Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. 29; *McGraw v. Lumber Co.*, 120 Cal. 574, 52 Pac. 1004."

13—*Swift & Co. v. Holoubek*, 55 Neb. 288, 75 N. W. 584.

"It omitted altogether the element of defendant's negligence, and per-

mitted a recovery on the sole ground that the machine was of a dangerous character. Nearly all machinery is more or less 'dangerous' in the familiar use of that word; but an employer does not insure his servants, even youths, against accidents on that account."

14—*Atlanta & W. P. R. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 (764).

"This charge was too strong against the defendant. In *Davis v. Factory*, 92 Ga. 712, 18 S. E. 974, the question of the duty of employers as to giving instructions to minors employed in operating dangerous machinery was to some extent involved, and was very carefully considered. After an examination of numerous authorities the writer felt authorized to say: 'Without doubt, in some cases, even minors are not necessarily entitled to any warning at all as to the character of the machinery about which they are at work, or as to the proper method of operating it and avoiding obvious dangers. Much depends upon the nature of the machinery, the age, capacity, intelligence, and



(b) If you are satisfied from the evidence that at the time the plaintiff was employed by the defendants, they, or either of them, or one A. B. for them, warned the plaintiff that the planer which injured him was dangerous, and that he must keep away from the same while it was running, and that after being so warned the plaintiff, in violation of said warning and instructions, went so near to said planer while it was running that his arm was caught in said planer and injured, then you should find for the defendants.

(c) If you find from the evidence that, before the plaintiff was put to work at the planer, the defendants told him the planer when running was dangerous, and instructed him to keep away from the same while it was running, and that afterwards the plaintiff was injured by going too near the planer when in motion, then you should find for the defendants.

(d) If the plaintiff, before he was injured, had been properly warned of the dangers of his position, and instructed to keep away from said planer while the same was in motion, and afterwards was injured through his own carelessness, in going too near said planer when the same was in motion, you should find for the defendants.<sup>15</sup>

(e) You are instructed that it was not enough to give the plaintiff, or one of his age, general instructions as to the dangers, but the instructions to the boy should have been such as would have satisfied a reasonably prudent and careful person that he was familiar with the exact danger that would be likely to befall a boy of his age while working around the place where he was injured.<sup>16</sup>

experience of the employe, as well as all the surrounding facts and circumstances.' Applying the language just quoted to the facts of the case at bar, we think the court should have left it to the jury to determine whether, under all the circumstances, it was incumbent upon the defendant to give to the plaintiff at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work, and how he could safely perform it."

15—Taylor v. Wootan, 1 Ind. App. 188, 27 N. E. 502 (503), 50 Am. St. 200.

"These instructions were properly refused. The first and third do not state the law correctly, as applied to the facts in this case. It was proven without contradiction that the appellee was but 12 years of age at the time he was injured, and that he had worked but two and one-half days for the appellants, and was wholly inexperienced in the running and operation of the machinery in the manufactory, and that he was employed to work in connection with the planer. Under these circumstances, it cannot be declared as a matter of law that the employers absolved themselves from responsibility by simply telling the appellee of the dangerous character of the machinery and warning him to keep away from it while it was in motion. They knew his age and

lack of experience, and it was their duty to have so graduated their instructions to his youth, ignorance and inexperience as to have enabled him to fully understand and appreciate the dangers surrounding him, and to have placed him, with reference thereto, in substantially the same relation as if he had been an adult. Instructions to an inexperienced servant must be such as to enable him to comprehend the dangers of his situation, and appreciate the necessity of adopting prudent methods for his protection. Woods, Master & Serva. para. 350. The first and third instructions requested by appellants fell far short of the requirements of the law."

16—Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869 (870).

"Counsel criticize that portion of this instruction which is to be the effect that general instructions are not sufficient. As an abstract statement, this portion of the charge may not be correct. Instructions are required for a particular purpose, and if they are sufficient to satisfy the requirements of the law in that regard, it matters not whether they are general or special. While it cannot be said, as a matter of law, that general instructions are not sufficient, yet, when we take this statement in connection with what follows, we think the instruction as a whole fairly states the law."

**§ 3767. Wound as Direct Cause of Disease from which Servant Dies.** If the jury find from the evidence that the deceased, A. B., was injured by a wound in the face, and that said wound was the direct cause of producing erysipelas that caused the death of said A. B., then said wound was in law the cause of the death of said A. B.<sup>17</sup>

**§ 3768. General Instruction as to Plaintiff Making Out His Case.** If the jury believe from the evidence that plaintiff has made out his case as laid down in his declaration, then you must find for the plaintiff.<sup>18</sup>

### REASONABLY SAFE PLACE FOR WORK.

**§ 3769. Master Must Furnish Reasonably Safe Place and Surroundings.** (a) The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff was an employe of the defendant, then it became and was the duty of the defendant, by its agents, to exercise reasonable care, taking into consideration the nature of its business and instrumentalities employed, to provide and keep in suitable repair and condition the structures, if any, around and under which he was to work; and if you believe from a preponderance of the evidence that the plaintiff, while in the exercise of due care, was injured in consequence of neglect on the part of the defendant of its said duty as charged in the plaintiff's declaration, then you should find the defendant guilty.<sup>19</sup>

17—East St. Louis C. Ry. Co. v. Dwyer, 41 Ill. App. 522 (523-524).

"By this instruction the jury were informed, if deceased was injured by a wound that was the direct cause of the disease of which he died, then in law said wound was the cause of his death. No reference is made to the instrument or means whereby he was injured. In this instrument the material averment that the lever of a defective jack-screw inflicted the wound, is entirely ignored. If his injury, and death resulting therefrom, was not so caused, there could be no recovery. Yet, by this instruction, the jury would probably understand that the proof of said material averment was not essential. Furthermore, the cause of death was a conclusion of fact to be found by the jury; not a presumption of law to be declared by the court."

18—C. R. I. & P. Ry. Co. v. Cleveland, 92 Ill. App. 308 (309).

"This instruction has been repeatedly approved by the Supreme Court in a number of cases cited, viz: Laffin, etc., Co. v. Tearney, 131 Ill. 322 (325), 23 N. E. 389, 19 Am. St. 34, 7 L. R. A. 262; Pennsylvania Co. v. Marshall, 119 Ill. 399-404, 10 N. E. 220; Chicago M. & St. P. Ry. Co. v. O'Sullivan, 143 Ill. 48-59, 32 N. E. 398; but the question here made that it omits important elements of appellants' defense, namely, that appellee assumed the risk, does not seem to have been presented to the court in any of these cases.

"It has been repeatedly held that, when an instruction purports to give the different elements which, if found to exist, will authorize a recovery, it should omit no element essential to a recovery. Chicago Ath. Assn. v. Eddy El. M. Co., 77 Ill. App. 204-7; Pardridge v. Cutler, 168 Ill. 504-12, 48 N. E. 125; City of Chicago v. Schmidt, 107 Ill. 186-91. If the jury was guided by this instruction, then they could reach a verdict for appellee without any reference to whether he assumed the risk of his employment or not. Am. S. Co. v. Chicago & A. R. R. Co., 177 Ill. 513-23, 53 N. E. 97; Gorell v. Payson, 170 Ill. 213-19, 48 N. E. 433."

19—Montgomery C. Co. v. Barlinger, 218 Ill. 327 (336, 337), 75 N. E. 900.

"This instruction wholly ignores the question of assumed risk, which was vital to the appellant's defense, and was, in effect, a direction to find in favor of the appellee, as all the facts found in this instruction, upon which the directed verdict was predicated, were substantially conceded to be true by appellant. The giving of the instruction constituted reversible error. (Lake Erie & W. R. Co. v. Wilson, 189 Ill. 89, rev'g 87 Ill. App. 360, 59 N. E. 573). Nor was the error cured by the instructions given on behalf of the appellant. (Ill. C. R. Co. v. Smith, 208 Ill. 603, 70 N. E. 628; Ill. T. C. L. Co. v. Hanley, 214 Ill. 243, 73 N. E. 373). In Partridge v. Cutler, 168 Ill. 504, on page 512, it is said: 'The law applicable to different questions may

(b) The court instructs the jury that it was the duty of the defendant in this case to afford the plaintiff a reasonably safe passage to and from his work, for travel.<sup>20</sup>

(c) The court instructs the jury that the master is bound to use ordinary care to provide machinery and appliances reasonably safe and suitable for carrying on the business in which the servant is engaged, and a reasonably safe place for him to work in, while so engaged in his service. And if the jury believe from the evidence that the defendant on the — day of —, 18—, was possessed of the packing house in question, and then had the plaintiffs and other servants engaged in remodeling and repairing the same, as alleged in the declaration, and that the defendant failed to exercise ordinary care to furnish the plaintiff with a reasonably safe place to work in, while so engaged in its said work, and that the place so furnished to plaintiff was dangerous, and that the plaintiff while in the discharge of his duty with due and ordinary care for his personal safety, and to prevent injury, and without notice of such danger, was in consequence of said failure and negligence of the defendant, then and there injured, then the jury will find for the plaintiff, and assess his damages at such sum as they believe from the evidence to be just compensation for the injury so sustained, not, however, to exceed the amount sued for.<sup>21</sup>

(d) The jury are instructed as a matter of law, that it was the duty of the defendants, so far as practicable, to furnish the plaintiff a reasonably safe place in which to do the work for which he was employed.<sup>22</sup>

(e) If the defendant furnished plaintiff a place which was as safe and free from danger as other persons of ordinary care engaged in like business and under like circumstances ordinarily furnish, then you will find for the defendant on such fact; but not if you find that places provided by such other employers of labor for their workmen

be stated in each. In such case the instructions supplement each other, and if they present the law fairly when viewed as a series, it will be sufficient. But if an instruction directs a verdict for either party, or amounts to such a direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed."

20—Himrod Coal Co. v. Clingan, 114 Ill. App. 568 (572, 574).

"This instruction in effect tells the jury that it was the absolute duty of the defendant to afford the plaintiff a reasonably safe passageway to and from his work. This is not the law. The instruction states the duty of the master too strictly. It is the duty of the master to use ordinary care only to provide a reasonably safe place for his servant to work, and to use in going to and from his work. Metcalf v. Nystedt, 102 Ill. App. 71, aff'd 203 Ill. 333, 67 N. E. 764; L. E. & W. R. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573."

21—Swift & Co. v. Raleigh, 54 Ill. App. 41 (48).

"The negligence on the part of ap-

pellee, which is made the basis of recovery under this instruction, is very general indeed, that is to say, that appellant did not furnish appellee a reasonably safe place in which to work, and that the place so furnished was dangerous. The generality of this language allows the imagination too much liberty for the proper adjustment of the differences between the parties. No other instruction was given for appellee on this point, and the limitations imposed by instructions given for appellant are not such as to cure the error under consideration."

22—Scott v. McMenamin, 51 Ill. App. 121 (123).

"The duty of a master is to use reasonable and ordinary care not to subject his servant to extraordinary and unreasonable danger. Chicago, R. I. & P. R. R. Co. v. Lonergan, 118 Ill. 49, 7 N. E. 55; Chicago R. M. Co. v. Monka, 4 Brad. 664; Heyer v. Salsbury, 7 Brad. 93; Cooley on Torts, 557, Note 1.

"The vice of the instruction consists not so much in it as a proposition of law, as in its inapplicability to the case under consideration."



or servants are not reasonably safe places in which their men are obliged to work. It is for you to say, from the whole evidence, whether such is the fact or not, as you, and not myself, are the judges of the fact.<sup>23</sup>

§ 3770. **Changes Due to Prosecution of Work.** Where a mining company in the prosecution of its work in the extraction of ores and putting in timbers and floors thereon for the purpose of catching the ore as it is broken down and distributing it into various chutes, and the said floors and timbers are being from time to time changed in order to keep up with the work and receive and sort the material broken down in the further progress of such work, in such case said floors and timbers and passageways are to be deemed the work itself, and not the place of work, or the means of ingress or egress within the rule requiring the master to keep them reasonably safe.<sup>24</sup>

§ 3771. **Injury Through Defect in Staging.** For the purposes of this trial I instruct you that it was the duty of the defendants to supply a reasonably safe staging for the plaintiff to do this work upon; and if they were at fault in that regard, and he was injured by reason thereof, he himself not being in legal fault that contributed to his injury, then he is entitled to recover. I say it was the duty of the defendants to supply such a staging. It is conceded by the defendants that the staging was not of that character; that it was not suitable and safe for the purpose of putting those timbers in

23—Guinard v. Knapp, Stout & Co., 95 Wis. 482, 70 N. W. 671 (672).

"Ordinarily, the very highest degree of care possible will defeat the success of the enterprise. The law aims to be practical, and to favor what is practicable. The standard by which the liability of the defendant is to be tested is the standard which the law has provided. The jury may not be allowed to make a new one to suit their inclination, in the particular case. The defendant in the particular action may not be required to have been wise and prudent beyond all his fellows. That is the vice of this instruction. It plainly informed the jury that they were not limited by the law of negligence, but could make the law, for the case, according to their own notion of what was right. It is often easy, after the accident, to see how it might have been prevented. The retrospect has this advantage. Human provision is limited. This was a fundamental error, which must require a reversal of the judgment."

24—Downey v. Gemini Mining Co., 24 Utah 431, 68 Pac. 414 (417), 91 Am. St. 798.

"If such a request embraced the law upon this subject in cases like the one before us, the defendant would be relieved from any responsibility of using reasonable prudence and care in the prosecution of its work, and each employe might be remediless for injuries received on account of the negligence of the master. Under it the master could, in the dark tunnels and excavations

of the mine, where employes were required to pass in and out to their labor, remove the usual known means of ingress or egress or dig pitfalls in the department or place where the servants are employed or required to pass to and from their labor, of which the employes would have no information or warning and yet remain wholly irresponsible for injuries to them through such negligence, which might or could have been avoided by the use of care or the timely warning of the danger. Such a doctrine might be exceedingly beneficial to the master in avoiding liability, but could hardly be considered as humane to the servant. The servant, in his employment has the right to suppose that the master will conduct his business as respects the servant's safety with ordinary prudence and care, and that if he make the place where the servant is employed, or is required to pass to his work, dangerous and unsafe, which was before reasonably safe, and is himself aware that the servant has no knowledge of the changed conditions, then the master should warn the servant of such danger in time to prevent the injury. In the present case it appears from the testimony of the plaintiff that the master made the platform where the servant was required to pass dangerous and unsafe, and gave no warning of its condition, and thereby the servant, although using due care as the jury found, was injured. We are of opinion that the request was properly refused."

place upon the wall. Yet if they were in legal fault in this regard, the plaintiff cannot recover if his negligence contributed in any degree to the happening of the accident that produced the injury.<sup>25</sup>

25—*Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278, 47 Atl. 1085.

"The plaintiff, a carpenter of long experience, was employed by the defendants to work in the construction of their mill, and was placed under the superintendency of one W. as foreman. He was injured by the breaking down of one section of a long staging built before he came upon the job by the force of workmen which he joined. This structure was insufficient in that the crosspieces upon which the planks rested were fastened to the standard with nails of insufficient size, left with their heads a quarter of an inch or more from the wood. A few hours before receiving his injury the plaintiff was sent to repair the staging where it had been broken by the falling of a man upon it from a height of several feet, and found that the break was caused by the pulling off of a crosspiece, and re-nailed the piece. His own injury resulted from the pulling off of a crosspiece about 16 feet from the place so repaired. This occurred while the plaintiff and three others were carrying a stick of timber along the staging. Before going upon it with the timber, the plaintiff asked W. if the staging was safe to work on, and W. replied that it was all right if not loaded down with timbers, and told the plaintiff to go on with his work and not ask so many questions. The plaintiff testified that he made this inquiry because he thought the staging looked rather shabby and uneven. At the close of the evidence the defendants moved that a verdict be directed in their favor on the ground that the plaintiff had not made out a case entitling him to recover, which motion the court overruled *pro forma*. This saved the question whether the plaintiff upon his own showing was guilty of contributory negligence. The writer of the opinion is inclined to think that the defendants were entitled to have a verdict directed on the ground that the plaintiff had repaired an injury to the staging of such a nature, and so caused, that the repairing could not have failed to call the attention of a prudent and experienced mechanic to the improper construction and weakness of the structure. But a majority of the court are satisfied that there was a case for the jury. The court, for the purposes of the trial, charged that it was the duty of the defendants to furnish a reasonably safe staging for the plaintiff to do his work upon. The general rule requires that the master provide for his servant a reasonably safe place in which to work. The question is whether a structure of this character is within the gen-

eral rule. It has been held not to be in a number of well-considered cases in other states, and we think, upon sufficient ground. There is a plain distinction between places prepared by the master through the agency of one class of servants for the occupancy of another class in some employment to be therein carried on and places prepared for temporary use in the erection of a building by those employed for that work. The latter are not places in which to work in the ordinary sense of the term, but instrumentalities which the workmen themselves provide as means of carrying on the work they are employed to do. It was the duty of those employed to build the defendant's mill to erect whatever staging was necessary to their undertaking. The defendants were responsible for the sufficiency of the materials provided for the staging, but not for the manner in which their workmen used them. 1 *Shear. & R. Neg.* 317.

"The case presents the further question whether a staging is within this rule as to a workman who comes upon the job after it is built. It is true that the plaintiff sustained no relations to the defendants or their workmen while the staging was being built, and that, as far as his service, considered individually, was concerned, he went to work upon it as a place prepared for his use. But the plaintiff's service involved no use of the construction, and it had been prepared not by the master as something which he undertook to provide for the plaintiff, but by his workmen as a part of the general work which they had undertaken to do, and upon which plaintiff entered. We think that in associating himself with these workmen for the completion of the building by the use of the staging already erected, the plaintiff assumed the risks which attached to the workmen generally. The test of the master's liability is not whether the servant came before or after the staging was built, but the relation which the structure sustained to the relative duties of master and servant. It was said in *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742, that the fact that the workman came after the standing place was erected simply tended to free him from the charge of contributory negligence, but did not alter the relation which the master sustained to his servants and their work. It is true that some of the reasoning of that case would be inapplicable to this, because of the different facts involved. In that case the platform fell short of completion because of the failure to lay down some additional planks, while in this the plat-

§ 3772. **Injury by Falling on Flight of Defective Stairs.** (a) It all comes down to this: that if, upon a consideration of the facts and circumstances, and all the probabilities that bear upon this branch of the case, you should not believe the testimony of the plaintiff and of the witness X. as to the stairs upon which they claim the plaintiff fell, but believe that given on the part of the defense, to the effect that he fell in attempting to go down the basement stairs, you may stop right here, and render a verdict for the defendants.

(b) If the jury find from the evidence that the plaintiff is honestly mistaken as to the place where he fell, and that in fact he fell on the basement flight of stairs, and that such fall was occasioned by the negligence of the defendants' foreman, Y., in failing to notify the plaintiff or warn him that the steps on the upper part of said flight had been removed, or to warn him not to attempt to descend said stairs; and further if the jury believe that at that time people generally having business in the building were suffered and permitted by the defendants, or their servant or servants having charge there for them, to pass over said flight of stairs, and the plaintiff, having business in said building, was then attempting to go down said stairs, and so fell, without any contributory negligence on his part, and solely through the negligence of the defendants' foreman Y. as above stated, and by such fall was injured, the plaintiff is entitled to recover, and the jury should find a verdict in his favor.

(c) If the jury find from the evidence that the plaintiff fell on any part of the stairs leading from the basement to the first floor and was thereby injured; and that such fall was caused, without any fault or negligence of his own, solely by the negligence of the defendants' servant or foreman, while acting in their employment, and in the ordinary discharge of his duty as such, he, the plaintiff, is entitled to recover, whether he so fell on that part of said stairs known as the

form was complete in all its parts, but insecurely put together, and that because of the personal directions of the foreman. But when it is held that it was the duty of the workmen to provide the staging as an incident of their employment, the relation of the foreman to that part of the work is determined. It was not a matter regarding which the master owed an exceptional duty because of its requiring the direction of one specially skilled. The points wherein the structure failed were matters within the knowledge of all experienced carpenters. In the erection of the staging, W. was the fellow servant of all who worked upon the job, whether actually engaged in its erection or not. It is true that a master is liable to his servant for injuries caused by the negligence of an incompetent fellow servant whom he has negligently employed, and that it appears from special findings that W. was not a competent person to have charge of the work, and that the defendants ought to have known it. But the judgment cannot be sustained on these findings, for the

plaintiff could not recover on any ground if guilty of contributory negligence, and the finding that he was not thus guilty was under instructions applicable to the case as submitted, but not such as the defendants would otherwise have been entitled to. The jury were left to consider the conduct of the plaintiff upon the theory that he had a right to assume that the staging was safe until something came to his notice from which he ought to have known that it was unsafe. In this view the plaintiff's duty to exercise caution as regards the character and safety of the structure commenced only when he was put upon his guard concerning it. But if it was not the duty of the defendants to furnish a safe staging the plaintiff had no right to proceed upon the assumption that it was safe, but was bound to consider the question of its safety from the start. The theory upon which the case was submitted was not only erroneous in itself but harmful to the defendants on the question of contributory negligence."



“lower,” “first” or “basement” flight, or upon the other part thereof, known as the “upper” or “second” flight.<sup>26</sup>

§ 3773. **Injury Through Shear Leg of Derrick Falling.** Now, if you believe from the evidence that on or about the — day of —, the plaintiff was in the employ of the defendant, and as such employe was engaged in its service in assisting in erecting or placing a derrick or shear leg, and at the time G. was engaged in the service of the defendant, and as its employe, was intrusted by it with the authority of superintendence, control and command of the plaintiff, or with authority to direct plaintiff, while engaged in its employment; that the plaintiff, in the performance of his duty as such employe, by the command of G. climbed to the top of the derrick or shear leg, and while the plaintiff was at the top of said derrick or shear leg the same fell, and that it was caused to fall by reason and because of the fact that G. pulled the rope attached to the top of the same, and that an ordinarily prudent and careful person, under the same or similar conditions and circumstances, would not have so pulled upon such rope, and that the pulling of the rope by G. was the direct and proximate cause of the falling of the derrick or shear leg, and that by reason of the falling of the shear leg or derrick the plaintiff suffered injury, then you will find for plaintiff.<sup>27</sup>

§ 3774. **Placing Hot-Water Barrels in Dangerous Position—Plaintiff Stepping in when Frightened by Dog.** Were the actions and conduct of the dog, at the time of the accident, outside of, and foreign to, and not embraced in, the risks assumed by the plaintiff as an employe of defendant? And if you find they were extraneous to such risk, and of such a nature they could not reasonably be foreseen

26—Barker v. Paulsen, 116 N. Y. 660, 22 N. E. 959 (1900).

“The substance of the charge given and excepted to, and of the two requests to charge, and the refusal of the court to charge, amount to this: that the plaintiff was not allowed to go to the jury upon the question whether the accident occurred in any other place, or under any other circumstances, than those detailed by the defendants and their witness Y. We think, under the complaint, which does not charge at what particular place in the stairs the accident occurred, and upon all the proof in the case in relation to the occurrence of the accident, and the circumstances under which it occurred, the plaintiff was entitled to go to the jury, and to claim a verdict from the jury in favor of the plaintiff whether the accident occurred upon the upper or lower flight, or whether it occurred in the manner described by Y., and others of the defendants’ witnesses, or whether it occurred at the time and place, and in the manner, detailed by the plaintiff’s witnesses.”

27—St. Louis S. W. Ry. Co. of Texas v. Smith, — Tex. Civ. App. —, 63 S. W. 1064 (1905).

“We think it clear that the charge in effect assumes that G. pulled on the rope. It is not submitted as an issue whether he pulled on the rope,

but whether in so doing he was guilty of negligence, and whether the pulling of the rope caused the shear leg to fall. The error complained of is three times repeated in a subsequent portion of the charge, and nowhere is it clearly and distinctly left to the jury to determine whether or not G. in fact pulled on the rope. Of course, we understand that the trial court did not intend to assume the fact as proved, but it is necessary that this should clearly appear from the charge itself. In *Mo. K. & T. Ry. Co. of Tex. v. Williams*, 17 Tex. Civ. App. 675, 40 S. W. 161, it is held that a charge which, from its form of expression, is liable to be construed by the jury as assuming the proof of a material fact in controversy, is misleading and erroneous. It is said: “The charge should submit the issue to the jury clearly, and in such a manner as to leave no room for doubt that the issue of fact was not assumed to be proved.” The nature of the charge in the case last cited is almost identical with the charge here complained of. The objection to the charge is meritorious and requires a reversal of the judgment. *Hous. C. S. Ry. Co. v. Artusey*, — Tex. Civ. App. —, 31 S. W. 319; *Gulf, C. & S. F. Ry. Co. v. White*, — Tex. Civ. App. —, 32 S. W. 322; *Mo. Pac. Ry. Co. v. Christman*, 65 Tex. 369.”

or anticipated by him, were they, under the evidence before you, of such a character as would reasonably cause alarm or fright to such a degree in the plaintiff, as a man of ordinary caution, prudence and nerve, as to draw his attention to the dog, and to cause him to forget the hot-water barrels before him, and involuntarily to step into one of them? If you answer in the affirmative your verdict should then be for the plaintiff.<sup>28</sup>

§ 3775. **Absence of Safeguards Around Vat in Packing House.** If you believe from the evidence that the vat or structure containing the hot liquid, in which the plaintiff fell and was scalded, was not surrounded with safeguards for preventing accident or injury to those employed at or near it at the time when the injury occurred, as provided in the ordinances of the city of C., pleaded in the declaration, and offered and given in evidence in this case; and if you further believe from the evidence that the absence of such safeguards was the direct cause of the injury complained of in this case, and if you further find, from a consideration of all the evidence in the case, that just before and at the time of the accident the plaintiff was exercising reasonable care and caution, under all the circumstances, for his own safety, then the defendant would be liable.<sup>29</sup>

§ 3776. **Improper Construction of Runways to Vessel.** And even though the jury shall believe from the evidence that the planks and horses used in forming the runways leading from the vessel to the dock belonged to the W., yet if the jury further believe from the evidence that neither the company nor Mr. G., either by themselves or their agents or employes, or any of them, had anything to do with putting them up on the day the accident happened to the plaintiff, or had knowledge thereof at and before the happening of the accident, and that the accident was caused by the runways being improperly put up, then the jury shall find both the defendants not guilty.<sup>30</sup>

28—Meyer v. Boepple B. Co., 112 Ia. 51, 83 N. W. 809.

"It will be seen that the court therein omitted the necessary element of negligence on the part of the defendant, and of the want of contributory negligence on plaintiff's part, and, in effect, directed a verdict for the plaintiff upon the findings alone that the action of the dog was no part of the risk assumed by the plaintiff and caused the accident in question. Plaintiff had no cause of action against the defendant except upon proof of negligence in placing and maintaining the barrels in the position they were, and upon proof of no negligence on his part, and these were questions of fact instead of law, and should have been incorporated in the positive instruction given, for the jury to determine. Quinn v. Ry. Co., 107 Ia. 710, 77 N. W. 464."

29—Chicago P. Co. v. Rohan, 47 Ill. App. 640 (645, 655).

"It is so well settled as to require no citation of authorities, that an employe can not recover for an injury suffered in the course of the business about which he is em-

ployed, on account of defective appliances used therein, when such injury was received after he had a knowledge of the defect and continued his work. Upon becoming aware of the defective condition of such appliances, he should desist from his employment; but if he does not do so, and chooses to continue, he is deemed to have assumed the risk of such defect, at least when he has not been induced by his employer to believe a change would be made, and has not plainly objected. The court, by its instruction, utterly disregarded this well known principle."

30—Alabaster Co. v. Lonergan, 90 Ill. App. 353 (358).

"We think the instruction as asked should not have been given, for the reason that it was calculated to mislead the jury in omitting the question of liability of the plaster works and G. for the acts of their agents or employes. The modified instruction was also in our opinion improper, in that it, in substance, tells the jury that the plaster works or G. would be liable for the improper putting up of the runways by their

§ 3777. **Injury to Miner Through Defective Roof in Mine.** (a) The court, on motion of plaintiff, instructs the jury that if they believe and find from the evidence that on or about ———, 18—, the deceased, W. F., husband of plaintiff, was in the employment of defendant in its mine, and that while in the discharge of his duties he was, without carelessness or negligence on his part which contributed thereto, injured by reason of a large rock falling from the roof of said mines upon him, and that he thereafterwards on the next day after the injury so received died, and should further believe and find from the evidence that the said roof of said mine was at the time when deceased was injured, as aforesaid, defective and unsafe, and that such defective and unsafe condition thereof was unknown to the deceased, and could not have been known by ordinary care and caution on his part, but was known to defendant, or might have been known by it by the exercise of reasonable caution and diligence on its part, then the jury will find for the plaintiff.

(b) If the jury believe and find from the evidence that the roof of said mines, as mentioned in the petition, was at the time deceased was injured in a defective and unsafe condition on account of the character of rock composing it, or the want of the necessary pillars or supports to hold it up, and should further believe and find that the agents or servants whose duty it was to inspect and maintain the roof of said mines knew, or by the exercise of reasonable care might have known, the condition thereof, then such knowledge was the knowledge of the defendant, and the neglect or failure to obtain such knowledge was the negligence or failure of defendant. The jury are further instructed that it was the duty of the defendant to provide for the use of its employes a reasonably safe place for them to perform the duties of their employment, and if the jury should believe and find that the defendant, under all the circumstances, negligently failed to furnish a reasonably safe roof for its mines, where the deceased received his injuries, and that the deceased was injured in consequence thereof, he being at the time in the exercise of reasonable caution and care under the circumstances, then your verdict should be for the plaintiff.

(c) The court further instructs the jury that if they believe and find from the evidence that the defendant was operating a lead mine, and had the deceased employed therein at the time mentioned in these instructions, and that the work in said mines was unsafe and dangerous at the time, then it was the duty of the defendant to use every reasonable precaution to secure the safety of its employes; and if you should believe and find from the evidence that through the negligence of the defendant loose rock was permitted to remain in the roof of said mine, and that the deceased was working under said roof, not aware of the existence of such loose rock, and that while so working a rock fell therefrom upon the deceased, whereby he was injured, of which injuries so received he died; and you further find that the defendant did not use reasonable precaution, under all the

agents or employes if they 'had knowledge thereof at and before the happening of the accident.' This could not be so unless there was

sufficient time after the knowledge acquired by the defendants to enable them by the exercise of ordinary care to have prevented the accident to the plaintiff."



circumstances, to insure deceased from the injuries aforesaid by the falling rock—then you should find the issues for the plaintiff, unless the danger was so patent and obvious that an ordinarily observant man in the situation of the deceased would have observed it.

(d) You are further instructed that it was not incumbent upon deceased while in defendant's employment to search for latent or hidden defects in the roof of its mines, and unless, by ordinary care and caution, the defective and unsafe condition thereof could have been discovered by the deceased, he had a right to assume that the mine where he was working, including the roof thereof, was safe and sufficient for the purpose of his employment.

(e) You are instructed, although you may believe and find from the evidence that the deceased knew, or by the exercise of ordinary care might have known, that the roof of said mines was in a defective and unsafe condition, and under the same continued to work, yet if said roof of said mines where deceased was at work was not so dangerous as to threaten immediate injury to him at the time and under the circumstances of the injury, or if he might have reasonably supposed that he could safely work by running his machine then and there by the use of care and caution, he cannot be said to have been guilty of such contributory negligence as to defeat a recovery by plaintiff, provided that in working at the time he exercised such care as a careful and prudent man of his calling would exercise under like circumstances.<sup>31</sup>

**§ 3778. Failure to Inspect Mine in the Morning.** If you believe from the evidence that the defendant by its inspector omitted to make the examination of the mine in the morning before the miners, including the deceased, were permitted to enter the mine on the day the accident occurred by which the defendant lost his life, then in determining whether such omission was willful on the part of the

31—Fisher v. Central Lead Co., 156 Mo. 479, 56 S. W. 1107 (1111).

"The evidence offered for the defendant tending to show that the pillars or supports of the roof of the mine were sufficient in number and strength, which was rejected, was competent, and should have been admitted on that issue. Its rejection, however, might not have wrought injury to the defendant's case, as the evidence as to the sufficiency of the supports was substantially all one way, but for the fact that in the second instruction the want of necessary pillars or supports is postulated as a ground of recovery. In this the court certainly committed prejudicial error. The court also erred in admitting in evidence a conversation had between S. and F. several days before the accident, which was irrelevant to the issues of the case, and calculated to prejudice the minds of the jurors.

"The learned counsel for the defendant criticises each one of these instructions in detail, pointing out errors of which they complain, and sums up by saying, 'That, taken altogether, they are a tissue of errors, and constitute a travesty on the law of this case.' We do not deem it necessary to follow the criticism of

counsel through each of these instructions, but, taking them altogether, the paramount error we find in them is that they fail to instruct. The real issues of the case on the evidence we have already pointed out. These instructions were not adapted to those issues, nor calculated to assist the jury in arriving at a correct conclusion upon them. But, on the contrary, by reason of their inapplicability to the facts in issue, each contained errors calculated to confuse and mislead the jury, and the same may be said of some of the instructions given for the defendant. The court did not err in refusing the three additional instructions asked for the defendant. This case furnishes an apt illustration of the futility of endeavoring to apply abstract propositions of law to a case they do not fit. For the errors noted, and to the end that a jury in another trial may be told, not what the law of the case is (it is sufficient if the court understands that), but clearly what they must do, by way of a verdict, on the facts in the case really in issue, as they may find them, the judgment of the circuit court is reversed and the cause remanded for new trial."

defendant, you may consider whether the defendant continuously omitted such examination for a considerable period of time immediately before such accident, if you believe from the evidence that it did so omit such examination; but you are not to understand the court as saying to you that such continuous omission would of itself make the omission on the day of the accident willful, but simply that you may consider that evidence in connection with all the other evidence in the case. And the court further instructs you that you must not consider any such evidence of previous omissions as proving or tending to prove that the defendant or its examiner omitted to make such examination on the morning of the day on which the accident occurred.<sup>32</sup>

§ 3779. **Failure to Put Posts in Neck of Old Rooms of Mine.** The court instructs the jury that it was the duty of the defendant to exercise reasonable care to provide the deceased, W. H., with a reasonable safe place to work, considering the nature of his employment, and if the jury believe from the evidence that under the custom of miners engaged in drawing stumps in defendant's mine at the place where deceased was killed it was the duty of defendant to put up posts in the neck of the old rooms, and shall further believe from the evidence that the defendant negligently failed to set up said posts, and by reason of said failure slate was caused to fall from the roof of said mine upon deceased and kill him, and that defendant's agents whose duty it was to look after the safety of said mine at the place where deceased was killed knew, or by the exercise of reasonable care could have known, of the dangerous condition of said mine in time to have prevented the death of deceased, they will find for plaintiff, and fix the damages as in instruction No. 2.<sup>33</sup>

§ 3780. **Willfully Neglecting to Furnish Props.** (a) The court instructs the jury that it was the duty of the defendant to deliver to the plaintiff as required by him with his empty cars timber of sufficient length and dimensions to be used as props and cap pieces, so that he might have been able to properly secure the workings for his own safety; and if the jury believes, from the evidence, that the plaintiff requested the defendant to deliver to him props of sufficient length and dimensions for his use to properly secure said workings for his own safety, and that the defendant willfully neglected or failed to furnish such props to the plaintiff upon such request, and that the plaintiff was injured by reason of such willful neglect of the defendant to furnish such props, as charged in the second count of the declaration, then you will find for the plaintiff, and you

32—Missouri & I. C. Co. v. Schwalb, 74 Ill. App. 567 (573).

"In view of the evidence, this instruction gives undue importance to an omission to make an examination in the morning before the miners entered. A failure to make such an examination might have been willful, and yet, if a subsequent examination was made in good faith before the accident, and the cause of the accident was not discovered, then a willful failure to make it at an earlier hour when the cause would have been less likely to be discovered is not a ground of recovery under the declaration."

33—Straight C. C. Co. v. Haney's Adm'r, 27 Ky. L. 1117, 87 S. W. 1114.

"In this instruction, the words 'under the custom of miners engaged in drawing stumps,' should have been omitted, and in lieu thereof these words should be substituted: 'in the ordinary course of business.' The instruction is also objectionable in that it assumes that the mine was in a dangerous condition, and after the words, 'and kill him,' this should be inserted: 'and that said mine at the time was not in a reasonably safe condition.'"

will assess his damages at such amount as you believe from the evidence he is entitled to recover.<sup>34</sup>

(b) The court instructs the jury that the operators of a coal mine must use all ordinary care to keep their workings in a reasonably good and safe condition, and if you believe, from the evidence, that the defendant had notice that the room in which the plaintiff was working was in an unsafe condition, and that the plaintiff requested of the defendant to deliver props of sufficient length and dimensions with the empty cars of the plaintiff so that the plaintiff might at all times be able to properly secure the workings for his own safety, and that the defendant failed to furnish said props, and that by reason thereof, while in the exercise of due care and caution for his own personal safety, the plaintiff was injured, as charged in the first count of the declaration, you will find the defendant guilty, and assess such damages as you believe, from the evidence, that plaintiff is entitled to recover.<sup>35</sup>

**§ 3781. Place of Employment for Shot-Workers in Mine.** If the jury believe and find from the evidence that one W., the straw boss for the plaintiff, had been informed by one C. that the room mentioned in the declaration was in a dangerous condition for men to work in, and if you further believe that after receiving such information—if you find that such information was received—said W., the straw boss, ordered and required plaintiff to work in said room, and that plaintiff, while obeying the orders and commands of the straw boss, was injured while using ordinary care for his own safety, then you should find the defendant guilty, unless you further believe from the evidence that the plaintiff knew that the room was dangerous and unsafe, or could have obtained such knowledge by the exercise of ordinary care and prudence for his own safety.<sup>36</sup>

**§ 3782. Method of Lowering Rails Into Mine.** The court further charges you, in the matter of what is a reasonably safe way to do a thing or perform an act, may be defined to be the way and manner that people engaged in the same business have adopted for doing the

34—*Sugar Creek Mining Co. v. Peterson*, 177 Ill. 324 (328), rev'g 75 Ill. App. 631, 52 N. E. 475.

"This instruction submitted to the jury the question whether the defendant willfully neglected or failed to furnish props and omitted any requirement of care on the part of the plaintiff, and was erroneous."

35—*Sugar Creek Mining Co. v. Peterson*, supra.

"This instruction assumed as a fact that the room in which plaintiff was working was in an unsafe condition, and submitted to the jury as a ground for recovery the question whether the plaintiff requested defendant to deliver to him props of sufficient length and dimensions to properly secure the workings. There was no evidence whatever that plaintiff had called for props of any particular length or dimensions, and that there was a failure to furnish according to his requirements."

36—*Muddy Valley M. & Mfg. Co. v. Parrish*, 74 Ill. App. 559 (562).

"The evidence tends to show that

the position of shot-worker in a coal mine is a dangerous employment, and that the rooms are likely to be in a more or less dangerous condition after a blast. Such dangers are incident to the employment of the shot-worker, and must be assumed by him. \* \* \* The instruction assumes that the room was in fact in a dangerous condition for men to work in, and does not attempt to direct the attention of the jury to the difference between that ordinarily dangerous condition in which the shot-worker may expect to find a room after a blast, the dangers of which he must assume, and that unusually dangerous condition, which might make appellant liable. It not only assumes that the room was in fact in a dangerous condition for men to work in, but induces the inference that if it was in a dangerous condition 'for men to work in' that would be a sufficiently dangerous condition to warrant a recovery by this shot-worker."



work. If you find from the evidence that the defendant adopted the ordinary and usual way of lowering the rails into its mines, which was the way that was adopted generally by mine owners in like cases, then in that event it would not be deemed carelessness or negligence on defendant's part to lower rails into the mine in this manner; and if an accident occurred thereby it would be an accident incident to the business and one for which the defendant is not liable.<sup>37</sup>

**§ 3783. Providing Foundations for Lumber Stacks.** On the question of negligence you are charged that it is the duty of those operating a saw mill and stacking lumber in its yards, through their agents or managers, to provide reasonably safe foundations for its lumber stacks. Such reasonably safe foundations as are commonly used by skilled and experienced millmen, and such as they could, by

37—Johnson v. Union Pac. C. Co., 28 Utah 46, 76 Pac. 1089 (1090).

"It is well settled that the master is required to exercise 'reasonable or ordinary' care for the safety of his servants while performing their duties. Reasonable care and ordinary care, which in law have the same meaning 'is the care which reasonable and prudent men use under like circumstances' (Cayzer v. Taylor, 10 Gray 274, 69 Am. Dec. 317), and must be measured by the character, risk and exposure of the business; and the degree required is higher where life or limb is endangered. As stated by Mr. Justice Field in the Nitro-Glycerine case, 15 Wall. 524-538, 21 L. Ed. 206: 'The measure of care against accident, which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interest were affected and the whole risk were his own.' In the case of Boyle v. Union Pac. Ry. Co., 25 Utah 422 (430), 71 Pac. 988 (991), which the appellant has cited as supporting its contention, Mr. Justice McCarty, speaking for this court, correctly stated the rule upon this subject as follows: 'The rule has become elementary that it is a duty the master owes to his servant to use reasonable care and prudence for his safety by providing the machinery in use with such appliances as will enable the servant with ordinary and reasonable care on his part to perform the duties required of him without danger, except as may be reasonably incident to the business or employment engaged in. That is, the master is required to provide the same kind of appliances, or appliances equally as safe, as those in general use by men of ordinary prudence who are engaged in the same kind of business. Bailey's Mast. Liab. pp. 15, 16, and cases cited. Shearman & Redfield Neg. § 194; Pool v. Southern Pac. Co., 20 Utah 210, 58 Pac. 326.' It is not only the master's duty to provide his servants with reasonably safe

appliances, but it is also his duty to use ordinary care in looking after, inspecting and keeping them in repair. Shearman & Redfield Neg. § 195; Bailey's Mast. Liab. p. 101. The same rule is stated in Titus v. R. R. Co., 136 Pa. 618 (626), 20 Atl. 517 (518), 20 Am. St. 944, which the appellant also cited as follows: 'No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man.' In Dickert v. Salt Lake C. Ry. Co., 20 Utah 394, 59 Pac. 95, this court held that: 'However usual the method of a common carrier, such as a street railway company, in starting its cars, if that method is dangerous, and its use violative of the high degree of care which the carrier is required to observe regarding its passengers, and in the use of that method, a passenger is injured, the carrier is liable.' Reasonable or ordinary care cannot be determined abstractly, for what would be such care in one case might be gross negligence in another, and therefore whether such care has been exercised depends upon, and can only be determined by the facts in each particular case, and is generally a question of fact for the jury to determine. Under the well settled rule upon the subject before mentioned, the instructions so as aforesaid requested are erroneous in this: that they are not limited in their application to the reasonable or ordinary manner in which similar work as that in which the defendant was engaged is generally performed under similar circumstances by reasonable and prudent persons engaged in the same occupation. As there was no proof that the conditions under which the work of the defendant was performed were the same as those under which reasonable and prudent persons engaged in the same occupation as the defendant generally perform their work, the instructions requested were not proper for that reason."

the use of ordinary skill, provide, and a failure to so do and provide would be in law negligence. The defendant company was required, and it was its duty in law, to provide a reasonably safe foundation for its lumber stacks, upon which its employes stacked their lumber, the foundations to be of that kind and construction as was ordinarily deemed safe for the purposes of stacking lumber and to keep the same in safe repair as far as ordinary skill and diligence could do, and, if the defendant company did this, then it could not be held liable, and, if you so find, you will find for the defendant. But if the foundation under the lumber pile was safe and sufficient, so far as ordinary skill and diligence could provide or ascertain, then the defendant would not be liable, and, if you so find, let your verdict be for the defendant.<sup>38</sup>

### SAFE AND SUITABLE APPLIANCES.

**§ 3784. Master's Duty to Provide Safe Appliances and Keep Them in Proper Repair.** The court instructs the jury that under the law it was the duty of the master, O., to furnish the servant, Z., with reasonably safe appliances, tools and instrumentalities with which to work. And if you believe from the evidence that the plaintiff was injured while in the exercise of that care for his own safety required of one of his age, capacity and experience, and by reason of the negligence of the master in failing to provide reasonably safe appliances, tools and instrumentalities, with which the plaintiff was to work, as alleged in the declaration, then you may find a verdict for the plaintiff.<sup>39</sup>

38—Kirby Lbr. Co. v. Dickerson, — Tex. Civ. App. —, 94 S. W. 155.

"As presented in these instructions, the duty imposed upon appellant was to provide a reasonably safe foundation for its lumber stack, and such as is commonly used by skilled and experienced millmen, and such as they could, by the use of ordinary skill, provide. The jury is instructed that the failure to do so would be, in law, negligence. This is the substance of the paragraphs of the charge complained of in the fifth assignment, and the same general principle, as to the duty of appellant, is presented in the other paragraphs referred to. The duty of the employer is made absolute, and although he may have exercised not only ordinary care, but the highest degree of care, if the foundation for the lumber stack proved to be not reasonably safe and not such as he could by the use, not of ordinary care, but of ordinary skill, provide, he is guilty of negligence and must answer for the consequences. The same obligation is imposed upon the employer to keep the foundation in safe repair, as far as ordinary skill and diligence could do, regardless of the amount or degree of care actually exercised by him. That this is a more onerous responsibility upon the employer than the law imposes is settled by the decisions of the Supreme Court of this state. In

the practical application of this measure of duty in the present case, appellee would have only been required to show that the foundation of the lumber stack was not reasonably safe, and that it was possible, by the use of ordinary skill, to have made it reasonably safe and kept it in such condition. These facts having been established, no amount of care on the part of appellant would have protected it from liability. The law imposed upon the appellant only the duty to exercise ordinary care to provide a reasonably safe foundation for the lumber stack, and a like degree of care to maintain it in such condition. This is not only theoretically, but practically, different from the measure of duty imposed upon it by the charge of the court. *Hous. & Tex. Ry. Co. v. Oram*, 49 Tex. 345; *Texas U. F. Ry. Co. v. McCoy*, 90 Tex. 266, 38 S. W. 36; *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. 894. In *Galveston, H. & S. A. Ry. Co. v. Crawford*, 9 Tex. Civ. App. 245, 29 S. W. 958, and *Hightower v. Gray*, 83 S. W. 254, 11 Tex. Ct. R. 392, cited by appellee in his brief, the doctrine of ordinary care as the measure of the employer's duty is expressly recognized."

39—*Osner v. Zadek*, 120 Ill. App. 444, (145).

"Under this instruction the jury may have found for the plaintiff if

§ 3785. **Negligence in Furnishing Reasonably Safe Machinery as Charged in the Declaration.** The jury are instructed that it was the duty of the defendant to furnish the plaintiff reasonably safe machinery to work with; and if the jury believe from the evidence that the defendant did not do so, but was guilty of negligence in that regard, as charged in the declaration, and that the plaintiff was in the exercise of ordinary care, and was without negligence on his part, injured by the negligence of the defendant as charged in the declaration, then the jury should find the defendant guilty.<sup>40</sup>

§ 3786. **Condition or State, When Shown to Exist, Presumed to Continue Until Rebutted by Evidence to Contrary.** You are instructed that a condition or state, when shown to exist, is presumed to continue until rebutted by evidence of plaintiff or defendant. Some evidence has been introduced by the plaintiff tending to show that some of the coal chutes at T., including the one in controversy, were out of order prior to ———; and the plaintiff claims that such condition continued until the time of the accident to him, and that at such time the said coal chute was by the negligence of the defendant, or its employes, in a defective condition, and that such negligence contributed directly to produce the alleged injury; and if you find from the evidence that defendant was guilty of negligence with reference to said coal chute, as claimed by the plaintiff, and that such negligence, if any, contributed to plaintiff's injury, the plaintiff would be entitled to recover therefor. On the other hand, evidence has been introduced by the defendant tending to show that subsequent to ———, and prior thereto, said coal chutes, including the one at which the accident occurred, were inspected at different times, and were repaired and in reasonably safe working order, not only prior to ———, but also subsequent to that date, and up to the time of the injury complained of by the plaintiff; and if you so find, then the plaintiff cannot recover in this case on the ground of claimed defective coal chute; or, if you find from the evidence that defendant exercised reasonable and ordinary care to inspect said coal chutes

they believed from the evidence that the machine was not reasonably safe, even though appellant used the utmost diligence to procure a safe machine, and even though there was no defect in the machine discoverable by the exercise of ordinary diligence. This is not the law. 'The master's obligation is not to supply the servants with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary and unreasonable danger.' Chicago, R. I. & P. R. R. Co. v. Lonergan, 118 Ill. 41 (49), 7 N. E. 55. 'The law imposes on the company the obligation to use reasonable care and diligence in providing suitable and safe machinery,' etc., p. 48. In this case the preponderance of the evidence tended to prove not only that appellant exercised reasonable care to furnish a safe machine, but that the machine was

safe when used with ordinary care. The instruction is erroneous and requires a reversal of the judgment. Belleville P. & S. Works v. Bender, 69 Ill. App. 189; Wabash R. R. Co. v. Farrell, 79 Ill. App. 508."

40—U. S. Rolling Stock Co. v. Chadwick, 35 Ill. App. 474 (476). "The phrase 'guilty of negligence in that regard as charged in the declaration' is distributive, and if the appellants were guilty as charged in any one count they were guilty as charged in the declaration.

"Where several counts all good, are referred to by the instruction for the plaintiff, and there is a lack of evidence as to one or more, it is held in Hannibal & St. J. R. R. Co. v. Martin, 111 Ill. 219, that it devolves upon the defendant to call the attention of the jury to the different allegations of the several counts, if he chooses so to do, and that case is applied and followed here in Lake Shore & M. S. R. R. Co. v. Johnson, 35 Ill. App. 430."



and to repair and keep the same in a reasonably safe condition, then the plaintiff in this case cannot recover.<sup>41</sup>

§ 3787. **Master not Liable for Latent Defects.** (a) It is the duty of the master to his servant to provide his servant with reasonably safe machinery and appliances with which to work, and if the master fails in this regard, and the servant is injured thereby, then the master is liable for such injury, unless the negligence or want of ordinary care of the servant is contributory to his injury.

(b) If you believe from the evidence that plaintiff was injured substantially as alleged, and that such injury was caused by the negligence of the defendant in providing the lever for use by the plaintiff, and that plaintiff did not assume the risk of danger arising from its use, and that the plaintiff was not guilty of contributory negligence, then you should find for the plaintiff and assess his recovery as hereinafter stated; but if you do not so find your verdict should be for the defendant.<sup>42</sup>

§ 3788. **Master Does not Insure Absolute Safety of Appliances.** (a) I charge the jury that the defendant is not an insurer of the lives of its employes, and that under the averments of this complaint there can be a recovery on the ground only of the existence of a defect in the ways or plant of the defendant. And if the jury find from the evidence that the defendant exercised reasonable care and diligence in

41—Atchison, T. & S. F. Ry. Co. v. Lloyd, 68 Kan. 369, 75 Pac. 478 (479). "The court in stating this rule should have incorporated into the instruction that such presumption may be rebutted by circumstantial as well as direct evidence."

42—Cudahy Packing Co. v. Roy, 71 Neb. 600, 99 N. W. 231 (232).

"Taking the instructions as a whole we are satisfied that under the circumstances in this case, where the question of the master's liability to his servant rests upon the single question whether or not the master used ordinary and reasonable care in furnishing and inspecting the lever whose breaking caused the accident, and where the master's liability may rest largely upon the question whether the defect in the lever was one which ordinary care could have discovered and guarded against, or was latent, so that the exercise of reasonable care by the master could not have discovered it, the unqualified statement that it was the master's duty to his servant to furnish a reasonably safe appliance to his servant was erroneous. We do not think that the proper rule can be better stated than in the language of Commissioner Irvine in *Lincoln St. R. Co. v. Cox*, 48 Neb. 807, 67 N. W. 740; "To a legal mind the word "reasonably" might perhaps imply the element of care; but we must deal with the instructions in the sense in which they would be understood by the jury. Notwithstanding these qualifying words, we think it quite clear, as already stated, that the instructions made the case turn upon

the fact of danger, and not the fact of negligence. A master does not insure his servant against defective appliances. He is not chargeable in all events because the appliances furnished his employes are defective. He is liable only when he has been negligent in the matter. The rule is that as to his servants he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice unless the exercise of ordinary care would have resulted in notice. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724; *Missouri P. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67, and *Union P. R. Co. v. Broderick*, 30 Neb. 735, 46 N. W. 1121, all recognize this rule." In *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 N. W. 821, 80 Am. St. 673, it is said by Sullivan J.: "The measure of defendant's duty to its servants was the care required by the usual and ordinary usage of the business. The standard of due care is the conduct of the average prudent man." See also *Chicago B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359; *Chicago B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462; *O'Neill v. C. R. I. & P. R. Co.*, 66 Neb. 638, 92 N. W. 731, 60 L. R. A. 443.

The principle stated in *Leigh v. Omaha St. Ry. Co.*, 36 Neb. 131, 54 N. W. 134, and in *Hammond v. Johnson*, 38 Neb. 244, 56 N. W. 967, has been modified by the later decisions of this court."

the selection of a suitable and safe machine, and that the same was a suitable and safe machine for the purpose for which it was being run, then the plaintiff cannot recover in this case.

(b) I charge the jury that the law does not require the defendant to guarantee the safety of its machinery as to its employes, but it does require the defendant to have exercised reasonable care and diligence on the selection of a suitable and safe machine; and if the jury find that such care and diligence was exercised in this case by the defendant in providing a reasonably safe machine on which the plaintiff was oiling, then I charge the jury there can be no recovery in this case.<sup>43</sup>

§ 3789. **Inspection of Tools and Appliances by Servant.** (a) The plaintiff had the right to assume that the tools and machinery furnished by the defendants were safe and proper for the performance of the services required of the plaintiff. It was not the duty of the plaintiff to inspect such tools and machinery, and for any failure to provide such suitable and proper tools and machinery and keep the same in reasonably good repair, if the jury find from the evidence that the machinery furnished by the defendants and used by plaintiff at the time of his injury was out of repair and in an unsafe and dangerous condition, which failure resulted in injury to the plaintiff, the defendants are liable, unless the plaintiff knew of such defects of such machinery, or by the exercise of reasonable care in the performance of the duties assigned, could have discovered such defects.<sup>44</sup>

(b) The jury is instructed that the servant is not bound to inspect the appliances furnished him by his master for the performance of his duties. The servant has the right to assume that the master has used ordinary care and diligence to furnish him, the servant, with appliances reasonably safe for the performance of his duties. The servant is bound to take notice of such defects as would be disclosed by ordinary care and diligence in observing the appliances furnished him; and if the jury find from a preponderance of the evidence in this case, that there was a defect in the plank in question in this case, and that such defect was the cause of the accident to the plaintiff in this case, and that the plaintiff did not know of such defect, and that he, the plaintiff, in the exercise of ordinary care and diligence would not have discovered the same, then, if you further find that such defect was one which would have been discovered by the defendants in time to have prevented the accident in question by the exercise of ordinary care and diligence in examination and inspection, then the jury should find the defendants guilty, provided the jury believe, from the evidence, that the plank had been provided by the

43—Houston Biscuit Co. v. Dial, 135 Ala. 168, 33 So. 268 (273).

"The duty which, under the statute, the defendant owed its employes extended to the use of care in the maintenance of its machinery as well as in providing it originally, but this duty of maintenance is ignored in above charges."

44—Falkeneau v. Abrahamson, 66 Ill. App. 352 (358).

"This instruction assumes that the appellee was in such a relation to the appellants, and the tools and

machinery with which he worked, that he need pay no attention to the condition of such tools and machinery.

But the proof in the case is clear that, as to that part of the cable which broke, that assumption is true.

The instruction also charges the appellants as insurers, and not for a liability only for want of ordinary and reasonable care. But the proof is clear of notice to the foreman put in charge of the machinery by the appellants."

defendants for use generally, in such use as it was being put to at the time of the accident, and if the plaintiff was in the exercise of ordinary care in all his conduct connected with or preceding the accident.<sup>45</sup>

(c) If the jury believe from the evidence that the plaintiff had constant opportunity to inspect any defect in the latch of the bucket that caused the accident for some time before the accident, and continued to work with such bucket, then he is chargeable with notice of the condition of said latch, and, if the accident was caused by such defect in said bucket, then verdict must be for the defendant.<sup>46</sup>

(d) You are instructed that the business of furnishing reasonably safe machinery, appliances, surroundings, etc., is upon the master; and while the master is not to be held liable for dangers and defects of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. And where the performance of the servant's duties requires constancy of attention to other matters, he has a right, and is entitled to assume that his master has furnished him with suitable and reasonably safe materials, machinery and surroundings, and relieved him, the servant, of investigation and inquiry in that regard.<sup>47</sup>

§ 3790. **When Appliances May be Deemed to be Safe.** As a general rule where appliances or machinery have been in use for years, and are not obviously dangerous, and it has uniformly proven safe, it may be presumed to be safe, and its use continued.<sup>48</sup>

§ 3791. **Increasing Danger Through Arrangement of Set Screw.** The court charges the jury that if they believe from a preponderance

45—*Armour v. Brazeau*, 191 Ill. 117 (123), rev'g 93 Ill. App. 235, 60 N. E. 904.

"It is one of the requirements of the law that an instruction shall be clear and simple and consist of a plain statement of the law which may readily be understood by the ordinary men who are called as jurors."

46—*Penn. Coal Co. v. Kelly*, 156 Ill. 9 (16), aff'g 54 Ill. App. 622, 40 N. E. 938.

"This instruction makes the plaintiff's right of recovery depend upon the question whether he made an inspection of the coal buckets to ascertain whether they were in repair or not, before using them, without reference to the question as to whether it was his duty in the exercise of due care to do so or not. The practical result of holding these instructions to correctly lay down the law would be to shift the responsibility of seeing that machinery and appliances furnished an employe are in good repair and reasonably safe from the master to the employe himself. But, however construed, the instructions are clearly erroneous in attempting to submit to the jury the question of law, namely whether it was the duty of plaintiff to examine the buckets of

defendant before he used the same.' If the servant must at his peril examine for himself, what becomes of the primary duty of the master to see that safe and suitable machinery and implements are furnished his employe?"

47—I. C. R. R. Co. v. Sanders, 58 Ill. App. 117 (120 and 122).

"Error in assuming a fact in issue is not cured by other instructions which assume that the question is still open. *Bressler v. Schwertferger*, 15 Bradw. 294. Such is the law where the evidence is conflicting, and the balance is doubtful. *Town of Geneva v. Peterson*, 21 Ill. App. 454. See, also, as clearly announcing the same doctrine the following cases decided by the Supreme Court: *Chicago & A. R. R. Co. v. Murray*, 62 Ill. 326; *Toledo, W. & W. Ry. Co. v. Larmon*, 67 Ill. 68; *Quinn v. Donovan*, 85 Ill. 194; *Wabash R. R. Co. v. Henks*, 91 Ill. 406; *Wabash, St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296."

48—*Godsell v. Taylor*, 41 Minn. 207, 42 N. W. 873 (874).

"This request was bad, because it laid out of account that the strength of machinery ordinarily becomes impaired by wear, and that to ascertain if such wear has rendered it unsafe may require some examination."



of the evidence that the plaintiff was injured by reason of the set screw, and that the same was so set or arranged that it increased the risks or dangers of the employe, plaintiff here, or that the lever attached to and connected with the "idler" was so defective that it could not be properly or efficiently used in stopping said saws when in motion, and that these defects were latent, defendant is liable.<sup>49</sup>

§ 3792. **Injury by Nut on Shaft Continually Coming Off.** You are instructed that if you find from the evidence that the nut on the end of the shaft in question was in the habit of coming off, or that it was off for hours at a time, or that by reason of such defect the wheel came out, the defendant was guilty of negligence.<sup>50</sup>

§ 3793. **Injury Through Defective Pulley.** In order to recover in this action, the plaintiff must establish by a fair preponderance of the evidence that the defendant was guilty of the particular acts of negligence charged in the complaint, namely that the defendant furnished and caused to be used in the performance of the work in which plaintiff was engaged, a defective and insufficient pulley, and that such defect and insufficiency in said pulley consisted in its small size or inherent weakness; that the pulley broke in consequence thereof, and caused plaintiff's injury, and that the defendant knew,

49—Harris Lumber Co. v. Morris, 80 Ark. 260, 96 S. W. 1067.

"The effect of this declaration was to make the defendant the absolute insurer of plaintiff's safety while performing service. It is true, as we said in *So. Cot. Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249, the master is bound to know of the structural parts of the machinery furnished to the servant, yet this instruction makes the master absolutely liable, regardless of the question of his negligence or care in selecting the machinery, because the arrangement of the set screw increased the danger. This instruction was erroneous in submitting to the jury the question concerning the alleged defect in the lever attached to the machine. There was no evidence that this defect contributed to the injury."

50—Shebek v. National Cr. Co., 120 Ia. 44, 94 N. W. 930 (1931).

"We think the jury would have been justified in drawing the conclusion from this instruction that defendant could not be chargeable with negligence unless it was first found that the 'wheel was in the habit of coming off, or that it was off for hours at a time.' It is very probable the court did not mean to be so understood, but the language employed is fairly capable of such construction, and had a clear tendency to mislead the jury. Certainly, the negligence of defendant is not to be made dependent upon the fact that the nut worked loose so often that the condition may be called 'habitual' or upon its being allowed to continue in that condition for 'hours.' It was defendant's duty not only to provide its employes a reasonably safe place to

work, but to use reasonable care and prudence in providing machinery and appliances safe and suitable for his use. This duty involves not only the furnishing of safe machinery, but watchfulness to keep it in safe repair. *Brann v. R. R. Co.*, 53 Ia. 595, 6 N. W. 5, 36 Am. Rep. 243; *Knapp v. R. R. Co.*, 71 Ia. 41, 32 N. W. 18; *Rogers v. Ludlow*, 144 Mass. 198, 11 N. E. 77, 59 Am. Rep. 68; *Ford v. R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598. See also *Wharton's Neg. Secs.* 212, 282. In other words, the master is to be held responsible not alone for defects of which he has actual knowledge, but for those as well, which the exercise of reasonable care and diligence on his part would have brought to his notice. This is to be considered, of course, in connection with the other rule, which holds the employe to assume the risk of all dangers which naturally or ordinarily pertain to the employment which he enters, as well as those dangers which are open and obvious to his senses as a person of ordinary intelligence and care. He is not required to inspect or search for obscure dangers or defects in his place of work, or in the machinery or appliances furnished him. He may rely upon the master having performed the duties which attach to that relation, save only as to such matters as are open to his observation, or such as, in the ordinary discharge of his employment, we may fairly say ought to have come to his knowledge. We hold, therefore, that the above paragraph of the charge states the rule of the master's liability in this case much too narrowly, and should not have been given."

or by the exercise of ordinary care could have known, of the defect and insufficiency of such pulley; and if the evidence fails to establish these facts, there can be no recovery. But if the evidence does establish these facts, then the plaintiff is entitled to your verdict.<sup>51</sup>

§ 3794. **Spike Maul Flying Off Handle.** The jury is instructed that it was the duty of defendant to furnish its section men with spike mauls which were reasonably safe and secure for said section men to work with in the performance of the work which was assigned by defendant to its section men to be done by them. If, therefore, the jury find and believe from the evidence in the case that the plaintiff, on or about the ——— day of ———, with one N., was employed by defendant as section man, and as such was engaged in spiking railroad rails to the ties on defendant's track; and if you further believe that for said work the defendant negligently furnished said N. an iron spike maul on a wooden handle with which to do said work; and if you further find from the evidence that by reason of the negligence of the defendant said spike maul was furnished to said N. in a condition that was not reasonably safe for use in driving spikes by reason of said spike maul not being sufficiently wedged and fastened on the handle; and if you further believe that while said N. was using said spike maul in driving a spike, it, the said spike maul, by reason of not being sufficiently wedged and fastened on the handle to render it reasonably safe for use in driving spikes, became loose on the handle, and flew off the handle, and struck and injured plaintiff, without any fault or negligence on the part of plaintiff, and while the plaintiff was in the exercise of ordinary care; and if you further find from the evidence that the defendant knew, or by the exercise of ordinary care might have known, of the unsafe condition of said spike maul, if you find from the evidence that said spike maul was unsafe, in time to have, by the use of ordinary care on the part of defendant, avoided injuring plaintiff, then your verdict should be for the plaintiff.<sup>52</sup>

§ 3795. **Defective Rope in Shaft of Mine.** If you believe from the evidence that the plaintiff, C. D., was injured as alleged in the complaint, and that said injury was proximately caused by the defect in the rope furnished by the defendant as alleged in the complaint, then and in that case you will find a verdict for the plaintiff, unless you further believe from the evidence that the plaintiff knew of the defect in the rope, or unless the defect in the rope was so obvious that the plaintiff must have known of the defect, or that prior to the injuries the plaintiff was put upon inquiry by some discovery or

51—*Indiana Bituminous Coal Co. v. Buffey*, 28 Ind. App. 108, 62 N. E. 279 (282).

"The instruction plainly tells the jury that they may find for appellee if the facts stated in the instruction are established by the evidence without any reference to actual or constructive knowledge of appellee. Upon the authority of *Penn. Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763, and *Chicago I. & L. Ry. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244, this instruction must be held erroneous."

52—*Deckerd v. Wabash R. Co.*, 111 Mo. 117, 85 S. W. 982 (1905).

"The following clause in the instruction is criticised, to-wit: 'And if you further believe that for said work the defendant negligently furnished said N. an iron spike maul on a wooden handle with which to do said work,' on the ground that it gave the jury to understand that an iron maul on a wooden handle was not a safe and proper maul, that a wooden handle for such a maul was not a safe one, and that it was negligence to furnish such a maul. This clause is open to this criticism and had a tendency to mislead the jury."

suggestion of danger which it was gross carelessness for him to neglect.<sup>53</sup>

§ 3796. **Use of Various Kind of Hitches on Dirt Dumpers.** You have, for instance, in evidence that there are three kinds of methods by which these dirt-dumpers are taken out to the end of the dump for the purpose of having the dirt carried out to the end of the bank. They have a chain attached to the frame of the dumper, as in this case, and there is what is called the "center hitch," fastened to the body of the dumper, and another method is what was called the "side hitch." The proper question for you to determine is as to which of these hitches was the proper hitch for these parties to make use of at this colliery; and it is also for you to determine whether, in making use of the proper hitch at this colliery, it would have been a safe thing for them to employ boys at the age of fourteen or fifteen years, or sixteen, for the purpose of driving this dumper and attending to this work. That is a question of fact for you to dispose of under the evidence in this case.<sup>54</sup>

§ 3797. **Injury While Handling Water Pipe and Sand Bucket.** You are further instructed that if you find from a preponderance of the evidence of this case that P., one of the defendants, directed the plaintiff to assist in handling certain water pipes and sand bucket at the plant of the above named defendant, and ordered said plaintiff to do whatever was necessary to assist them in handling said water pipe, and sand bucket, and that it was necessary to so assist the said employe, and that plaintiff in compliance with the directions of said P., defendant, proceeded to and did assist in handling said water pipe and sand bucket and that in pursuance of and in compliance with such directions, he received the injuries complained of in the petition, then your verdict will be for the plaintiff.<sup>55</sup>

§ 3798. **Placing Caps and Dynamite Packed in Sawdust in Uncovered Box on Tender of Engine.** The court instructs the jury that if they believe from the evidence that the defendant S. was guilty of negligence in putting the dynamite mentioned in the evidence in a box, and in with caps for exploding such dynamite, and putting sawdust on it, without the box so packed being covered or protected, then they must find for the plaintiff, if they believe such negligence of the defendant to have been the proximate cause of the injury complained of, although they may further believe from the evidence

53—Gribben v. Yellow A. M. & M. Co., 142 Cal. 248, 75 Pac. 839 (841).

"So, it will be seen that the court assumes that the only means of going down the shaft was the rope, that it was furnished by the defendant for that purpose, and ignores altogether the question whether, if the rope was worn or weakened, the carelessness or negligence of the plaintiff and his fellow servants caused the same."

54—Kehler v. Schwenk, 144 Pa. 348, 22 Atl. 910 (911), 27 Am. St. 633.

"This was giving the jury an entirely erroneous view of the point of the case and their province in regard to it. They should have been told that if they found from the

evidence that the lower hitch was the one in general use upon dirt-banks with an up grade, there was no negligence in the use of that hitch by the defendants."

55—Standard D. & D. Co. v. Harris, — Neb. —, 106 N. W. 583.

"The instruction is complete in itself. It sets out a state of facts, and authorizes a verdict for the plaintiff upon a finding of those facts. An instruction thus framed is clearly erroneous, unless it includes every fact, not conclusively established, necessary to sustain a verdict for the plaintiff. Globe Oil Co. v. Powell, 56 Neb. 463, 76 N. W. 1081; Cortelyou v. McCarthy, 37 Neb. 742, 56 N. W. 620; Id. 53 Neb. 479, 73 N. W. 921."



that the witness D. was negligent in placing such box so unprotected on the tender of the engine.<sup>56</sup>

### FELLOW-SERVANTS.

§ 3799. **Fellow-Servants Defined.** Where a number of employes of a common master or employer are engaged in a common enterprise, and are paid by a common master or employer, then, regardless as to the department in the enterprise under which they are employed and may be engaged in rendering service, they are co-employees.<sup>57</sup>

§ 3800. **Elements Necessary to Constitute Relationship of Fellow-Servants.** Even if the jury should find that the plaintiff was injured by reason of the defective and improper construction of the shed which fell upon him, if they should also find that the condition of the shed was due to the negligence of other servants of the defendants, he was not entitled to recover, unless they further found that the defendants did not use reasonable care in selecting faithful and competent employes to construct the building.<sup>58</sup>

56—Schwartz v. Shull, 45 W. Va. 405, 31 S. E. 914 (917).

"This instruction should have not been given, for it is misleading, in that it submits to the jury the question of determining whether the defendant's negligence in putting the caps and dynamite together, packed in sawdust, in an uncovered box, was the proximate cause of the plaintiff's injury. This is a legal question, and should have been determined by the court."

57—Ingram v. Hilton & D. L. Co., 103 Ga. 194, 33 S. E. 961 (962).

"This charge is excepted to on the ground that it 'is not a correct statement of the law as to what constitutes one a fellow servant of another.' We think the exception is well taken. In Wood, Mast. & Serv. Par. 435, the author lays down the following rule for determining who are fellow servants: 'The true test of fellow service is community in that which is the test of service, which is subjection to control and direction by the same general master in the same common object; but, unless they are subject to the same general control, the fact that they are engaged in the same common pursuit does not render them co-servants. It is subjection to the same general control, coupled with an engagement in the common pursuit, that affords the test; and, unless the two elements concur, there can be no common service which disentitles an employee under the control of one master from recovering for injuries received through the negligence of a servant under the control of another master.' This rule has been adopted as sound by this court. Ellington v. Lumber Co., 93 Ga. 57, 19 S. E. 21. It will thus be seen that the test of fellow service is not as stated by the trial court, whether or not employes are paid by the same common master, but whether or not they are alike sub-

ject to direction and control by him, or by one whom he appoints to stand in his place."

58—Hearn v. Quillen, 94 Md. 39, 50 Atl. 402 (404).

"This prayer was erroneous, because the evidence did not tend to show that the defendant's other servants through whose negligence the injury occurred were fellow servants of the plaintiff. The employes of the same person, unless they are engaged in the same general business, are not fellow-servants, in the sense that each takes the risk of the other's negligence. Wonder v. Railroad Co., 32 Md. 418, 3 Am. Rep. 143; Yates v. Iron Co., 69 Md. 382, 16 Atl. 280; Norfolk & W. R. R. Co. v. Hoover, 79 Md. 266, 29 Atl. 994, 25 L. R. A. 710, 47 Am. St. 392. We do not think that the occupation of operating the sawmill at which the plaintiff was engaged when he was injured can be regarded in any sense the same general business or occupation as that of erecting the shed roof, even if the latter did stand over the mill. The other prayers of the defendants were requests in different forms to the court to take the case from the jury for want of evidence legally sufficient to maintain the plaintiff's case. After what we have already said of the evidence, it is apparent that these prayers should not have been granted. The fact that the roof fell under the circumstances disclosed by the record while it was in course of construction was, until otherwise explained, *prima facie* evidence of the insufficiency of the building. Mullin v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Howser v. Railroad Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. 332. Not only was there no evidence tending to otherwise explain the accident, but the testimony of the boss carpenter, already referred to, shows that the condition of some of the

§ 3801. **Failure of Master to Employ a Sufficient Number of Servants.** The court instructs the jury that it was the duty of the defendant to exercise reasonable care and diligence to employ a reasonable number of servants in and about the work in which the plaintiff was engaged to render the performance of the work by the plaintiff reasonably safe; and if the jury believe, from the evidence, that the defendant failed to exercise such reasonable care and diligence, and negligently failed to employ a sufficient number of workmen so as to render the performance of the work by the plaintiff reasonably safe, and that by reason of its negligence, if any, in that respect, the plaintiff was injured, and that before and at the time of the injury he was exercising reasonable care and caution for his safety, as charged in the declaration, your verdict should be for the plaintiff.<sup>59</sup>

§ 3802. **Who Are Fellow-Servants a Question of Fact for the Jury.**

(a) The court instructs the jury that the plaintiff and the servant in charge of and operating said car which struck said plaintiff were fellow-servants, and the plaintiff cannot recover under the first count of the original declaration, even if you find from the evidence that said servant was guilty of negligence in the manner in which he operated said car at the time and place in question.<sup>60</sup>

(b) The court instructs the jury that the servant employed to put machinery in proper order is not the fellow-servant of one whose duty it is to use it.<sup>61</sup>

posts on which the roof structure rested for support was regarded by him as so dangerous before it fell that he called the attention of one of the defendants to it. This court cannot give its assent to the proposition that a building or roof placed upon an insufficient base has been skillfully erected. *Commissioners v. Wise*, 71 Md. 53, 18 Atl. 31."

59—*Swift & Co. v. Rutkowski*, 167 Ill. 156 (1888), rev'd, 67 Ill. App. 209, 47 N. E. 362.

"This instruction was erroneous and well calculated to mislead the jury. We are not aware of any well-considered case where it has been held a servant who is in the exercise of reasonable care and caution may recover from the master upon the ground alone that the master has failed to furnish a sufficient supply of help, and yet the jury were so informed by this instruction."

60—*Chicago U. T. Co. v. Sawusch*, 119 Ill. App. 349 (353, 354), aff'd, 218 Ill. 130, 75 N. E. 797.

"The action of the court in refusing to give the instruction is assigned for error. We do not think it was error to refuse the instruction. It may be correct to say that the negligence charged in the first count of the original declaration does not include the question as to the proper equipment or construction of the car. Upon that point we express no opinion. Whether two servants of the same master in a given case are fellow-servants is a mixed question of law and fact. This

instruction makes it a question of law alone, and leaves to the jury no question of fact to determine as to the relation of the two men. If that question is a material question in this case, and we do not think it is, it was for the court, by proper instructions, to define the relation of fellow-servants, and for the jury to determine from the evidence whether the relation as thus defined existed in fact. Appellant cannot complain of this ruling of the court for the further reason that the court fully instructed the jury as to what constituted fellow-servants in other instructions, particularly in the fifth and twenty-fifth instructions given at appellant's request, where the substance of this refused instruction was given."

61—*Himrod Coal Co. v. Clingan*, 114 Ill. App. 568 (573, 575).

"This instruction invades the province of the jury in that it states as a matter of law, a servant employed to put machinery in order is not a fellow-servant of one whose duty it is to use it. The question whether the relation of fellow-servants exists in a given case is always one for the jury unless the facts admitted or proven beyond dispute show the existence of the relation within the established rule. *Hartley v. C. & A. R. R. Co.*, 197 Ill. 440, 64 N. E. 382; *Con. Coal Co. v. Fleschbein*, 207 Ill. 593, 69 N. E. 963. It is only when the evidence is such that all reasonable minds must reach the conclusion that the rela-

**§ 3803. Responsibility of Master for Incompetency of Fellow-Servants.** (a) If the injury happened to the plaintiff from any act or conduct on the part of these other servants or employes, which was not simply the result of negligence on their part, then the plaintiff would not be entitled to recover. That would be the negligence of co-employes, and for which he would not be entitled to recover. In order to entitle him to recover at all, in that connection, the court charges you that in respect to either of these alleged injuries, under the allegations as made in the original and amended petitions in this case, you must not only be satisfied that the defendant company was guilty of negligence, either itself or through its agents or representatives, in the employment and keeping in its employ of incompetent and unskillful servants, but that the happening of the injury to the plaintiff was the result, not of any negligence on the part of other servants or employes, but was the result, while they were in the discharge of the duty to which they had been assigned, of a want of competency and skillfulness on their part.<sup>62</sup>

(b) The court further instructs the jury that if the deceased in this case was placed to work by one H., the defendant's foreman, in and upon its electric mining machine, and that the service thereof was highly dangerous, and that the said H. operated said machine as runner, and that said deceased was inexperienced, and without instruction as to the danger and the operation of said machinery, and that the said H. was incompetent and inexperienced as a machine engineer or runner, and that while engaged in said service the deceased, in working about and upon said machine, under the orders, control and direction of the said H., as such runner and engineer, was crippled and injured by the negligence and incompetence of said H., then the defendant company is liable for such negligence and incompetence of said H., and the jury should find for the plaintiff.<sup>63</sup>

tion of fellow-servants exists between employes of the same master, that the court can declare them to be fellow-servants. *Duffy v. Kivilin*, 195 Ill. 630, 63 N. E. 503. The instruction is also but an abstract proposition of law and not by its terms applicable to the facts in the case and is therefore misleading."

62—*Ingram v. Hilton & D. L. Co.*, 108 Ga. 194, 33 S. E. 961 (1962).

"His honor was evidently endeavoring to apply the principles now embraced in section 2611 and 2612 of the Civil Code, in so far as they relate to the selection by a master of incompetent servants. It will be seen, however, that this charge does not distinctly bring out the idea which the language of these sections was intended to convey. While a servant is not ordinarily entitled to damages resulting from injuries caused by the mere negligence of a competent fellow servant, he is entitled to damages occasioned by the carelessness or negligence of an incompetent and unskillful fellow servant, if such carelessness or negligence were solely due to or arose from the latter's incompetency or unskillfulness, and if, in employing him or retaining him in his service, the

master failed to exercise ordinary care, and the injured servant did not know, and had not equal means of knowing, or could not by the exercise of such care on his part have ascertained, the fact that his fellow servant was incompetent, and therefore likely to perform his duties in an unskillful and negligent manner. In other words, the liability of the master arises because of his omission of duty to provide the injured employe with a competent fellow servant, not because the negligence of the latter is in law imputable to the master. The distinction above indicated was clearly pointed out by his honor, though it is evident that he had the same in mind."

63—*McVey v. St. Clair Co.*, 49 W. Va. 413, 38 S. E. 648 (1900).

"The above instruction is improper for the reason that it does not negative contributory negligence. *McCreery's Adm'x. v. Railroad Co.*, 43 W. Va. 110, 27 S. E. 327; *Fisher v. R. R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; *Webb v. Packet Co.*, 43 W. Va. 800, 29 S. E. 519; *Industrial Co. v. Shultz*, 43 W. Va. 471, 27 S. E. 255. It matters not what dangerous places a boy may be sent to. He may nevertheless, if not an infant of tender years, be guilty of



§ 3804. **Subsequently Acquired Knowledge of Servant's Incompetency by Master.** You are instructed that if the defendant used reasonable care in the employment of the hoister, M., and was satisfied that he was a fit and competent man to perform the duties of hoister, the defendant performed his full duty, and is not liable for a careless act of the hoister, unless the hoister between the hiring of the hoister and the time of the accident, became incompetent and the defendant had knowledge thereof.<sup>64</sup>

§ 3805. **Not Duty of Servant to Inquire as to Competency of Fellow-Servants.** The court instructs the jury as a matter of law, that one employed in a service is not bound to investigate and find out at his peril whether the common master has used reasonable care in the selection of those already employed in the same branch of service; but on the contrary he is warranted in assuming that his employer has discharged his duty in that respect, and until notice to the contrary is brought home to such servant, he may act upon that supposition.<sup>65</sup>

§ 3806. **Fellow-Servants in Mine.** (a) You are instructed that when the plaintiff engaged in the employment of the defendant for compensation he took upon himself the risks and perils ordinarily incident to the performance of the service for which he was employed. That one of the risks and perils, under the laws of Wyoming, as assumed by the said deceased is that resulting from the carelessness and negligence of the other servants in the same general employment. If you therefore find from the evidence that the accident resulted from the negligence of the engineer operating the hoisting engine, or from the negligence of any of the men who were employed in taking rails down the slope, then and in either of said cases plaintiff could not recover in this case, for the reason that the accident was caused by the omission or act of a fellow-servant with the deceased, for which omission or negligence the said defendant is not liable.

(b) The court instructs you that the defendant in this case is not liable for any neglect or misconduct of the fellow-servants of plaintiff which may have caused his injuries, and further charges you that Mr.

such acts of careless negligence, depending on his age, knowledge, experience and physical ability, as will amount to contributory negligence, and whether his acts do amount to such is a question of inquiry for the jury, and this instruction excludes this question from the jury's consideration. It is complete in itself, and directs a finding in favor of the plaintiff, and cannot be aided by other instructions."

64—Johnson v. St. Paul & W. C. Co., 126 Wis. 492, 105 N. W. 1051.

"There are two answers to this assignment of error: First, the instruction is one touching the general question of the liability of the defendant, is not applicable to any of the questions of fact submitted by the special verdict, and hence could not properly be given to the jury. Second, it is erroneous because it requires that the defendant should have actual knowledge of the

subsequently acquired incompetency of the servant, whereas, it is sufficient if in the exercise of reasonable care the defendant should have ascertained the fact of such incompetency. Kamp v. Cox Bros. & Co., 122 Wis. 206, 99 N. W. 366."

65—Himrod Coal Co. v. Clingan, 114 Ill. App. 568 (573, 575).

"There is no averment in the declaration upon which to base this instruction, nor does it appear from the evidence that the defendant employed or retained in its employ an incompetent or unskillful person. The instruction therefore submitted to the jury a cause of action at variance with that set out in the declaration. An instruction must be upon a theory advanced by the pleadings, and which there is some evidence to support. Rosenkrans v. Barker, 115 Ill. 332, 3 N. E. 93; Penna. Co. v. Marshall, 119 Ill. 399, 10 N. E. 220; Cleveland, C., C. & St. L. Ry. Co. v. Hall, 70 Ill. App. 429."

T. and Mr. McD. and other men under Mr. B. were fellow-servants with the plaintiff, and if therefore the accident happened because of the negligence of these men to obey the orders of Mr. B., the mine boss, to fasten the rails upon the car, you will find no cause of action against the defendant.

You are instructed that where two or more persons are employed in the same general work by a company, if one is injured by the negligence of the other his employer is not responsible. The court further charges you that Mr. B., the mine foreman, and Mr. T., his assistant, and Mr. McD. and the others loading the cars with the iron rails in question, were fellow-servants of the plaintiff in this case.<sup>66</sup>

**§ 3807. Runner and Helper on Mining Machine Fellow-Servants.** The court instructs the jury that if they believe from the evidence in this case that the deceased, J. E. V. B., was on the 29th day of July, 1896, by B. H., foreman of the defendant's mines at St. Clair, placed at work on or about a dangerous or unsafe mining machine in the defendant's mines in room No. 4, as a helper, and that the proper operation or running of said machine required signals to be given and received by and between the runner and helper, and that the said machine was started on the day aforesaid by said H. without observing such proper signal to start the same, or if said machinery was started by said H. while the deceased was standing in, or dangerously near, the bits of the said machine, which fact was known to H., or could have been known by him by the use of proper care and diligence, then such starting of said machine was negligence in the defendant's company, and the jury should find for the plaintiff.<sup>67</sup>

**§ 3808. Negligence of Fellow-Servant.** (a) The jury are instructed that although the plaintiff's husband assumed the risks ordinarily incident to the service in which he was engaged, and the risk of such defective appliances as were obvious or known to him, he did not assume the risk of being injured by the negligence of other employes of the defendant, unless they were fellow-servants, as defined in the instruction given on that question.<sup>68</sup>

66—Johnson v. Union Pac. C. Co., 28 Utah 46, 76 Pac. 1089 (1091).

"All of the requests under consideration were properly refused, first, because it is not the law in the state of Wyoming that 'persons employed in the same general work,' of the master are fellow servants, and on principle, and by the weight of authority, persons engaged in the service of the master, who are entrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employes, but are vice principals; and second under evidence, the alleged negligence is not attributable to either the engineer or the subordinate employes who assisted in loading the rails upon the cars."

67—McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648 (649).

"The above instruction is bad for the reason that H. in running the machine was acting merely as the fellow servant of the decedent, and an act of negligence on his part in

starting the machine without warning, alone, would not make the company liable, as is alleged in the instruction, yet it would be a fact tending to show that H. was incompetent to run the machine, and the company would be liable because of the incompetency, if established to the satisfaction of the jury, and not because of H.'s negligence in running the machine. This instruction bases the right of recovery on the negligence of a fellow servant rather than on his incompetency. Jackson v. R. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337, 355.

68—Mobile & O. R. R. Co. v. Healy, 100 Ill. App. 586 (591).

"In saying that 'he did not assume the risk of being injured by the negligence of other employes,' etc., the jury may have inferred that the judge believed that other employes were negligent. It was for the jury to say whether or not appellant's employes in charge of the yard and cars were negligent."

(b) For all such acts as relate to the common employment which are on a level with the acts of the fellow laborer, except such acts as are done by the vice principal against the reasonable objections of the injured servant, the master is responsible.<sup>69</sup>

(c) If the jury believe from the evidence that the plaintiff was injured by following the direction or obeying the order, or through the carelessness or by the fault of his fellow-servant—then the plaintiff cannot recover.<sup>70</sup>

§ 3809. **Who Are Vice-Principals.** (a) An employer cannot escape liability for an injury to a servant which was caused by the wrongful act of a fellow-servant whom the employer has placed over and given superintendence of the work of the servant who was injured.<sup>71</sup>

(b) It will be noted that the plaintiff seeks to make the defendant company responsible for the acts of the said C. D. Before he will be entitled to this he must prove by a preponderance of the evidence that said C. D. was acting at the time as a vice-principal of the defendant. It will not be sufficient to show that the said C. D. was merely a fellow servant. If that is all that is shown there can be no recovery. The vice-principal is a person to whom the employer commits the entire charge and management of its business in that particular regard, with power to choose his own assistants and to control and discharge them as freely and as fully as the principal itself could. The employer is liable and answerable to all the under-servants for the negligence of such a managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants. If in the case at bar you find that at the time complained of the said C. D. had the entire charge and management of the defendant's business in the building of bridges within the district, and that he had power to choose his own assistants and to control and discharge them as freely as the defendant itself could, you would be justified in finding that C. D. was a vice-principal, within the meaning of the law; and if you find the act complained of was one within the scope of his duties as such superintendent, and one which he might have directed done by another, then you would be justified in finding the act one for which the principal would be responsible. If you do not find these things established by the evidence, your verdict should be for the defendant.<sup>72</sup>

69—Carleton Min. & Mill. Co. v. Ryan, 29 Colo. 401, 68 Pac. 278 (284).

"This is a proposition of law incorrectly stated."

70—Hinckley v. Horazdowsky, 133 Ill. 359 (367), 24 N. E. 421.

"This instruction does not announce the rule correctly as applied to fellow servants generally."

71—Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 470, 79 S. W. 869 (873).

"This instruction was clearly erroneous and ought not to have been given. It is a settled rule of decision in this state that an employer is not liable for the negligent act of a foreman or boss by which a fellow servant is injured, unless such foreman or boss had the power to employ or discharge his injured fel-

low-servant. The rule may be an arbitrary one, but it has been uniformly recognized and enforced by our Supreme Court. Mo. Pac. Ry. Co. v. Williams, 75 Tex. 4 (7), 12 S. W. 835, 16 Am. St. 867; Galveston, H. & S. A. Ry. Co. v. Smith, 76 Tex. 618, 13 S. W. 562, 18 Am. St. 78; Young v. Hahn, 70 S. W. 950, 6 Tex. Ct. Rep. 107. We do not understand, however, that this rule applies to an act of a foreman or boss which, from its nature, must necessarily be considered the act of the master."

72—Scott v. Chicago G. W. Ry. Co., 113 Ia. 381, 85 N. W. 631 (632).

"The instruction was erroneous, for the reason that it failed to recognize the distinction between acts done in the performance of the master's duty to the servant and



**§ 3810. Responsibility of Master for Negligence of Vice-Principal.**

(a) The court instructs the jury that, unless they believe from the evidence that the accident causing the injuries complained of to this plaintiff was due to or caused by the negligence of the defendant company, or its agents or officers superior in authority to the plaintiff, the law is for the defendant, and the jury should so find. If the jury believe from the evidence that the accident was caused by the negligence of fellow servants of plaintiff, that is, by servants or employes of the defendant company on the same level of employment with the plaintiff, or not superior in authority or rank to him, then the law is for the defendant, and the jury should so find.

(b) The court instructs the jury that if they believe from the evidence that the injuries to the plaintiff were caused by the negligence of employes or servants or agents of the defendant company superior in authority, grade or rank as servants to the plaintiff, the law is for the plaintiff, and the jury should so find; unless the jury shall also believe from the evidence that the plaintiff himself was also guilty of negligence which contributed to the causing of said accident, and, but for which negligence on his part, if any such there was, the accident would not have occurred, in which latter event the law is for the defendant, and the jury should so find.<sup>73</sup>

(c) The court instructs the jury that the master is bound to use care, skill and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to the servant injured by the omission. This duty on the part of the master is one that he cannot rid himself of by casting it upon an agent, officer or servant employed by him. Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master. In authorizing an agent to perform such act, the principal is in legal contemplation himself acting when the agent acts, for he who acts by an agent acts by himself. The rule which absolves the master from liability for the negligence of the fellow-servant has no application whatever where the agent stands in the master's place.<sup>74</sup>

acts done in discharge of a duty that the master might properly commit to another without liability, for negligence. A master is liable for the negligence of a superior servant when the servant is engaged in the performance of some of the master's personal duties, but not otherwise; and it is the character of the work, rather than the rank of the servant, that controls. The duties that may not be delegated to another are well understood, and need not be reiterated. They are stated in a general way in *Newbury v. Mfg. Co.*, 100 Ia. 441, 69 N. W. 743. See also *Barnicle v. Connor*, 110 Ia. 238, 81 N. W. 452. The instruction in question fails to recognize this distinction."

73—*Vandyke v. Memphis N. O. & C. Packet Co.*, 24 Ky. L. R. 1283, 71 S. W. 441 (442).

"This was error. There was no question of fellow servants in the case. A master employing a servant impliedly engages with him that the place in which he is to work shall be reasonably safe, and he must ex-

ercise ordinary care to keep it safe. The servant has a right to look to the master for the discharge of this duty, and it is immaterial to whom the master may intrust the discharge of the duty which the law imposes upon him. He cannot delegate it to a servant, so as to exempt himself from a want of proper care in the person to whom the duty is delegated, without regard to the rank or title of the agent intrusted with its performance. *Union Pac. Ry. Co. v. Snyder*, 152 U. S. 689, 14 Sup. Ct. 756, 38 L. Ed. 597; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612; *Filke v. Railroad Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Shear & R. Neg. par. 204.*"

74—*Himrod Coal Co. v. Clingan*, 114 Ill. App. 568 (576).

This instruction is misleading. "Although abstract in form it may be inferred therefrom that appellant was negligent in the selection and maintenance of the switch and ap-

§ 3811. **Superior Authority Does Not Always Destroy Relationship of Fellow Servants.** (a) The court instructs the jury that even though Dr. B.'s position was that of general superintendent of the factory, still if the jury find from the evidence that he and H. were working together in trying to extinguish a fire, and both of them doing the same kind of work, and if the jury find from the evidence that while so working together with H., trying to extinguish said fire, if he was so working, Dr. B. was negligent, and that such negligence, if it existed, caused the injury complained of, H. cannot recover damages from defendant, and your verdict should be for the defendant.

(b) The court instructs the jury that no matter in what rank or position H. and Dr. B. usually worked, if the jury find from the evidence that at the time the accident occurred, H. and Dr. B. were working together and assisting each other in putting out a fire, and further so find that while so working together with H., if he was so working, trying to extinguish said fire, Dr. B. so negligently directed a stream from a fire extinguisher, that an explosion was caused thereby, which resulted in the injuries complained of, your verdict should be for the defendant.

(c) The court instructs the jury for the defendant, that the mere fact that of a body of workmen, one is the foreman or superintendent does not prevent their all being servants in the same line of employment, or in and of itself render the employer liable for an injury resulting from the negligence of such superintendent or superior, and in this case, although the jury may believe from the evidence, that Dr. B. was superintendent of defendant's works and the superior of plaintiff, yet if the jury further believe from the evidence that at the time of, and just before the explosion, Dr. B. and the plaintiff were engaged together in putting out a fire in one of the defendant's kilns, and that the negligent manner of Dr. B. in putting out the fire, if the jury find he was negligent, caused the explosion which injured the plaintiff, yet if the jury further find from the evidence that the negligence complained of consisted of some act done or omitted by Dr. B., which might just as readily have happened with one having no such authority, the jury should find for the defendant.<sup>75</sup>

pliances. There is no allegation in the declaration to that effect, and no evidence tending to prove improper construction of the switch, nor that the same had become defective or out of repair. The instruction was not applicable to the facts and was calculated to mislead the jury. An instruction directing the attention of the jury to an element of liability not shown by the pleadings or evidence in the case is calculated to mislead and is erroneous. It is not proper to direct the attention of the jury to matters not in issue. *C. & A. R. Co. v. Robinson*, 106 Ill. 142.

<sup>75</sup>—*Hobbold v. Chicago Sugar Refg. Co.* 44 Ill. App. 418 (421).

"The appellant excepted and the jury found against him. Numbers 5, 6 and 8 go far beyond the rule laid down in the *May case*. *C. & A. R. Co. v. May*, 108 Ill. 288. It is there said: 'The true rule on the

subject as we understand it is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such an employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servants exercising such authority sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case in this respect must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by one

§ 3812. **Servants' Right to Assume Master Has Used Reasonable Care in Selection of Fellow-Servants.** The court instructs the jury as a matter of law that one employed in a service is not bound to investigate and find out at his peril whether the common master has used reasonable care in the selection of those already employed in the same branch of service; but on the contrary he is warranted in assuming that his employer has discharged his duty in that respect, and until notice to the contrary is brought home to such servant he may act upon that supposition.<sup>76</sup>

### ASSUMPTION OF RISK.

§ 3813. **Servant Assumes All Risks Ordinarily and Naturally Incident to Particular Service in Which He is Engaged.** (a) You are instructed that a servant is held to assume the ordinary risks of the business upon which he enters as far as these risks, at the time of entering upon the business, are known to him, or could be readily discernible by a person of his age and capacity, in the exercise of ordinary care; and while a person who engages for a particular service only agrees to encounter the danger of that service, yet, if being assigned to duties not within his contract, he determines to perform them as a part of his engagement, he is held to assume the necessary risks attendant thereon; and in this case it is for you to determine, from a fair consideration of all the testimony, whether the danger, if any, to which the plaintiff was exposed, at the time he entered upon the task of wiping the water from the moving belt, was such a danger as was known to him or could have been readily seen by a person of his age and capacity in the exercise of ordinary care.<sup>77</sup>

(b) The court instructs the jury that the plaintiff assumed, by virtue of his employment, only the risk of such secret, latent defects in the appliances furnished him by the defendant as could not have been discovered by the defendant by the use of ordinary diligence.<sup>78</sup>

having such authority, which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable."

76—Himrod Coal Co. v. Clingan, 114 Ill. App. 568 (575).

"There is no averment in the declaration upon which to base this instruction, nor does it appear from the evidence that the defendant employed or retained in its employ an incompetent or unskillful person. The instruction therefore submitted to the jury a cause of action at variance with that set out in the declaration. An instruction must be upon a theory advanced by the pleadings, and which there is some evidence to support. *Rosenkrans v. Barker*, 115 Ill. 332, 3 N. E. 93, 56 Am. Rep. 169; *Penna. Co. v. Marshall*, 119 Ill. 399, 10 N. E. 220; *C. C. & St. L. Ry. Co. v. Hall*, 70 Ill. App. 429."

77—*Norfolk B. S. Co. v. Hight*, 56 Neb. 162, 76 N. W. 566 (569).

"It is complained that the portion

of this from the beginning to and inclusive of the words 'ordinary care,' limits the risks which the jury were told the servant assumed to such as were known at the time of the employment or then discernible by the exercise of ordinary care. This portion of the instruction is open to the criticism made, and, furthermore, is defective and erroneous. The general rule of which it is undoubtedly an attempted statement, is that the servant assumes all the ordinary risks incident to the employment. *Mo. Pac. Ry. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Dehning v. Iron Works*, 46 Neb. 556, 65 N. W. 186; *Chicago B. & Q. R. R. Co. v. McGinnis*, 49 Neb. 619, 68 N. W. 1057; *Chicago B. & Q. R. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. 456; and not alone such as are at the time designated in the instruction under examination known to the employee or then readily discernible by him by the use of ordinary care."

78—*Texas P. C. Co. v. Poe*, 32 Tex. Civ. App. 469, 74 S. W. 563.

"This charge is error. The plain-



§ 3814. **Burden of Proof as to Assumption of Risk not Incident to Employment.** (a) The court instructs the jury that the burden of proof under the issues is upon plaintiff, and if the deceased, while employed by defendant, knew the defective condition of the machine, or could have known it by the exercise of ordinary care, and continued to work there without protest or promise of the defendant to make repairs, then there could be no recovery of damages.<sup>79</sup>

(b) It is alleged by the defendant, that the decedent, if killed by an electric current, was killed as a result of the risk assumed by him as an employe of the defendant. In this connection you are instructed that the decedent, by entering the employ of the defendant and engaging in the work which he was engaged at the time of his death, assumed the ordinary and usual risks and dangers incident to such employment, which were known to him or which could have been known to him by the exercise of reasonable care on his part. He is presumed to have had knowledge of those things and conditions which a man of ordinary skill and prudence, under the same or similar circumstances, exercising ordinary care for his own safety, should have known. It was the duty of the decedent to use the natural senses possessed by him to the same extent that a man of ordinary care and prudence would, under the same or similar circumstances; to discover existing dangers, and if the death of the said B. was due to an electric shock, received by him from a current of electricity, and such current of electricity was one of the ordinary risks and dangers incident to the said employment of the said B., which was known to him or which could have been known to him by the exercise of reasonable care on his part, then plaintiff cannot recover, and your verdict will be for the defendant. The burden of proof is upon the defendant to establish the defense, of assumption of risk by the decedent by a preponderance of the evidence.<sup>80</sup>

tiff, when he entered the employment of defendant, assumed all risks arising from such defects in the track and appliances furnished him for the performance of his work as were open and obvious, and of which he had knowledge, or should, in the performance of his duties, necessarily have acquired knowledge. *Mo. K. & T. Ry. v. Hanig*, 91 Tex. 347, 43 S. W. 508.

The charge eliminates such risk from the consideration of the jury, and instructs them that plaintiff assumed only such latent defects in the appliances as defendant could not have discovered by the use of ordinary diligence."

79—*Shebek v. National Cracker Co.*, 120 Ia. 414, 94 N. W. 930 (931).

"This instruction is erroneous. True, the burden was upon plaintiff to establish the alleged negligence of defendant, the consequent injury of the deceased, and his freedom from contributory negligence, but the pleadings as we have seen presented another issue. The answer alleged that the defective condition of the machinery was well known to the deceased, and that, knowing it, he remained in defendant's service without protest. In other words, the answer tenders a plea of assumption

of risk, and upon this issue the jury should have been told the burden was on defendant. *Nicholaus v. R. R.*, 90 Ia. 85, 57 N. W. 694; *Thompson v. Railroad Co.*, 70 Minn. 219, 72 N. W. 962; *Nadau v. White, R. L. Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. 29.

The effect of the court's charge was to reverse this rule, and cast the burden upon the plaintiff, and we cannot say the error was without prejudice."

80—*Martin v. Des Moines, E. L. Co.*, 131 Ia. 734, 106 N. W. 364.

"Omitting the last clause, this instruction could perhaps be harmonized with the views we have expressed; but when to the admittedly correct statement that the deceased is held to have assumed the ordinary and usual risks and dangers incident to his employment, and that if his death was from a risk of that character his administrator cannot recover, it is immediately and without explanation added that the burden of proof is upon defendant to establish the defense of assumption of risk by a preponderance of the evidence, we are confronted by a contradiction or inconsistency which could have scarcely failed to confuse and mislead the jury. It would seem

§ 3815. **Circumstances to be Considered on Question of Assumption of Risk.** The jury are further instructed that not only the defects but the danger must be known to the servant before he can be held to take his own risk.<sup>81</sup>

§ 3816. **Servant Being Directed to do Work Not in Line of His Regular Employment.** (a) The court instructs the jury that if they believe from the evidence in this case that the deceased, B., was, on the — day of —, 18—, a minor 17 years of age, without experience in operating or running an electrical mining machine, and while engaged in the service of the defendant as "coal loader" in its mines that one B. H., the boss of the coal loaders in said mine, and as such the superior officer of the deceased, required the deceased to leave his work as such coal loader in room No. 3, and to assist in running and operating the defendant's electrical mining machine in room No. 4, and outside of the line of his duty and the scope of his contract and service, the said deceased did not under such circumstances incur and assume the risks and dangers attendant upon the running and operating of such machine; and if the jury further find that such machine was dangerous, and its operation hazardous, then it was the duty of the said H. to instruct and warn the deceased as to the dangers and risks attendant upon the operation of said machine, and his failure to do so was negligence for which the defendant is responsible; and if the deceased, while working in and about said machine, was injured, and while obeying the orders of the said H., in assisting to run and operate the same, and his death thereby occasioned, then the jury should find for the plaintiff.

(b) The court instructs the jury that if they believe from the evidence in this case that the deceased, B., a minor of 17 years of age, was on the — day of —, 18—, employed by the defendant as coal loader in its mines at S., and that the service of coal loader was attended with only ordinary danger, and that one B. H., a foreman and superintendent of the coal loaders and machine men of the defendant in said mine, on the said — day of —, 18—, and while the said B. was engaged and occupied in the line of his duties as such coal loader, called upon and took the deceased away from his work of loading coal in room No. 3, and placed him at work in room No. 4, not at loading coal, but in assisting to run and operate the defendant's electric mining machine, out of the line of his employment

quite probable that by some oversight of the Court in formulating the charge, or by some mistake in making up the record of this court, there has been dropped from between the body of this instruction as above quoted and the concluding sentence thereof, a clause in which 'assumption of risk' as applied to the defendant's alleged negligence was properly explained, and in connection with which omitted clause the concluding sentence would be a correct proposition of law. We must take it, however, as it appears in the record, and in that form the proposition clearly places upon the defendant the burden of establishing the assumption by the deceased of the risks ordinarily incident to the employment in which he was engaged, although in the preceding

part of the same instruction, the jury was properly told that deceased is held to have assumed such risks as a matter of law. The error in the instructions, in the form here presented, is clearly of a prejudicial character."

81—Meyer v. Meyer, 86 Ill. App. 417 (422).

"Here the jury were informed that, regardless of whether the master knew or ought to have known of defects and dangers, and regardless of whether any obligation rested upon the servant to discover the same, he could not be held to have taken his own risk with them, unless he in fact knew of such defects and danger. Of course, this is not the law, and the instruction is palpably erroneous."

as such coal loader, and that the deceased was wholly inexperienced in operating and running said mining machine, and was not instructed by said foreman or other representative of the said defendant in running such machine, or warned of the danger or risk attending its operation, and that the service of running and assisting to run said electric machine was highly dangerous, much more so than that of coal loading, then the said B., in entering upon the services required of him by the said H., in and about said electric machine, did not assume the risks and dangers attendant upon running or assisting to run said machine, and the defendant is responsible for any injury resulting to the said B. while working upon said machine and obeying the orders of H., his superior, and who as to that act was the representative of the defendant company. In such a case the rule as to fellow servant does not apply, and the jury should find for the plaintiff.

(c) The court instructs the jury that if they believe from the evidence in this case that the deceased was in the employment of the defendant in its mines at the S. Coal Works, in this county, as a coal loader, on the 29th day of July, 1896, and that at the time he was a mere youth 17 years of age, and while on that day engaged in his work as such coal loader he was called upon by B. H., his boss in said mines, to leave his work of coal loading, and required to assist in running and operating the defendant's electric mining machine in room No. 4 in said mine, away from and out of the scope of his employment, and that the said deceased had no knowledge, by experience or instruction, as to the dangers of service of running and assisting and operating said machine, and that the service of running and operating said machine was in reality highly dangerous, and that the deceased was not employed and engaged in this particular service, but in that of coal loading, and was ordered into it against his will, and while so engaged in assisting in the operation and running said machine the deceased was injured, from which injury he died the next day, then the jury should find for the plaintiff; and the court further instructs the jury that they have a right to consider the youth and physical weakness of the deceased, and if the jury believe from the evidence that he was ordered to work upon said machine, and that he objected to doing so, and went reluctantly to the service required of him by said H., then he is entirely free from any charge of contributory negligence, and the defendant became liable for any injury thereby occasioned the deceased.<sup>82</sup>

82—McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648 (649-50).

"The above instructions are improper for the reason that they do not negative contributory negligence. *McCreery's Adm'x v. Railroad Co.*, 43 W. Va. 110, 27 S. E. 327; *Fisher v. Railroad Co.* 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; *Webb v. Packet Co.*, 43 W. Va. 800, 29 S. E. 519; *Parkersburg Indl. Co. v. Shultz*, 43 W. Va. 470, 27 S. E. 255. It matters not what dangerous places a boy may be sent into. He may nevertheless, if not an infant of tender years be guilty of such acts of careless negligence, depending on his age, knowledge, experience and physical ability, as will amount to

contributory negligence, and whether his acts do amount to such is a question of inquiry for the jury, and these instructions exclude this question from the jury's consideration. Each of these instructions are complete in themselves, and direct a finding in favor of the plaintiff, and cannot be aided by other instructions.

The last quoted instruction is further bad for the reason that it tells the jury, in effect, that because the deceased was a physically weak minor, and objected to working on the machine, and reluctantly did so, he could not be found guilty of contributory negligence. While all these matters tend to establish



(d) You are further instructed that where the danger attending the work is not incident to the servant's employment, nor assumed by him under contract of service, then if ordered to do extra hazardous work and the servant is injured while in the exercise of ordinary care, then he may recover and the jury are instructed that the burden of showing the knowledge of such danger on the part of the servant is on the defendant.<sup>83</sup>

(e) The court instructs the jury that if you believe, from the evidence, that ——— was employed as a laborer by the defendant at Mattoon, that the defendant's manager directed ——— to clean out a certain scrubber as alleged in the declaration, and that such work was dangerous, that defendant's manager had knowledge of the danger of such work, or in the exercise of ordinary care would have had knowledge of it, that plaintiff did not know of the danger and had no equal means of knowledge with the manager, and that in cleaning out such scrubber as directed, plaintiff was injured as alleged in the declaration, then your verdict should be for the plaintiff.<sup>84</sup>

**§ 3817. Servants' Knowledge of Facts which would Make His Own Act Dangerous.** When the said L. accepted employment from the defendant, he thereby assumed the risks of all dangers ordinarily incident to the business for which he was so employed, except such dangers as might result from the negligence of the defendant; and he also assumed the risk of any danger resulting from the negligence on the part of the defendant, if he knew of the existence of such danger.<sup>85</sup>

**§ 3818. Slipping on Floor and Injuring Hand in Machinery.** You are instructed as a matter of law, that an employe assumes the risks and dangers incident to his employment that are open, obvious, and apparent, and respecting which he has the same knowledge and opportunity to observe possessed by the master; and in this case you are instructed that respecting the condition of the floor and the presence

negligence for which the defendant is liable, yet they do not exclude the possibility that the decedent might be guilty of an act of carelessness so bad that it, even in one so young, weak and inexperienced, might be found by the jury to be contributory negligence on his part. There is some evidence on the part of the defendant, tending to show such conduct on the part of the deceased, and while it is not at all sufficient to have overthrown the verdict had the jury been permitted to consider it, and found to the contrary, this instruction includes it entirely from their consideration."

83—Meyer v. Meyer, 86 Ill. App. 417 (422).

"This instruction assumes that whatever dangers attended the work of deceased were not incident to his employment, and were not assumed by him, and that he was ordered to do certain work, and that such work was extra hazardous. These matters so assumed were all the proper subject of determination for the jury alone; and to thus obviate the necessity of their findings on the questions proposed was harmful error."

84—Mattoon Gas L. & C. Co. v. Dolan, 96 Ill. App. 652 (658).

The court held that it was reversible error to give the above instruction, because it omitted the element that plaintiff "was exercising ordinary care for his own safety," even though other instructions given in behalf of the plaintiff told the jury that he must prove that he exercised ordinary care for his own safety before he could recover. The court cited *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Quinn v. Donovan*, 85 Ill. 194; and *Partridge v. Cutler*, 168 Ill. 504, 48 N. E. 125.

85—Texas Portland C. & L. Co. v. Lee, 36 Tex. Civ. App. 482, 82 S. W. 306 (307).

"The ground of complaint is that the court by the foregoing charge limited the risk of dangers assumed by the deceased, L., to such dangers as were known to him, while the rule is that he assumed the risk of any danger resulting from the negligence on the part of defendant, if he knew of such danger, or if the same was open and obvious. There is some plausibility in the criticism made upon the charge standing alone."

of water thereon at the place where the plaintiff stood at the time the alleged injury was received the danger of slipping, if you find there was such danger, was obvious and apparent, and plaintiff assumed the risk incident to such condition; and if you find, from the evidence in this case, that the injuries of which plaintiff complains were received by him by reason of slipping upon the floor, and further find that, if plaintiff had not slipped, he would not have been injured, then you are instructed that for such injuries defendant is not liable in this case, and your verdict should be for the defendant.<sup>86</sup>

§ 3819. **Assuming Risk as to Caving in of Bank.** If you believe from the evidence that the deceased had been working in digging and shoveling earth and clay from the heap or pile in the shed of the defendant, as mentioned in the declaration, for about two days, and that while so working he had full opportunity to become acquainted with the risks of the situation and of his employment, and the danger of the bank caving or falling, and having accepted this risk and continued in such employment without objection on his part, knowing that said bank might fall or cave in and injure him when undermined, he can not recover, if he was injured by exposure to such risk.<sup>87</sup>

§ 3820. **Loosening of Dirt in Sand-bank by Foreman.** (a) But if the danger ordinarily incident to such work was increased by the foreman, W., having loosened dirt which fell on plaintiff, and the plaintiff did not know of such increased danger, and could not have known thereof by the use of ordinary care, then plaintiff would be entitled to a verdict against defendant, unless plaintiff's own negligence contributed to the injury.

(b) You are therefore instructed that if you find from a preponderance of the testimony before you, that the natural and ordinary danger of said sand-bank caving in was increased by any act of the defendant's foreman, W., and that plaintiff did not know of such increased danger, if any, and could not have known thereof by the use of ordinary care, then you will find a verdict for the plaintiff, unless you further find from a preponderance of the testimony before you that the plaintiff failed to use such care and diligence to avoid the injury as a person of ordinary prudence would ordinarily have used under similar circumstances, and that such failure on his part to use such care and diligence contributed to his being injured.<sup>88</sup>

86—Swift & Co. v. Holoubek, 60 Neb. 784, 84 N. W. 250 (251, 252).

• "We do not think it was erroneous to refuse the instruction requested on this particular phase of the controversy. By it was excluded the idea of recovery by reason of the alleged defective machinery, which, if plaintiff's contention were true, was the direct and immediate cause of the injury, even though the initial and moving cause may have been the slipping of plaintiff while standing where he was. The fact of plaintiff's slipping, although no negligence was established on the part of the defendant with respect to the condition of the floor, would not preclude a recovery if it be found that the machinery was improperly and imperfectly constructed and attached, by reason of which plaintiff's hand was permitted to pass under the

shield, and upon the revolving knives, and thereby receive the injury, and that such defective and faulty machinery caused the injury or contributed thereto."

87—Anthony Ittner Brick Co. v. Ashby, 100 Ill. App. 604 (610). Refusal approved, 198 Ill. 562, 64 N. E. 1109.

"In our opinion the instruction is faulty in assuming that the deceased accepted the risk of the falling of the bank, knowing it might fall and injure him, when the matter was one of the two principal matters in the case, for the jury to determine from the evidence."

88—Jackson v. Mo. K. & T. Ry. Co. of Texas., 23 Tex. Civ. App. 319, 55 S. W. 376 (377).

"This charge made it the duty of the plaintiff to use ordinary care to discover the increased danger re-

**§ 3821. Insecure Condition of Blocking and Scaffolding under Gas Pipe.** Should you find and conclude from an examination of all the evidence in the case that the plaintiff has established and proved all the material allegations of his complaint, and that he has shown that he was in the employ of the defendant company, and that he was engaged in the work of the defendant, and in the line and scope of his duty at the time he received the injury complained of, and that such injury was occasioned by the falling of an iron gas pipe and its supports upon his foot and leg in the manner complained of, and that the fall of such pipe and subsequent injuries were occasioned by the giving way of the blocking or supports placed under said pipe, and that the blocking or supports was arranged and placed under the pipe by and under the direction of the defendant's superintendent, foreman or boss having control and direction of the plaintiff at the time; and you further find that through the ignorance, want of skill, incompetence, negligence or carelessness of such superintendent, foreman or boss, the blocking and supports under said gas pipe was insufficient, or so carelessly placed and arranged that it was insufficient to support said gas pipe when being moved thereon under the direction of such superintendent, foreman or boss, and that by reason thereof said supports and blocking fell over or slipped from such position and allowed the gas pipe or the supports or blocking to fall upon the plaintiff's leg or foot, by which the plaintiff was lamed and injured as complained of; and if you further find that the giving way or falling over of the blocking and supports and the fall of the pipe and injury to plaintiff was not brought about or in any manner caused by the carelessness or negligence of the plaintiff—then your verdict should be for the plaintiff and you should assess, etc.<sup>89</sup>

**§ 3822. Defective Material in Lever.** You are further charged

sulting from an act of defendant's foreman. This was error. The plaintiff was not bound to use diligence to discover such increased danger. He had the right to assume that the foreman would do his duty, and unless he knew of the failure of the foreman in this respect, or in the ordinary discharge of his duty must have acquired the knowledge he would not be prevented from recovering by reason of the negligence of the foreman. *Mo. K. & T. Ry. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Texas & P. Ry. Co. v. Eberhart*, 91 Tex. 321, 43 S. W. 510. Again it would seem that this charge is subject to the criticism that it assumed the plaintiff was guilty of negligence."

<sup>89</sup>—*Indiana Natural G. & O. Co. v. Vauble*, 31 Ind. App. 370, 68 N. E. 195 (1917).

"An essential averment of the complaint was that appellee had no knowledge of the weak and insecure condition of the blocking and scaffolding. Such an averment implies not only actual knowledge, but also any implied knowledge. *Evansville, etc., Ry. Co. v. Dewel*, 134 Ind. 156, 33 N. E. 355.

But to sustain such an averment appellee was required to prove not only that he had no knowledge of

this defective condition, but also that he could not have known it by the exercise of ordinary care. If he did know it, or could have known it by the exercise of ordinary care, and voluntarily continued in the work, he assumed the risk. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235; *Penn. Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Cleveland, C. C. & St. L. R. R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86; *Chicago, I. & L. R. R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244.

The instruction undertakes to enumerate certain facts which, if proven, will authorize a verdict in appellee's favor. It omits appellee's knowledge of the weak and insecure condition of the blocking and scaffolding. It plainly directs the jury to find for appellee if the facts enumerated were proven. Under this instruction, appellee would be entitled to a verdict even though he had full knowledge of the defective condition of the blocking, or could have had such knowledge by the exercise of ordinary care. Such an instruction is not cured by another which correctly states the law. It can be corrected only by withdrawing it from the jury. *Chicago, I. & L. R. R. Co. v. Glover*, supra."



that if you find from the evidence that at the time plaintiff received his alleged injuries he was experienced in the use of jackscrews and levers, and that at and before he used said bar the same was bent, and that plaintiff knew, or in the ordinary discharge of his own duty must necessarily have known, of the condition of said lever, then I charge you that plaintiff assumed all risks of injury by reason of using said lever in such condition.<sup>90</sup>

§ 3823. **Operating Furnace without a Screen.** The court instructs the jury that the defendants had the right to operate the furnace with or without a screen, and from time to time remove the screen for repairs; and, if you believe from the evidence that the plaintiff was injured by reason of one of the dangers naturally and ordinarily incident to his working about the furnace without a screen, then he cannot recover, and you will find for the defendants.<sup>91</sup>

§ 3824. **Assumption of Risk In Tearing Down Bridge.** (a) The law requires the master to provide a safe place for the servant to do the work required of him, and, if it is a work of extra hazard, to warn him of the danger, and to direct the performance of the work in such a way and with such care as will not subject the servant to a risk that a reasonably prudent man would not knowingly assume. So, if you believe from the evidence that the defendant failed in any particular to discharge this duty to the plaintiff, you must find the issues for the plaintiff, unless the proof shows that after being aware of the danger, or by the exercise of ordinary care he might have known of it, the plaintiff failed to use reasonable care for his own safety.

(b) The plaintiff was not required to inspect the trestle to see if it was safe to go upon it. He was only required to use ordinary care. The law made it the duty of the defendant to see that it was safe, and the plaintiff had a right to rely upon the care, superior knowledge, and judgment of his employer, and to act upon the assumption that the defendant would not expose him to unnecessary risk, and that it had and would take all proper precaution to guard him against danger.

(c) Although you may believe from the evidence that the plaintiff knew, or by the exercise of ordinary care might have known, the condition of the trestle in every particular, and the effort that was being made to pull it down, this alone will not preclude a recovery. Before the plaintiff can be charged with having assumed the risk, it must be proven that he not only knew these facts, but that he fully appreciated the danger. So, if you believe from the evidence

90—Galveston H. & S. A. Ry. Co. v. Hampton, 24 Tex. Civ. App. 458, 59 S. W. 928 (1929).

"We do not believe defendant has any right to complain of this charge. It misstates the law, but in favor of defendant. It proceeds upon the idea that if plaintiff knew the lever was bent, he being experienced in this class of work, he knew the danger, and assumed the risks thereof. The defect in question being the defective material composing the lever, it does not follow as a matter of law that even the experienced

servant would know of such defect and danger from simply observing that the lever was bent, but this is the meaning and effect of the instruction."

91—Curtis v. McNair, 173 Mo. 270, 73 S. W. 167 (1913).

"It leaves out of view the duty of the master to use reasonable care to protect his servant, and substitutes the danger incident to the business as the master sees fit to run it for the danger incident to that kind of business when conducted with reasonable care for the safety of the servant."

that a person of plaintiff's experience and intelligence, under all of the circumstances, might reasonably have supposed that he could safely perform the work he was ordered to perform, by the use of proper caution, he is not guilty of contributory negligence, unless the proof shows that he failed to use proper care for his own safety after being aware of the danger, and you should find for the plaintiff.<sup>92</sup>

**§ 3825. Continuing Work After Insufficient Repair of Appliance.** The court instructs the jury that if they believe from the evidence that the plaintiff, C. D., knew the saw was out of order and reported the same, to the foreman, and that the saw was repaired in the presence of C. D., and that he made no further complaint before the accident, they must find for the defendant.<sup>93</sup>

**§ 3826. Continuing Work In Dangerous Place After Notice of Defect to Master.** If you believe from the evidence that the defendant's foreman directed the plaintiff to repair the belt that he attempted to repair, and if you further believe from the evidence that the light at the place where said belt was to be repaired, was not reasonably sufficient to enable plaintiff to do the work he was directed to do by the foreman (if you believe he was directed) with reasonable safety, and if you further believe from the evidence that plaintiff had complained to defendant's foreman previous to said injury in regard to said insufficiency of light and that said foreman had promised him to provide sufficient light, and that plaintiff continued to work in reliance on said promise, and that said foreman had failed to provide reasonably sufficient light, etc.<sup>94</sup>

92—Grayson-McLeod Lumber Co. v. Carter, 76 Ark. 69, 88 S. W. 597 (598).

"The instructions copied above are inapplicable to this case. In this case the appellee was engaged in tearing down a bridge, and in continually changing his place of work, and sometimes in making it more insecure. There was no duty to furnish him a safe place in which to work, since his employment made it his duty to tear down and to change and destroy his places for work, and to make them safe or unsafe as his work rendered them, and was such as to place it out of the power of his employer to perform such duty. He assumes the hazards of this employment. Gulf. C. & S. F. Ry. Co. v. Jackson, 65 Fed. 48, 12 C. C. A. 507; Finalyson v. Utica Mining & Milling Co., 67 Fed. 507 (510), 14 C. C. A. 492."

93—Virginia & N. C. Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991 (994).

"The instruction ignores the principle that the essential duty of a master to use ordinary care to furnish reasonably safe machinery for the use of the servant is a personal nonassignable, continuing duty. In the form in which the instruction was offered, it is not a correct exposition of the law, and was properly refused. N. & W. Ry. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Union P. Ry. Co. v. Daniels, 152 U. S. 688, 14 Sup. Ct. 756, 38 L. Ed. 597; N. &

W. Ry. Co. v. Wade, 102 Vt. 140, 45 S. E. 915; Settle v. St. L., etc., Ry. Co., 127 Mo. 342, 30 S. W. 125, 48 Am. St. 633."

94—Hillie v. Hettich, 95 Tex. 321, 67 S. W. 90 (91).

"We are of the opinion that the assignment of error upon this instruction is well taken. Under the petition plaintiff's right to recover depended on proof of the fact, among others, that when the promise was made it was a part of his duty to repair belts, for the promise would be only an undertaking to furnish light sufficient to protect him while doing such work as he was employed to do. It would have no reference to anything outside of the scope of his employment. The jury could have found from the evidence that it was no part of his duty to repair the belt; and had they done so, the plaintiff's case as he alleges it, would have failed. The charge did not require the finding of this essential fact, but authorized the jury to supply its place by another not alleged, viz., an order from the foreman, at the time of the occurrence to repair the particular belt. The charge was erroneous not only in allowing a recovery upon the facts not alleged, but in virtually requiring the jury to apply a previous promise to furnish light to the work of executing the particular order given without such a promise, when the jury might have found that the previous undertaking was only to

§ 3827. **Continuing In Employment After Promise of Master to Repair Machine.** (a) The court further instructs the jury, as a matter of law, that if they believe, from the evidence, that the machinery in question was out of order, and that such fact was known to the plaintiff, and that the plaintiff called the attention of the defendant to such fact, and if the jury further believe, from the evidence, that the foreman in charge of the plaintiff promised to have said machinery repaired, without fixing a time when the same should be repaired, and that said promise was indefinite as to when the same should be repaired, and that the plaintiff continued to work upon said machinery from day to day with the knowledge that the repairs were not made, then the court instructs the jury, as a matter of law, that the plaintiff assumed the risk of working thereon, and that he cannot recover in this case, and that the jury should find the defendant not guilty.<sup>95</sup>

(b) In other words, the general rule is that the servant assumes all ordinary risks of his employment, and if any defect in the tools, implements or appliances is called to the attention of the employer and the employer agrees to repair such defect, the employe may rely upon it, and continue his employment on the strength of the promise to repair, provided it is done within a reasonable time.<sup>96</sup>

§ 3828. **Refusal of Master to Repair Appliance.** If the defendant refused to repair the saw, or by its conduct gave the plaintiff to

furnish light for the doing of other and less dangerous work. If the order was given to do work which it had not before been plaintiff's duty to do it was given without any promise to furnish more light to aid him in doing it; and the plaintiff, at the time, knowing the condition of the lights and undertaking to repair the belt with such knowledge, assumed the risk, and would have failed, unless he could show right to recover upon some other theory. *G. H. & S. A. Ry. Co. v. Drew*, 59 Tex. 10, 46 Am. Rep. 261."

<sup>95</sup>—*Swift & Co. v. Madden*, 165 Ill. 41 (46), 45 N. E. 979, affg. 63 Ill. App. 341.

"It was not necessary that the foreman should fix a definite time when the repairs should be made to enable plaintiff to recover for injuries received while engaged in the service of defendant after the notice was given. The rule on this question is well stated by this court in *Missouri Furnace Co. v. Abend*, 107 Ill. 44. It is there said (p. 51): 'It is now uniformly stated by text-writers that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of the promise in that regard without being guilty of negligence, and if any injury results therefrom he may recover, unless, when the dan-

ger is so imminent that no prudent person would undertake to perform the service.' We do not think the instruction contained a correct statement of law, and it was therefore properly refused."

<sup>96</sup>—*Yerkes v. N. P. Ry. Co.*, 112 Wis. 184, 88 N. W. 33 (35), 88 Am. St. 961.

"This instruction is clearly bad, in that it does not insist upon the element of protest and objection above discussed. It would be satisfied although the servant called the defect to the attention of his master under circumstances in no wise implying or indicating that he was unwilling to continue working with it in its then condition. In so far it was misleading, improper and erroneous. True, in the same paragraph, the court made another statement of the rule, in which he described the duty of the employe as to notify the employer of a special risk and object to continuing the work under the then existing conditions, but we cannot hold that thereby the vice in the portion excepted to was cured. The court attempted apparently to phrase the same rule twice. In so doing he expressed it once correctly, but again erroneously. It is well settled in this state that an erroneous instruction on a given subject is not cured by the fact that the law is correctly stated elsewhere; for it cannot be known whether the jury have been guided by the correct rule or the erroneous one."



understand that it did not intend to repair the saw, the plaintiff assumed the risk.<sup>97</sup>

### CONTRIBUTORY NEGLIGENCE.

§ 3829. **Contributory Negligence of Servant.** (a) The jury are instructed that the employer is under no greater obligation to look after the safety of an employe than the employe is to look after his own safety.<sup>98</sup>

(b) The jury are instructed that an employer is not required to exercise any greater degree of care for the preservation and safety of his employe than the employe exercises on his own behalf, and that all risk knowingly assumed by the employe is incident to the service that he enters, and is supposed by him to be voluntarily assumed, and to form a portion of the consideration for the wages which he charges for his services.<sup>99</sup>

(c) If the injury was caused by his (plaintiff's) own negligence or that of his fellow employes on the car with him, and would not have happened but for such negligence, then plaintiff cannot recover, even though you might believe defendant was negligent. On the other hand, if he or they were negligent, and the defendant was also negligent, and the negligence of the defendant concurred with the negligence of the others, and contributed to the injury, then defendant would be liable for the injury.<sup>100</sup>

97—*Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991 (1994).

"This instruction was properly refused because there is no evidence to support it, and for the additional reason that it does not accurately propound the principle of law intended to be inculcated. The presumption is that the master's knowledge of machinery is superior to that of the servant, and that when a servant complains of defective machinery, which the master refuses to repair, and directs the servant to continue its use, unless the defect is so palpable, immediate and constant that only a reckless man would use it, the servant has a right to presume that the master considers the machinery in a reasonably safe condition, and may continue to use it without necessarily assuming the risk. *Va. Portland C. Co. v. Luck's Admr.*, 103 Va. 427, 49 S. W. 577; *Shearman & Redfield*, on Neg. § 168."

98—*Western Stone Co. v. Musical*, 196 Ill. 382 (386-7), 63 N. E. 664, aff'g, 96 Ill. App. 288.

"There was no error in refusing this instruction for the reason, if no other, that it states an abstract proposition of law. 'A party cannot complain that an instruction is refused if he fails to make an application of the rule of law to the evidence.' (*Vallette v. Bilinski*, 167 Ill. 564, 47 N. E. 770.) But the instruction was erroneous in the fact that it wholly ignored that appellee

was working at that particular spot under the order of appellant, and, under such circumstances, as said in the *Schymanowski* case (Ill. Steel Co. v. *Schymanowski*, 162 Ill. 447, 44 N. E. 876), the master and servant are not altogether upon a footing of equality."

99—*Himrod Coal Co. v. Adack*, 94 Ill. App. 1 (5).

"In *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131, the refusal of the trial court to give the above instruction was approved. That case, like the one at bar, involves a charge of willful failure to comply with the positive requirements of the provisions of the mines and miners act."

100—*Texas & P. Ry. Co. v. Maupin*, 26 Tex. Civ. App. 385, 63 S. W. 346 (347).

"This charge is objected to as being contradictory and misleading. The objection is well taken. The statement 'on the other hand, if he or they were negligent, and the defendant was also negligent,' does not announce a correct proposition of law, and is misleading. The pronoun 'he', as used in this clause, refers to the plaintiff, and the effect of the charge is to tell the jury that, if defendant was negligent, the plaintiff could recover, although plaintiff himself may have been negligent. This is not the law. If the defendant was negligent, and the plaintiff was also negligent, and his negligence contributed to the injury, plaintiff could not recover."

(d) You are instructed that it was the duty of J. S., under the circumstances of this case to have exercised the highest degree of care for his own safety, and if he failed to do so, and that by reason thereof the accident happened to him that resulted in his death, then you will find for the defendant.<sup>1</sup>

§ 3830. **In Order to be Defense, Negligence of Servant or Fellow-Servant Must be a Proximate Cause of Injury.** You are instructed that if A. B. voluntarily went behind the flat car on the elevator track, and that such position was known by him to be one of probable danger, and that such act on his part was an act which an ordinarily prudent person, having regard for his own protection and personal safety, would not have done, and that he thereby contributed to his own injury, then, though you may believe the defendant's employes were guilty of negligence in making the switch, or in the movement of the cars, the plaintiff should not recover, though the negligence of A. B. was not the proximate cause of his injury.<sup>2</sup>

§ 3831. **Burden of Proof as to Contributory Negligence—Rule That it is on Defendant.** If you believe from the evidence that the negligence, if any there was, on the part of the plaintiff, contributed to the injuries complained of, I instruct you that he cannot recover; but the burden of proof is upon the defendants to show that the plaintiff was guilty of such contributory negligence, if any there was, and the defendants must prove that fact by a fair preponderance of the evidence.<sup>3</sup>

§ 3832. **Voluntarily Doing Work in More Dangerous of Different Possible Ways.** If you find from the evidence that the plaintiff was injured while performing a dangerous work, and that he could have done the work in a less dangerous way, but that he voluntarily chose

1—*Louisville & N. R. Co. v. Shumaker's Adm'x.*, 112 Ky. 431, 67 S. W. 829 (830).

"What a reasonably prudent man would ordinarily do under a given state of fact is as near an approximate to the true standard as can be well expressed in words. It places both parties on an equal footing as to the rule to be applied in ascertaining whether there has been negligence. The court did not err in refusing the instruction asked by appellant, as it sets up a different standard, and would have resulted in confusing the jury."

2—*Houston & T. C. R. Co. v. Turner*, 34 Tex. Civ. App. 397, 78 S. W. 712 (715).

"This charge is erroneous in that the jury were told in effect that if they found the facts to exist as therein stated, the same constituted negligence on the part of the deceased, A. B., and precluded a recovery by appellee, although such negligence was not the proximate cause of his injury. If the deceased, A. B., was guilty of negligence in the respect mentioned in said charge, and such negligence was the proximate cause of his injury, then appellee was not entitled to recover. It was not enough to defeat appel-

lee's recovery, by reason of this issue, that the jury believed that such negligence contributed proximately to his injury and death. Had the special charge been in conformity with the views of the law here expressed, it should have been given."

3—*Indianapolis v. Cauley*, 164 Ind. 304, 73 N. E. 694.

"Contributory fault, like any other fact that must be affirmatively shown, is to be considered established when it is found to be sustained by a preponderance of all the evidence in the case, without reference to whether it was produced by one party or the other. The instruction quoted is equivalent to telling the jury that it must not charge plaintiff with fault unless the defendants have proven that fact by a preponderance, thus depriving the defendants of the benefit of any evidence that may have been disclosed by the plaintiff and his witnesses. For this reason the instruction was erroneous. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456; *Pittsburg, C. C. & St. L. R. R. Co. v. Lichteiser*, 163 Ind. 247, 71 N. E. 218; *R. R. Co. v. Collins*, 163 Ind. 569, 71 N. E. 661."

a more dangerous way, and was injured in consequence, then he is not entitled to recover, and you must find in favor of the defendant.<sup>4</sup>

§ 3833. **Voluntarily Assuming Dangerous Position in Front of Truck.** If the jury believe from the evidence that plaintiff, without an order from said D., defendant's foreman, so to do, voluntarily went in front of said truck for the purpose of testing the stone thereon to see that it had been sawed in straight lines, or square, and while doing said work received his injuries, if any, by the defendant's hooker or engineer in charge of the movements of said truck in moving the same and causing it to run on or over plaintiff's foot, then, and in that event, they should find for defendant, unless they further believe from the evidence that defendant's hooker or engineer in charge of said engine and truck knew, or by the exercise of ordinary care might have known, of the peril, if any, on which plaintiff had voluntarily placed himself in getting in front of said truck in time to have prevented, by the use of ordinary care, his injuries, if any were sustained by him.<sup>5</sup>

§ 3834. **Continuing Work at Obviously Dangerous Machine.** It is not enough to charge the servant with contributory negligence that he may have known of the fact that the machine was defective, but it must also appear either that he knew that the continued use of the defective appliance was dangerous, or that the defect complained of rendered the use of the appliance so obviously dangerous as that a person of his intelligence and understanding could perceive it.<sup>6</sup>

4—Florida Cent. & P. R. Co. v. Mooney, 40 Fla. 17, 24 So. 148 (150, 152).

"This instruction requested by defendant, was properly refused. It is sought to be sustained in this court upon the theory that the facts therein stated would constitute contributory negligence. The language of this instruction is apparently approved in many decisions, most of which are collected in Bailey's Personal Injuries, Relating to Master and Servant (volume 1, p. 392, et. seq.). As an abstract proposition we do not think this instruction can be sustained upon principle. The servant, in the performance of his duties, is bound to exercise ordinary care, or that degree of care which prudent persons usually exercise under similar circumstances; and, if he is injured by failure to exercise such care, his master is not liable. Wood, Mast. & S., § 372."

5—Bowling Green Stone Co. v. Capshaw, 23 Ky. L. R. 945, 64 S. W. 507 (508).

"We are of opinion that this instruction is erroneous, and prejudicial to appellant, in the use of the phrase 'or by the exercise of ordinary care might have known.' This placed upon appellant the duty of keeping a lookout for appellee at a place where he voluntarily placed himself, without orders, direction or duty to be. If appellee, outside of the duties which he was employed to perform, and without directions from D., the superintendent, so to do, went voluntarily into a place of danger—in front of

the truck—he should have called attention to his position, so that the hooker or engineer would know of his peril, and would then be under the duty of exercising care to avoid injuring him. If appellee, being thus situated, without directions from D., and outside of his duties, failed to give the hooker or engineer notice of his position, he would be guilty of contributory negligence for which he could not recover. His negligence would be in being in a place of danger, without directions, and outside of his duties as an employe. If his duties as employe of appellant required that he take the measurements, he could do so without orders from D.; or, if he had orders, he could do so whether his duties regularly required that of him or not. Appellee's regular duties as carpenter and repairer, or orders from D., if either fact existed, would justify his presence there at the place and at the time he was hurt, and if his presence be justified, appellant would owe him a lookout duty; while without a reason for his presence—the one or the other, the regular duty or the order—appellant would only owe him a duty to use ordinary care to avoid injury to him after his perilous position became known as he would be a mere volunteer. Louisville & N. R. Co. v. Adams' Adm'r, 21 Ky. L. 498, 51 S. W. 577.

6—Georgia Cotton-Oil Co. v. Jackson, 112 Ga. 620, 37 S. E. 873 (874).

"We do not think that this charge correctly stated the standard of diligence required of adult employees.



§ 3835. **Contributory Negligence of Minors.** (a) If the jury believe from the evidence that J. had been warned by K. not to go to the point where he was injured, and in disregard of such orders he went to said point, then he was found guilty of contributory negligence, and cannot recover in this suit. If the jury believe from the evidence that J. knew of the defect complained of in the complaint, and went under the rock that injured him voluntarily and without being required to go there in the discharge of his duties, then he was guilty of contributory negligence, and cannot recover in this suit.<sup>7</sup>

(b) I charge you, gentlemen of the jury, that it was not defendant's duty to warn plaintiff's intestate of dangers at points in his mine where it was not necessary for him to go in the discharge of his duties, and if the jury believe from the evidence that plaintiff's

The first sentence of section 2612 of the Civil Code reads as follows: 'A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself.' This section further provides that, where a servant sues for injuries resulting from defective machinery supplied by the master, it must appear that the servant 'did not know, and had not equal means of knowing,' of the defects in the machinery, or the danger of operating the same, 'and by the exercise of ordinary care could not have known thereof.' Construing all together the provisions of this section, its clear meaning is that, while an employe is in every instance bound to exercise for his own protection whatever skill and diligence he possesses, the degree of diligence on his part must in no instance fall short of 'ordinary care.' The standard of diligence which these words are used to define is well settled. By 'ordinary care' is meant that degree of care which might reasonably be expected of an ordinarily prudent person under like circumstances. The case of *Pitts v. Railroad Co.*, 98 Ga. 655, 27 S. E. 189, relied on by counsel for the defendant in error, is not authority for the contrary of what is above laid down. It is true that in the first headnote, which was prepared by Mr. Justice Atkinson, there is a loose expression to the effect that an employe injured by defective machinery would not be precluded from recovering damages merely because he knew of the defects therein, when it did not further appear either that he 'actually knew that the continued use of the defective appliance was dangerous, or that the defect complained of rendered the use of the appliance so obviously dangerous as that a person of his intelligence and understanding could readily perceive the danger.' The chief justice, however, did not assent to the correctness of the proposition laid down by our Brother Atkinson, but concurred in the judgment rendered in that case for reasons which he set forth in a separate headnote; while

the writer dissented from the judgment altogether."

7—*Tutwiler Coal, C. & I. Co. v. Enslin*, 129 Ala. 336, 30 So. 600 (602).

"The first and second refused charges are wanting in clearness—incorrect, in fact, in stating that under certain conditions, Delius Jones, the deceased could not recover. The defect is slight and it may be inferred, that the meaning of the party drawing the charge was that the plaintiff, under the conditions hypothesized, could not recover. The court had no right to change the language of the charges, and being faulty, we are not disposed to put the court in error for refusing them. Furthermore we apprehend the charges may have been refused for the reason that they ignore the fact that plaintiff's intestate was under 14 years of age. Whether he could be guilty of contributory negligence or not was a question of fact to be determined by the jury, dependent upon the other fact, whether it had been shown that deceased had capacity to be guilty of contributory negligence. Between 7 and 14, a child is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity. *Pratt Coal & I. Co. v. Brawley*, 83 Ala. 371, 3 So. 555, 3 Am. St. 751; *Lovell v. Iron Co.*, 90 Ala. 15, 7 So. 756; *Jefferson v. Electric Co.*, 116 Ala. 299, 23 So. 546, 38 L. R. A. 458, 67 Am. St. 116. It may be true that contributory negligence may, under some conditions, be imputed to an infant under 14 years of age, as a matter of law, as where the evidence of his care and prudence and his capacity to exercise judgment and discretion is not in conflict, and different inferences cannot be drawn therefrom. The fact, however, that the infant was shown to be 'bright, smart and industrious,' without more, it is not sufficient to overcome the presumption of that want of discretion which his age *prima facie* implies, for an infant may be all this and yet be so wanting in judgment and discretion as to make him rash and imprudent. *Ala. Min'l Ry. Co. v. Marcus*, 115 Ala. 389 (395), 22 So. 135.

intestate was injured at such point, then defendant was guilty of no negligence, and plaintiff cannot recover in this suit.

(c) If the jury believe from the evidence that plaintiff's intestate was at a place other than where his duties required him to be at the time he was injured, and that he had not been told by any one to whose orders he was bound to conform to go to the place he was injured, then the jury must find for the defendant.<sup>8</sup>

(d) The jury are instructed that in determining the relative degrees of care, or want of care, manifested by the parties at the time of the injury in this case, the age and discretion of the plaintiff, C. D., are proper subjects of inquiry for the jury. The law does not require that a person of the age of C. D. shall exercise the same degree of care and caution as a person of maturer years, but only such care and caution as a person of his age, intelligence and discretion, would naturally and ordinarily use under like circumstances.<sup>9</sup>

§ 3336. **Working with Split, Frayed, Ravelled or Untwisted Rope.** The jury are instructed that, even if they believe from the evidence that the rope used by the plaintiff at the time of the accident was ravelled, split, frayed or untwisted, yet if they further believe from the evidence that such condition of said rope was open and apparent to the observation of the plaintiff, and that before the happening of the injury, he had a reasonable opportunity to observe the same, and the danger, if any, caused thereby, then the plaintiff cannot recover for any injury that may have been occasioned merely by the rope being in such ravelled, split or frayed or untwisted condition.<sup>10</sup>

§ 3837. **Comparative Negligence.** (a) The court instructs the jury that even if you believe from the evidence that the plaintiff was guilty of some negligence in riding on the steps of the tender, still this will not prevent a recovery in this case if you further believe, from the evidence, that the negligence of the plaintiff was

8—Tutwiler Coal, C. & I. Co. v. Enslen, 129 Ala. 336, 30 So. 600 (603).

"As a sufficient justification for the refusal of the fifth charge—applicable also to the third and fifth—we may appropriately adopt the language of the appellee's counsel, that it 'ignores the fact of intestate's tender age and childish instincts, and that he had been put to work, not only in a dangerous place, but in proximity to other danger, where the natural instincts of a child might call him to go, notwithstanding he might not have been required, by the strict necessity of his business to go. Alabama C. Coal & C. Co. v. Pitts, 98 Ala. 285, 13 So. 135; 2 Bailey, Pers. Inj. pars. 2714, 2766."

9—Scott v. McMenamin, 51 Ill. App. 121 (122).

"The appellee in the above case was sixteen years old. Where the question of the negligence of an infant arises, the circumstances in evidence are always to be taken into consideration, and the inquiry is whether the minor exercised such care as under the circumstances might be expected from one of his age and intelligence. Chicago v.

Keefe, 114 Ill. 222 (229), 2 N. E. 267, 55 Am. Rep. 868."

10—Wierzbicki v. Ill. Steel Co., 94 Ill. App. 400 (401).

"There being evidence, though controverted, that plaintiff used the rope under a special and imperative order of defendant's foreman, this instruction was calculated to lead the jury into the belief that plaintiff had no right of recovery if he knew of the condition of the rope, or that, before the injury, he had a reasonable opportunity to observe it, and the danger which would be incurred by its use, irrespective of any order given by the defendant's foreman to the plaintiff to use it. As said in the case of Offutt v. World's Columbian Exposition, 175 Ill. 472 (80), 51 N. E. 651: 'The plaintiff was not required by law to disobey his master or by obeying assume the hazard of obedience, unless the danger was so imminent that an ordinary prudent man would not incur it.' This was said with reference to a servant who himself pointed out to the master's foreman the danger of a certain course of conduct, and was notwithstanding ordered by the foreman to pursue that course of conduct, by reason of which he was injured."

slight as compared with the negligence of the defendant, and that the negligence of the defendant was gross.<sup>11</sup>

(b) The court instructs the jury, even if you believe from the evidence that the plaintiff was guilty of some negligence in coupling the car and engine together, still this will not prevent the recovery in this case if you further believe from the evidence that the negligence of the plaintiff was slight as compared with the negligence of the defendant, and that the negligence of the defendant was gross.<sup>12</sup>

(c) Although the jury may believe from the evidence that the defendant or its servants were guilty of negligence which contributed to the death in question, still if the jury further finds from the evidence that the deceased was also guilty of negligence which directly contributed to the injury, then the plaintiff cannot recover in this suit, unless the jury further find from the evidence that the defendant was so willfully negligent as to show an utter disregard for the life of the deceased, and that the negligence of the deceased was but slight, as compared with that of the defendant. The court instructs you that, although you may believe from the evidence that the defendant was guilty of negligence as alleged in the complaint, and that such negligence contributed to the death of the deceased, yet if the jury further believe from the evidence that the deceased was also guilty of an equal or nearly equal degree of negligence directly contributing to his death, and without which it could not have occurred, then the jury should find for the defendant. The jury are the sole judges of whether the rules of the defendant prohibited the deceased from riding on the engine at the time.<sup>13</sup>

### RELEASES.

**§ 3838. Release of Right of Action by Servant.** (a) On the question of settlement and release, you are charged that the release read

11—C. C. C. & St. L. Ry. Co. v. Butler, 55 Ill. App. 594 (596).

"This is not a correct legal proposition as to the doctrine of comparative negligence. In the present instance, he may not have used such care, and yet by the terms of this instruction, he would not be barred of recovery. Hence the instruction is clearly erroneous. Chicago, B. & Q. R. R. Co. v. Johnson, 103 Ill. 517; Willard v. Swansen, 126 Ill. 381, 18 N. E. 548."

12—C. C. C. & St. L. Ry. Co. v. Selsor, 55 Ill. App. 685 (689).

"The vice of this instruction is that it omits all reference to the well established doctrine that it was incumbent upon the plaintiff to exercise ordinary care for his own safety. From it the jury might well have understood that the plaintiff could recover, though his negligence was so great as to amount to a failure to use ordinary care, if it was but slight in comparison with the default of the appellant. This is not the law. Calumet I. & S. Wks. v. Martin, 115 Ill. 358, 3 N. E. 456; Hawk v. C. B. & Q. R. R., 147 Ill. 399, 35 N. E. 139; Cleveland, C. C. & St. L. R. R. v. Braderly, 150 Ill. 328, 36 N. E. 965. A party can-

not require another to respond in damages for an injury occasioned in part by his failure to exercise ordinary care, unless the injury was inflicted willfully or through negligence so gross and reckless as to amount to willfulness."

13—Denver & R. G. R. Co. v. Maypole, 33 Colo. 150, 79 Pac. 1023 (1024).

"These instructions are erroneous, and because of the giving of them the case must be reversed. It has been held several times by this court that an instruction such as that given by the court upon the subject of comparative negligence is erroneous. Denver & R. G. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211. The court and not the jury should construe the company's rule, and determine which of its employees the company prohibits from riding upon its locomotives; and after so determining, should declare the law applicable in an instruction to the jury. The jury should determine whether the deceased had knowledge of the existence of the rule, and also, even though he had such knowledge whether he had permission from the proper authority to ride upon the locomotive."



in evidence will bar and prevent the plaintiff from recovering herein, unless you find and believe from a preponderance of the evidence that the plaintiff did not know or understand the nature and effect of the same at the time he signed and delivered the same, and that such want of knowledge of the nature and effect of such release was not caused by negligence or lack of care on the part of the plaintiff in failing to read the same.<sup>14</sup>

(b) If you find and believe from a preponderance of the evidence herein that the plaintiff signed said release read in evidence without reading it, and that he believed that it was simply a receipt for \$—, and intended only to pay him the value of his services for — days; and if you believe W., the agent of defendant, prepared same, and represented to the plaintiff, that it was only a receipt for the \$—; and you further believe from the evidence that the plaintiff, under all the facts and circumstances in this cause, was justified or excused in relying and believing upon the statement of said agent, W., without reading it—then, if you so believe, said release would not be binding upon the plaintiff, if the plaintiff had not agreed to accept the \$— in full settlement and satisfaction for the injuries complained of.<sup>15</sup>

14—Chicago, R. I. & T. Ry. Co. v. Williams, — Tex. Civ. App. —, 83 S. W. 248 (249).

"This, of course, is tantamount to a direction that the appellee can recover in the event the jury find and believe from a preponderance of the evidence that he did not know and understand the nature and effect of the instrument at the time he signed and delivered it, and that such want of knowledge was not caused by his negligence. This is not sufficient to authorize him to recover. Before he would be authorized to recover in this case, the appellee will be required to show not only that he was ignorant of the true nature and effect of the release executed by him, but that his want of knowledge in these respects was procured or induced by some act of the appellant amounting to fraud. It is undisputed that appellee was able to read, and could have read the instrument executed by him, and his failure to do so can only be excused by a replication of fraud upon the part of the company's representative. The principle is illustrated in the language of Mr. Justice Head in Williams v. Rand, 9 Tex. Civ. App. 631, 30 S. W. 511: 'In order for him to avoid its effect, the charge should require him to show not only that he could not read, and did not, in fact, know its contents, but that it was misread to him, or some other fact that would excuse his negligence in signing an instrument, the effect of which he did not understand.' Which case see for a valuable review of authorities on this question."

15—Chicago, R. I. & T. Ry. Co. v. Williams, *supra*.

"This paragraph of the charge is not excepted to by any assignment, but, notwithstanding this, before we could give to it the effect of curing an error in another paragraph, we would have to find it to be a correct charge itself. Now, this paragraph, though somewhat more onerous on appellee than the preceding one, also details a state of facts which, if found by the jury, would authorize them to return a verdict for the appellee notwithstanding the release. But it is nowhere indicated that the jury would have to find for the appellee under both of these paragraphs before returning a verdict in his favor. But even this is not the most serious objection to the fourth paragraph of the charge. In it the jury are instructed that if they find that the plaintiff, under all the facts and circumstances in this cause, was justified or excused in relying and believing upon the statement of said agent, W., then they would find for the appellee. It is the province of the jury to find whether or not the appellee was guilty of negligence in the matter of signing the release, and whether or not appellant's agent made false and fraudulent representations to the appellee to induce the execution, but it is the court's province to say what would justify or excuse the appellee in the premises. The jury may have considered that the fact that appellee did not have his specs convenient was a sufficient excuse for not reading the release, and for this reason, if they so believed, under the charge, they could have returned a verdict in his favor."

## CHAPTER CXLVII.

### NEGLIGENCE—MASTER AND SERVANT—RAILWAY COMPANIES.

See Approved Instructions, Chapter LXIV, Vol. II.

#### IN GENERAL.

- § 3839. Duty of railway companies.
- § 3840. Requiring plaintiff to prove his employment was connected with use and operation of railway.
- § 3841. Referring jury to pleadings without reference to issues.
- § 3842. Proof of accident and injury will not authorize a recovery.

#### APPLIANCES.

- § 3843. Railroad companies bound to furnish safe and appropriate appliances.
- § 3844. Use of appliances by specified number of railroads.

#### ROLLING STOCK.

- § 3845. Duty of railway company to provide safe rolling stock.
- § 3846. Duty as to inspection of car received from other roads.
- § 3847. Injuries through defective drawbars or drawheads.
- § 3848. Hand-holds on cars.
- § 3849. Inspection of hand-hold of cars.
- § 3850. Allowing steel plates on engine to rust.

#### TRACK AND ROAD BED.

- § 3851. Master must use ordinary care to see that they are safe.
- § 3852. Maintaining portable coal chutes too near track.
- § 3853. Maintaining stretcher post in dangerous proximity to track.
- § 3854. Law fixes no exact standard for height of bridges over railroads.
- § 3855. Duty to have yard suitably lighted.
- § 3856. Injury by latent defect in lock of switch.

#### OPERATION AND MANAGEMENT OF TRAINS AND CARS.

- § 3857. Injury "in manner and form as charged in the declaration."

- § 3858. Operating car at dangerous rate of speed.
- § 3859. Recklessly running train at high speed through a crowd of workmen.
- § 3860. Injury through collision—Failure to give signals.
- § 3861. Circumstantial evidence as to application of emergency brake—Injury to brakeman.
- § 3862. Injury through act of third person in unsetting brakes on cars.
- § 3863. Injury through sudden jerk or lurch of train.
- § 3864. Kicking car upon track with great force against another.
- § 3865. Starting car before plaintiff has had a reasonable time to board it.
- § 3866. Injury to servant by projecting door of refrigerating car.
- § 3867. Launching tie from moving car.
- § 3868. General practice yard crews in giving signals.

#### RULES AND REGULATIONS.

- § 3869. Railroad not liable for injury through disregard of its plain instructions.
- § 3870. Brakeman disobeying rules by remaining in locomotive cab.
- § 3871. Rule against coupling cars in motion may be waived.
- § 3872. Assumption of risk as to cars being left uncoupled when rule of master to contrary.
- § 3873. Servant prevented by negligence of master from complying with rules.
- § 3874. Authority of clinker pullers to move engines.

#### FELLOW-SERVANTS.

- § 3875. Liability for negligence of fellow-servants.
- § 3876. Negligence of company in employing servant.
- § 3877. Conductor and flagman as fellow-servants.

- § 3878. Fellow-servants of section foreman.  
 § 3879. Fellow-servants of road master.  
 § 3880. Contributory negligence of fellow-servants.

## ASSUMPTION OF RISK.

- § 3881. Assumption of risk by railway employe.  
 § 3882. What is a risk "ordinarily incident to his employment"?  
 § 3883. Servant having knowledge of defects.  
 § 3884. Risks assumed by locomotive engineer.  
 § 3885. Assumption of risk of accident at crossing by locomotive engineer.  
 § 3886. Assumption of risk as to top heaviness of engine by locomotive engineer.  
 § 3887. Fireman assuming risk of engineer violating rules.  
 § 3888. Prior knowledge of employe of defect in driving box.  
 § 3889. Assumption of risk as to cars received by company.  
 § 3890. Assumption of risk as to defective switchstand.  
 § 3891. Assumption of risk as to defective drawhead.  
 § 3892. Assuming risk of defects in hand cars.  
 § 3893. Assumption of risk in rolling engine wheels.  
 § 3894. Assuming risk of injury from oil house near track.  
 § 3895. Assumption of risk as to "flying switches."  
 § 3896. Assuming risk of locomotive running off track.

- § 3897. Railroad employe's duty to search for defects.  
 § 3898. Continuing in employment with knowledge of dangerous conditions.  
 § 3899. Continuing in employment after promise of engineer to repair defects.  
 § 3900. Remaining in employment of railroad company after giving notice of defect in track.

## CONTRIBUTORY NEGLIGENCE.

- § 3901. Encountering danger in order to save lives of passengers.  
 § 3902. Giving undivided attention to work.  
 § 3903. Injury to employe while trying to escape imminent peril.  
 § 3904. Failure to check train run at dangerous speed when in servant's power to do so.  
 § 3905. Manner of uncoupling cars as contributory negligence.  
 § 3906. Conductor bleeding reservoir of car.  
 § 3907. Contributory negligence on hand car.  
 § 3908. Boarding moving engine.  
 § 3909. Exposing body between cars.  
 § 3910. Stepping from caboose while it is being uncoupled.  
 § 3911. Pushing trucks with shoulders instead of hands.  
 § 3912. Riding in sitting position with leg over side of car.  
 § 3913. Brakeman sitting on rear bolster of car and lighting a cigarette.  
 § 3914. Leaning against loose plank in chute on stock pen.

## IN GENERAL.

§ 3839. **Duty of Railway Companies.** The jury are instructed that the defendant company is required by the law to use reasonable care and caution in the selection and employment of competent persons to manage its business, so that no unnecessary risks shall be incurred by any of its servants in the discharge of their duties; and if you believe, from the weight of the evidence, that the defendant had not done so, and that the complainant received the injuries complained of in the declaration by reason of such negligence, then the defendant is liable for the injuries sustained, provided the plaintiff was using reasonable care and caution to avoid the injury.<sup>1</sup>

<sup>1</sup>—M. & O. R. R. Co. v. Godfrey, 155 Ill. 78 (80), rev'g 52 Ill. App. 564, 39 N. E. 590.

"No evidence was offered to show that the servants of the defendant

in charge of the train were incompetent, careless or unskillful, and in the absence of such evidence there was nothing on which to base the instruction. It would not be pre-



§ 3840. **Requiring Plaintiff to Prove His Employment Was Connected with Use and Operation of Railway.** (a) Before the plaintiff can recover, he must establish by a preponderance of the evidence the following propositions: First, That plaintiff was in the employ of the defendant, and that such employment was connected with the use and operation of the defendant's railway at the time of the accident.

(b) That the plaintiff, in the performance of his duties at the time of the accident, exercised ordinary care and prudence, and did not in any manner contribute to his own injury. If each of the foregoing propositions are established by a preponderance of the evidence, then your verdict should be for the plaintiff, and, if the plaintiff has failed to satisfy you by a preponderance of the evidence as to any one of these five propositions, then your verdict should be for the defendant.<sup>2</sup>

§ 3841. **Referring Jury to Pleadings Without Reference to Issues.** The charge against the defendant, the I. C. R. Co., and the statement of alleged facts upon which the plaintiff claims a right to recover, will be found in his original petition, and the first amendment thereto, herewith submitted to you; and you will turn to these papers for the particular statement of fact upon which the plaintiff must recover, if he is entitled to recover at all, under the evidence and the instructions in this case; and I need not restate these allegations to you.<sup>3</sup>

§ 3842. **Proof of Accident and Injury Alone Will not Authorize a Recovery.** The court instructs the jury that where an employe sues the employer, as in this case, for damages caused by the alleged negligence of the latter, then the plaintiff must prove the negligence of

sumed because of the happening of the accident alone. It was error to give this instruction."

2—Williams v. Iowa Cent. Ry. Co., 121 Ia. 270, 96 N. W. 774 (776).

"With further reference to the first clause of the paragraph it may be observed that, to entitle plaintiff to the benefit of Code, Sec. 2071, he was not required to prove his employment to have been connected with the use and operation of the railway. Even though his employment may have had nothing whatever to do with the movement of the trains, yet, if the performance of his duties brought him into a situation where he was exposed to the perils and hazards arising from such operation or movement, and he was thus injured by the negligence of a co-employe, he is within the protection of the statute. Pyne v. R. R., 54 Ia. 223, 6 N. W. 281, 37 A. M. Rep. 198; Keatley v. R. R., 94 Ia. 691, 63 N. W. 560; Jensen v. R. R. Co., 115 Ia. 404, 88 N. W. 952. It was error, therefore, as an abstract proposition of law, to direct the jury that plaintiff could not recover without showing his employment to have been connected with the operation of the road; but, as we hold that his employment was of that character, the error was not of itself prejudicial, and we should not

be disposed to reverse upon that ground alone."

3—Keatley v. Illinois Cent. R. Co., 94 Ia. 685, 63 N. W. 560 (562).

"We can discover no ground upon which this instruction can be sustained. If the other paragraphs of the charge had stated the issues, the direction to the jury to examine the petition and determine the issues would have been an error without prejudice. But there is no statement of the issues in any part of the charge, and the acts of negligence charged in the petition are such that no proper presentation of the case to the jury could have been made without a plain and clear statement of the issues. The case is peculiar in this respect. The negligence charged involves the employes operating the train, the iron gang, and the relation of the deceased to these two independent classes of employes; the deceased being a member of another force, called the 'stone gang.' That similar instructions have frequently been disapproved and held to be erroneous and prejudicial, see McKinney v. Hartman, 4 Ia. 154; Beebe v. Stutsman, 5 Ia. 271; Reid v. Mason, 14 Ia. 541; Pharo v. Johnson, 15 Ia. 560; Little v. McGuire, 43 Ia. 447; Fitzgerald v. McCarty, 55 Ia. 702, 8 N. W. 646; Porter v. Knight, 63 Ia. 365, 19 N. W. 282."

defendant, and proof of the accident and injury alone will not be sufficient to authorize a recovery.<sup>4</sup>

### APPLIANCES.

**§ 3843. Railroad Companies Bound to Furnish Safe and Appropriate Appliances.** (a) The court instructs you that, while it is true that a master is not required to use every new or improved device, yet it is his duty to use ordinary care in furnishing appliances that are reasonably safe. If the master uses an appliance that is dangerous and unsafe when there are other and usual appliances in common use that he might use, and a servant is injured by reason of the dangerous appliance while he is in the usual course of his employment and while in the exercise of due care and caution for his own safety, then the master is liable for damages for such injury.<sup>5</sup>

(b) The court instructs the jury that if the deceased, C. D., was in the employment of the defendant, and if it was a part of his duty under his employment to use the jack-screw mentioned in the evidence in raising and lowering cars or parts thereof, then it was the duty of the defendant and its servant or agent furnishing said appliance to said C. D., by defendant's authority, to have used ordinary care to have furnished said C. D. with an appliance reasonably and ordinarily sufficient and suitable for said C. D. to use in the discharge of his duty.<sup>6</sup>

(c) The duties which a railroad company owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order.<sup>7</sup>

**§ 3844. Use of Appliances by Specified Number of Railroads.** (a) If the jury believe from the evidence that the means and appliances used by the defendant in attempting to get the car on the track are such means and appliances as are ordinarily in use by the P. R. R., the E. R. R., the K. C., M. & B. R. R., the M. and O. R. R., the S. C. R. R., the O. & M. R. R., and the I. C. R. R., engaged in like business, and surrounded by like circumstances, as was defendant at the time J. was killed, and that said railroads are well-regulated railroads, then their verdict must be for the defendant, although the jury may believe the evidence of the witness who testified that such means

4—*Smith v. Gulf W. T. & P. Ry. Co.*, — Tex. Civ. App. —, 65 S. W. 83 (85).

"While this charge is abstractly correct, it was upon the weight of the evidence, and therefore an invasion of the province of the jury. *Mo. K. & T. Ry. Co. v. Baker*, — Tex. Civ. App. —, 58 S. W. 964. From the verbiage of this charge, the jury might have been induced to believe that, in the opinion of the trial judge, the only proof of negligence before them was the occurrence of the accident."

5—*Chicago & E. I. R. R. Co. v. Finnan*, 84 Ill. App. 333 (391).

"This instruction is bad. If it is based upon the evidence, it cannot be sustained because it proceeds upon the assumption that an appli-

ance furnished by the master was dangerous per se, and that in its use the master is negligent because there are other appliances not dangerous which he might use. If intended as an abstract proposition, it is not applicable to the case, which is one charging negligence against the master in maintaining an appliance in bad repair, thereby rendering it not reasonably safe."

6—*East St. Louis Connecting Ry. Co. v. Dwyer*, 41 Ill. App. 522 (523, 524).

"The evidence did not warrant the giving of this instruction."

7—*Dolan v. Sierra Ry. Co. of Cal.*, 135 Cal. 435, 67 Pac. 686 (687).

"Standing alone, this declaration does not contain a sound principle of law."

and appliances are not in use in like business and surrounded by like circumstances by the G. P. R. R., the A. G. S. R. R., and the R. and D. R. R., and that said last-named three railroads are all well regulated.

(b) If the jury believe from the evidence that the means or appliances used by defendant in or about attempting to get said car upon said rails were of the same character as the means or appliances used under like circumstances by other well-regulated railroad companies, then their verdict must be for the defendant.

(c) If the jury believe from the evidence that other well-regulated railroad companies use jacks like the one used in this case for the purpose for which they were used, then their verdict must be for the defendant.<sup>8</sup>

### ROLLING STOCK.

#### § 3845. Duty of Railway Company to Provide Safe Rolling Stock.

(a) The jury are instructed as a matter of law that a railway company owes the duty to its employes to do all that human care, vigilance and foresight can do consistently with the practical operation of the road in providing safe and properly constructed engines, cars and machinery, and to keep the same in repair.<sup>9</sup>

(b) The court instructs the jury that if they believe from the evidence that the plaintiff was in the employ of the defendant as a switchman, in the switch-yards of the defendant, that in that case it was the duty of the defendant to furnish reasonably safe machinery and appliances and to keep the track in reasonable repair, and the plaintiff had a right to rely upon the defendant to do so, and the plaintiff was not bound to test the safety and fitness of the machinery in the first instance, before using it, in the absence of notice or knowledge, in the exercise of due care, that there was something wrong in that respect, and that the law does not presume, in the absence of proof, that the plaintiff had notice of defects, if the

<sup>8</sup>—*Louisville & N. R. Co. v. Jones*, 130 Ala. 456; 30 So. 586 (589).

<sup>9</sup>—Ordinarily, the fitness of a railroad appliance for special uses of one company may be tested by what is shown to be the custom of well-regulated railroad companies with respect to such uses under like circumstances. The practice of a few such companies, though it may tend to show what is the custom, does not have that effect as a conclusion of law. *L. & N. R. Co. v. Hall*, 37 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; *Richmond & D. R. Co. v. Weems*, 97 Ala. 270, 12 So. 186. In *Weems'* case a charge proposing to make a standard test of duty by the usage of five railroad companies was held to be invasive of the jury's province. Charge 6, referring to eight companies for a like purpose, is subject to the same objection. This charge, and likewise charges 7 and 8, would have withdrawn from the jury the question of whether there was negligent superintendence in omitting to use supports in addition to the jack, for, though they may have been in general and proper use for replacing

cars, due care might require that under circumstances like those of this accident their use should be supplemented by other supports."

<sup>9</sup>—*C. C. & St. L. Ry. Co. v. Selsor*, 55 Ill. App. 685 (687).

"Our Supreme Court have declared against it in principle in *Webber Wagon Co. v. Kehl*, 139 Ill. 44, 29 N. E. 714, and in *C. & A. R. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117, and many other cases. The case of *T. P. & W. R. R. Co. v. Conroy*, 68 Ill. 560, which, it is quite probable, led the Circuit Court to give the instruction, was expressly overruled in *C. & A. R. R. Co. v. Kerr*, supra. The master is not bound to provide absolutely safe machinery. It is sufficient if he has exercised ordinary and reasonable care and diligence in constructing or providing machinery safe and suitable for the use of those who are to work with or operate it. The jury were clearly misdirected. It is suggested by counsel for the appellee that this misdirection ought not to work a reversal if it appears to this court from the evidence that the machinery was not reasonably safe."



jury believe from the evidence that any existed, but the burden is on the defendant to prove that the plaintiff had notice of the defects, provided he has shown in the first instance, he was in the exercise of ordinary care at the time he was injured; and if the jury believe from the evidence that plaintiff received injuries from the defects of the foot-board, as alleged in the declaration, or received injuries from defects in the crossing at "B" street, by boards protruding, as alleged in the declaration, if from the evidence any such defects existed, while riding on the foot-board in the regular and usual course of his employment, and exercising due care, if the jury so believe from the evidence, and that such defects were unknown to him, and that if the jury further believe from the evidence that the defendant knew of such defects, if any existed and are proven by the evidence, and that the existence of such defects constituted negligence on the part of the defendant, and in the exercise of ordinary care and diligence the defendant could have known of and repaired them, then the defendant is liable therefor.<sup>10</sup>

**§ 3846. Duty as to Inspection of Car Received from Other Roads.**

(a) The court instructs the jury that it is the duty of a railroad company to exercise a high degree of diligence to provide cars, machinery and appliances it furnishes its employes in the operation of its road that are reasonably safe and suitable; and such company is liable in a suit for the use of the next of kin for the death of a brakeman, by the improper construction and by latent defects in such cars, machinery and appliances, if such improper construction or such latent defects as the case may be renders the same unsafe, and are such as may be discovered by the use of the usual tests for such purpose, providing such brakeman was in the exercise of ordinary care at the time of the accident.<sup>11</sup>

10—Peoria, D. & E. Ry. Co. v. Hardwick, 48 Ill. App. 562 (568, 569, 570).

"By this the jury were told that the master's duty is absolute, that he must furnish reasonably safe machinery, etc., and keep the tracks in reasonable repair. Thus he is made an insurer to that extent. But it is well settled that he is bound only to use due and reasonable care to that end. Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; C., R. I. & P. Ry. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55. And this rule has been frequently announced by the Appellate Courts. The difference between the duty to furnish reasonably safe machinery and appliances, and the duty to use reasonable care to furnish such, is too apparent for discussion, and while in judicial opinions the distinction may not always have been kept in view, yet, it is believed, that it has nowhere been intended to hold that the master is under an absolute duty in this respect. This instruction is also faulty in releasing the plaintiff from all duty to take notice of any defects which the use of the engine might have disclosed as to its construction. To say the least, the instruction is confusing and misleading, so that the jury might easily

mistake the law to be applied to the evidence upon this very important point in the case. The latter clause assumes that in the exercise of due care the plaintiff might fail to discover defects in the foot-board or in the crossing, and yet, that in the exercise of no higher degree of care the defendant was expected to make the discovery, a suggestion condemned as unreasonable by the Supreme Court in C., R. I. & P. Ry. v. Clark, 108 Ill. 119."

11—Wabash R. R. Co. v. Farrell, 79 Ill. App. 508 (516).

"This instruction should not have been given. It places upon the employer a higher degree of duty than the law requires. In favor of his employes, a master is bound to exercise reasonable or ordinary care to see that the machinery and appliances furnished him for use are reasonably safe. He is not bound to use the highest or even a high degree of care. The same care required of the servant is required of the master, no more and no less. Hence it has been held that an instruction which tells the jury that it is 'the duty of a master to furnish his servants with tools and appliances that are reasonably safe' is erroneous. (Belleville P. & S. Wks. v. Bender, 69 Ill. App. 189; Camp Point

(b) If the jury believe from the evidence that the draw-bar of car No. — broke while in the usual and customary use to which such class of cars was applied by the defendant, then the presumption is that such draw-bar was defective either in its style or form of construction, or in the material of which it was constructed, and in such case the defendant was *prima facie* chargeable with negligence in the use of such draw-bar; and unless such *prima facie* negligence has been repudiated by proof that such draw-bar was of the kind usually employed in skillful railroading, and was made by a skillful maker, or had been subjected to and had stood the usual tests for the discovery of such defects in such appliances, and you believe from the evidence that the deceased, —, while in the exercise of due care on his part met his death by reason of the breaking of the upper part or upper half or nearly so of such draw-bar when it came against the draw-bar of the car in the usual course of the business of the defendant, in switching in the yard of the defendant at F. on or about —, as alleged in the declaration, and it has not been shown by the evidence that such draw-bar was of the kind usually employed in skillful railroading and made by a skillful maker, or had not been subjected by the defendant to the usual tests for the discovery of defects and withstood them, then you should consider such facts together with all the other facts and circumstances in evidence in determining whether deceased met his death by the negligence of the defendant, as charged in the declaration; and if upon such consideration, you do believe that said deceased did meet his death by such negligence, then you must find the defendant guilty, and assess her damages at such sum, not exceeding the amount alleged in the declaration, as in your judgment the widow and son as next of kin have sustained by such death.<sup>12</sup>

§ 3847. **Injuries Through Defective Draw-bars, or Draw-heads.** It would have been negligence on the part of defendant to use car No. — in the train, if said car or the draw-bar, draw-head or coupling were defective and unsafe, or with the use of reasonable diligence

Mfg. Co. v. Ballou, admr., 71 Ill. 417.) But in any respect we think the instruction was misleading as applied to the facts of this case. The car which it is claimed was defective in its draw-bar appliances was a foreign car not provided by appellant, but received by it for transportation over its road in the ordinary course of railroad business. Its duty in relation to such car was one of inspection only, and it was not to be held responsible for latent defects which could not be discovered by such inspection as the exigencies of traffic will permit in the exercise of reasonable care. (C. & G. W. R. R. Co. v. Armstrong, 62 Ill. App. 228. See also Kelly, admr. v. Abbott, 63 Wis. 307, 53 Am. Rep. 292; Ballou, admx. v. C. M. & St. P. Ry. Co., 54 Wis. 257, 41 Am. Rep. 31.)

<sup>12</sup>—Wabash R. R. Co. v. Farrell, 79 Ill. App. 508 (517).

"By this instruction, the jury are told that the mere fact of the accident raises a presumption of negligence against appellant, which we

have seen is not the law. The duty of appellant in relation to this foreign car being one of inspection only, it was not bound to apply such tests as are usual for the discovery of the defects in manufacture as might be proper or necessary in regard to its own cars. (Ballou, admx. v. C. M. & St. P. Ry. Co., 54 Wis. 257, 41 Am. Rep. 31.) Inasmuch as it is the duty of a railroad company to receive from other companies cars for transportation over its road, to require it to apply all the common tests to ascertain whether such cars are properly made of good material and skillful workmanship and equipped with the best appliances, would be to place upon it an insufferable burden. The law makes no such requirement. When foreign cars appear to be in ordinarily safe and proper condition, railroad companies are obliged to transport them, and their duty as to such cars is that of inspection merely. (Bailey's Personal Injuries, relating to Master and Servant, section 2540.)"

could have ascertained the same to be defective and unsafe; and if you believe from the evidence that said car, draw-bar, draw-head or coupling thereto were unsafe, and that the plaintiff was a brakeman on defendant's train, and that said car was in said train, and that the plaintiff was in the discharge of his duty as brakeman on said train, trying to make a coupling and using all due care for his personal safety, and was injured in consequence of said car, draw-bar, draw-head or coupling being defective and unsafe, then the plaintiff would be entitled to recover for the injury received.<sup>13</sup>

§ 3848. **Hand-holds on Cars.** It is the duty of a railroad company to furnish to its employes cars and attachments (including hand-holds upon which to climb upon said cars) reasonably safe for the purposes for which they are to be used. It is also the duty of the railroad company, after having provided such cars and attachments, to use "ordinary care" to see that said cars and attachments are kept in a reasonably safe condition. If the railway company fails in either of these respects, and an injury is thereby occasioned to one of its employes, then the company is guilty of negligence.<sup>14</sup>

§ 3849. **Inspection of Hand-hold of Car.** If you believe from the evidence that defendant's car inspector at L. inspected said car with reasonable and ordinary care—such care as is ordinarily used in inspecting cars—that was all that was required of defendant, and defendant would not be liable to plaintiff for injuries received by reason of any defects in said car or hand-hold.<sup>15</sup>

13—Illinois Central R. R. Co. v. Harris, 53 Ill. App. 592 (592, 597).

"This instruction assumes to state in the first part of the instruction what, as a matter of law, would constitute negligence, and impliedly create a liability; viz., the use of car No. —, if in any way defective and the company knew it. It was not negligence as to the appellee to use such car even if defective, unless such defect caused the injury. C. C. C. & St. L. Ry. Co. v. Dixon, 49 Ill. App. 299. There must be the relation of cause and effect, to constitute actionable negligence. It is also the law that 'there must not only be negligence in fact, but it must have been the proximate cause of the injury without intervening negligence on the part of the plaintiff or lack of exercise of ordinary care,' for 'the harm which one brings upon himself he is considered as not having received.' C. & A. R. R. Co. v. Becker, Adm., 71 Ill. 25. The sharp issue in the case was whether the alleged iron splinters on the draw-heads were the cause of the injury, or whether the accident would not have happened notwithstanding such alleged negligence, owing to the fact that appellee projected his left arm straight in between the double buffers to make the coupling, which many witnesses introduced by appellant, testified he could not do and hope to escape injury."

14—St. Louis S. W. Ry. Co. of Texas v. Corrigan, — Tex. Civ. App. —, 81 S. W. 554.

"The court, in instructing the jury that 'it is the duty of a railway company to furnish to its employes cars and attachments (including hand-holds upon which to climb upon said cars) reasonably safe for the purpose for which they are to be used,' put the duty too strong, and imposed a greater burden on appellant than the law requires."

15—Int'l & G. N. R. Co. v. Hawes, — Tex. Civ. App. —, 54 S. W. 325 (326).

"The instruction was erroneous in this: Because it tells the jury, if they found that the defendant had inspected the car in question with such care as is ordinarily used by railroads in making inspections, the defendant could not be held guilty of negligence. The rule is that ordinary care is required of railroads in making inspections—that is, such care as one of ordinary prudence would use under like circumstances; and to tell the jury, as the requested instruction does, in effect, that if the defendant did what is ordinarily done by railroads in making inspection of cars, the defendant exercised ordinary care in respect to the defective handhold, would be a plain invasion of the province of the jury, since the instruction required the jury to accept the custom of the railroad as in itself the exercise of ordinary care, regardless of their own judgment as to whether or not the observance of such custom would, under the circumstances, be the exercise of ordinary care. It may be



§ 3850. **Allowing Steel Plates on Engine to Rust.** The court instructs you that if you believe from the evidence that the locomotive in question was constructed in the shops of the defendant, and that in the construction of the same, there was used by or with the knowledge and consent of defendant, or any of its officers or agents who had charge of the construction of said locomotive, steel plates that had been permitted to rust, and in consequence thereof to deteriorate in strength, whereby said plates became and were insufficient and improper to be used for the purpose aforesaid, and that afterward, in consequence of such defective plates, if the jury believe from the evidence that they were defective, the said engine exploded, and by such explosion killed C. D., husband of the complainant, while he was exercising ordinary care, then the jury should find the issues for the plaintiff.<sup>16</sup>

### TRACK AND ROAD-BED.

#### § 3851. **Master Must Use Ordinary Care to See that they Are Safe.**

(a) Now, in the first place, it was the duty of this railroad company to furnish a roadway reasonably safe for C. D. to discharge his duties as flagman. It is claimed, gentlemen, that the railroad company failed and was negligent in that duty; that it constructed and allowed its railroad track, or the cattle gaps adjacent to the railroad track, to be so erected and maintained as to be unsafe for C. D. to have discharged his duties while acting as such flagman or said railroad company. You are to determine whether or not that stock gap there was so constructed and maintained or not from the testimony as given to you by the witness. It was the duty of that railroad company to furnish such a track, and such a stock gap there, as well-regulated railroads do; and, if they did not, and that was the cause, and the proximate cause, of C. D.'s death, then the plaintiff in this case would be entitled to recover, unless C. D. should have contributed—should have been guilty of contributory negligence, which was the direct and proximate cause of his death.<sup>17</sup>

that in determining an issue involving a matter of science or art, the opinion of a scientist or expert would be binding upon the jury, and require a finding in accordance with the opinion of the scientist or expert, but no such issue is presented here."

16—C. & A. R. R. Co. v. DuBois, 56 Ill. App. 181 (190).

"We have seen that the obligation imposed by law upon the appellant company was that in building the engine it should use reasonable and ordinary skill and care to make it safe for the use to which it was to be devoted, and that a failure to exercise that degree of care constituted negligence in law. Whether such degree of care was used was a question of fact. The instruction invaded the province of the jury by assuming to advise them that if certain recited facts were proven they were required by the rules of law to find that the servants of the company who constructed the engine did not discharge their duties with

reasonable and ordinary care or skill. The jury should have been advised as to the degree of skill and care demanded by law of the workmen who build the engine, and left free to determine from the facts disclosed by the evidence whether such workmen were negligent or not."

17—No. Ala. Ry. Co. v. Mansell, 138 Ala. 548, 36 So. 459 (462).

"As evidential of what, in the exercise of due care, ought to have been done in the construction and maintenance of the roadway, it was proper to consider the usage prevailing on other well-regulated railroads; but 'all railroads are not required to conform to one standard,' and safety may be conserved, and, therefore, the duty of care performed, by providing a roadway not in conformity with such usages. L. & N. R. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; L. & N. R. R. Co. v. Jones, 130 Ala. 456, 30 So. 586; Richmond R. Co. v. Weems, 97 Ala. 270, 12 So.

(b) The jury are instructed as a matter of law that a railway company owes the duty to its employes to do all that human care, vigilance and foresight can do, consistently with the practical operation of its road, in providing a safe road, road-bed, track, ties and rail, and to keep the same in repair; and if you believe from the evidence that the plaintiff, while exercising reasonable care in the performance of his duty for the defendant, and without notice of any defects, received an injury resulting from the negligence of the defendant in either of the above particulars, they will find for the plaintiff and assess his damages, providing you also believe from the evidence that the conductor in charge of the train upon which the plaintiff was performing his duty, received no notice of any defects before the happening of the injury.<sup>18</sup>

§ 3852. **Maintaining Portable Coal Chutes Too Near Track.** The court instructs the jury that it was the duty of the defendant to keep its portable chute, when not in use, at such distance from its moving trains as was reasonably necessary to enable its servants to ascend or descend the side ladders of its freight trains in the discharge of their duties, with reasonable safety, without the exercise of more than ordinary care. And if the jury believe from a preponderance of the evidence that the plaintiff was injured whilst discharging in good faith his duty to defendant, under the directions of defendant's employe superior in authority to plaintiff, and that his injuries in controversy were caused by the gross negligence of defendant, its agents or employes, in failing to keep, if it did so fail, its portable chute, when not in use, at a reasonably safe distance from the side ladders on its moving trains, the law is for the plaintiff and the jury should so find. If, however, the jury believe the plaintiff knew that the defendant's portable chute was too close for reasonably safe passage on the side ladder of defendant's train at the time

186. If the part of the oral charge first excepted to this principal was ignored, and it was erroneously assumed that, subject only to the defense of contributory negligence, the plaintiff would be entitled to recover if the track and stock gap in question were not such as were furnished on well-regulated railroads generally, and if the failure to have it so was the proximate cause of the death of plaintiff's intestate. Such failure would not necessarily, and as a matter of law, have established the charge as negligence. Whether it did so depended in part on whether the duties of trainmen were such as, in their proper execution, might expose them to danger of collision with the structure; and this was a question about which different conclusions might well have been drawn from the evidence. Had there been no variance between the complaint and the proof, the question of negligence on defendant's part and of contributory negligence would, under the evidence, have been proper for the determination by the jury."

18—C. & A. R. R. Co. v. Kerr, 148 Ill. 605 (608, 609), 35 N. E. 1117.

"This instruction was evidently written without proper regard to the different degrees of care imposed by the law upon railroad companies as to employes and passengers. It was said in Chicago, R. I. & P. R. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55; 'It is also a well-settled proposition in this and the courts of other States, that a railroad company is not bound to furnish absolutely safe machinery for its employes. The law imposes upon the company the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery, tracks and switches, engines, etc., for the use of those engaged in its service.' Keeping in mind that in determining what is reasonable care in a given case, the nature of the employment, the machinery and appliances used, and the danger to which the employe is exposed, are always to be considered, the rule thus announced is a just one, and easy of application. We are therefore of the opinion that the giving of said instruction was error."

and place in controversy, then, in that event, the law is for the defendant, and the jury should so find.<sup>19</sup>

§ 3853. **Maintaining Stretcher Post in Dangerous Proximity to Track.** If you believe from the evidence that the plaintiff was injured substantially at the time and place, and in the manner as alleged in his petition, and that defendant maintained said stretcher post in dangerous proximity to defendant's track, and was thereby guilty of negligence, and that plaintiff was injured as a direct and proximate result of such negligence, if any, and you fail to find from the evidence that plaintiff was guilty of contributory negligence, and was not injured on account of assumed risk, then you will find for the plaintiff.<sup>20</sup>

19—*Louisville & N. R. Co. v. Hall*, 24 Ky. L. R. 2487, 74 S. W. 280 (282).

"By this instruction, the jury are told, as a matter of law, that it was negligence in appellant not to keep its coal chute far enough from the track so as not to injure employes on the side ladders of passing cars. Whether or not it is possible to maintain a portable coal chute used for furnishing coal to passing engines so far away from moving trains that one on the side ladder of a box car may pass safely between the chute and the train was a question of fact for the jury. . . . As was said by this court in *Needham v. L. & N. R. Co.*, 85 Ky. 425 (3 S. W. 797, 11 S. W. 306): 'It is the duty of the master to use ordinary care in providing for the use of the servant safe machinery and premises in safe condition. He is not, however, an insurer.' In *Shearman & Redfield on Negligence* (4th Ed.) par. 189, the principle is stated in these words: 'The master is bound to use ordinary care, diligence and skill for the purpose of protecting his servants from encountering unnecessary risks in the service, but he is not bound to use any higher degree of care for that purpose.' These citations are in accord with the great weight of authority on this subject. In fact, we know of none to the contrary. This instruction is objectionable for another reason, as it only requires plaintiff 'to know' that the chute was too close to the track for reasonably safe passage by it on the side ladder of the car. It should have contained the additional qualification that he knew, or could by the exercise of ordinary care have known."

20—*Int'l & R. N. R. Co. v. Von Hoesen*, — Tex. —, 92 S. W. 799.

"It is complained that this instruction authorized the jury to find for the plaintiff, unless it is shown that he was guilty of contributory negligence and was injured on account of the assumed risk. We are of the opinion that the charge is subject to this construction. It is true that the court did, at the request of appellant, by separate charges, instruct the jury as to the issue of contributory negligence and assumed risk; and they were in-

formed that if either of these defenses was established, the plaintiff could not recover. Under the evidence, both issues are in the case, and we cannot say that if the jury had found in favor of defendant as to either of these defenses that such finding would be disturbed. Of course, it is needless to state that if the plaintiff was guilty of contributory negligence, or that the injuries sustained were on account of a risk assumed, he could not recover. Of course, we know that the court did not intend to instruct the jury that in order to defeat a recovery by the plaintiff, both defenses should be established; but as the jury is required to take the law from the court, and is not supposed to look to any other source for information upon that subject, they must be governed by the charge. Now to the mind of an ordinary juror this instruction is calculated to convey the idea that the plaintiff is entitled to recover, unless he is defeated by his contributory negligence, and the injuries sustained were on account of one of the risks assumed. This is not an instance of a mere ambiguity in a charge that is corrected by other portions, or where one erroneous instruction is withdrawn or clearly or unequivocally corrected by a proper instruction; but as we construe this charge, it breeds a conflict with other instructions which separately presented to the jury the issue of assumed risk and contributory negligence. Both charges are entitled to equal dignity; and we cannot say that the jury was not influenced by the instruction complained of. In turning to the other parts of the charge they discovered that they are informed that if the plaintiff was guilty of contributory negligence, or the injuries were on account of the risk assumed, then to find for the defendant. When they come to this charge which is complained of, they are, in effect, told that the plaintiff is entitled to recover, unless he is guilty of contributory negligence and his injuries were received on account of the assumed risk. We cannot say which of these two conflicting instructions controlled the jury in reaching a verdict."



§ 3854. **Law Fixes no Exact Standard for Height of Bridges Over Railroads.** The court instructs you that if you believe from the weight of the evidence in this case that R., deceased, was riding up on top of a car in the train of the defendant, and was at the time in the discharge of his duty as brakeman for the defendant, and was not acting in violation of any rule of the defendant, and was in a proper position and place on the car for the performance of his duties, and was in the exercise of due care, and he was killed by coming in contact with the top of a bridge of the defendant railroad company while passing under it, and if the roof of such bridge was lower than the usual height of such bridges, and that he, R., by reasonable care and foresight, could not have known it was dangerous to attempt to pass under, then the defendant railroad company is liable for damages to the administrator of said deceased for such killing.<sup>21</sup>

§ 3855. **Duty to Have Yard Suitably Lighted.** You are instructed that it was the legal duty of the defendant company to use ordinary care to furnish for the use of plaintiff reasonably safe and suitable appliances with which to perform his work, and also that it was the legal duty of the defendant company to use ordinary care to furnish for the use of plaintiff a reasonably safe and suitably lighted yard in which to perform his work; that this was a personal duty that the defendant company owed to the plaintiff.<sup>22</sup>

§ 3856. **Injury by Latent Defect in Lock of Switch.** It is the duty of a railroad company to keep its switches, targets, locks, and appliances upon its road and right of way in good repair, so that it will be safe for its employees to discharge their duties; and if the defendant company failed to keep the lock in repair at the place where the plaintiff was killed, so that by reason of such want of repair the decedent's train, without fault on his part, and without knowledge on his part of such condition, was turned from the main track to the side track, and the engine overturned, and the decedent killed,

21—Cleveland, C. C. & St. L. R. Co. v. Walter, Admr., 147 Ill. 60 (63), 35 N. E. 529.

"As to the instruction it was, in our opinion, erroneous. Under the instruction, if the roof of the bridge was lower than the usual height of such bridges, then the railroad company was liable. The real question for the jury was, whether the bridge, as constructed, was safe, and not dangerous. It might be lower than other bridges and at the same time be safe. If the bridge, as constructed, was of a sufficient height, so that brakemen on the top of the car might cross over the bridge in safety, then it made no difference whether it was higher or lower than other bridges."

22—Galveston H. & S. A. Ry. Co. v. English, —Tex. Civ. App. —, 59 S. W. 626 (627).

"We think that this instruction is clearly erroneous, in that it charges appellant with a duty not imposed by law. The full measure of appellant's duty to appellee, so

far as the conditions of its yards was concerned, was to use ordinary care to furnish him with a reasonably safe yard in which to perform his work; and, if this duty was discharged by appellant, it would not be liable for any damage that might occur from a failure to have the yard suitably lighted. This charge can only mean one of two things, viz.: Either that it was the legal duty of appellant to use ordinary care to have its yard suitably lighted, regardless of whether or not said yard would be reasonably safe without such light, or that in the opinion of the court said yard would not be reasonably safe unless same was suitably lighted; and the jury must necessarily have so interpreted said charge. Under either of these interpretations the charge is obviously upon the weight of the evidence, and cannot be sustained. Tex. & P. R. Co. v. Murphy, 46 Tex. 363; Gulf, C. & S. F. R. Co. v. Gasscamp, 69 Tex. 546, 7 S. W. 227; Campbell v. Trimble, 75 Tex. 270, 12 S. W. 863."

then in that case I charge you that the defendant would be liable to the plaintiff in this case.<sup>23</sup>

## OPERATION AND MANAGEMENT OF TRAINS AND CARS.

§ 3857. Injury "In Manner and Form as Charged in the Declaration." The jury are instructed that if they believe, from a preponderance of the evidence, that the deceased was in the employ of the defendant as a switchman as alleged in the declaration, and while

23—Cleveland, C. C. & St. L. Ry. Co. v. Snow, 37 Ind. App. 646, 74 N. E. 910 (911).

"We think this instruction is too broad, in so far as it undertakes to define the duty owing from the appellant to the decedent. It is the duty of the employer to make the working place of its employes safe, but this duty is performed if the employer exercises reasonable and ordinary care. The instruction leaves the jury to conclude that the duty to make switches and appliances upon its road and right of way safe is absolute, and that, if they should find that the switches and appliances were not safe, the negligence of the company would be established; that is, although the evidence might show that the appliances were all that reasonable and ordinary care would suggest, or that the highest degree of care had been exercised to keep these appliances in repair, yet the jury, under this instruction, were told, in effect, that they were required to decide the one question only, namely, whether the appliances were or were not safe. The general rule has often been approved that the employer must exercise ordinary skill and care in providing the employe with a safe working place and with safe machinery and appliances. To say that the employer must provide safe appliances and if he fails to do so, and an injury results, there is a liability, is equivalent to saying that the employer becomes, through the contract of hiring, an insurer against injury. In the contract of hiring there is an implied undertaking that the employer will use all reasonable care to furnish safe premises and appliances for conducting the business safely. Pittsburgh, etc. Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Krueger v. Louisville, etc. Ry. Co., 111 Ind. 51, 11 N. E. 957; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Lake Shore, etc. Ry. Co. v. McCormick, 74 Ind. 440; Wabash Paper Co. v. Webb, 146 Ind. 303, 45 N. E. 474. We think the instruction objectionable for another reason. It proceeds upon the theory that, if the switches and appliances were defective at the time of the injury, it was because appellant had failed to keep them in repair, not that appellant had installed defective appliances, and was maintaining them at the time of the injury. If defective appliances were put in and maintained, appellant was necessarily bound to know they were defective at the time of the injury. But if the appliances when put in were proper appliances, and were not in repair at the time of the injury, the company might or might not be bound to know they were not in repair. If they were out of repair, and appellant knew it, or if they had been out of repair for such length of time that appellant would be charged with notice, appellant must answer for such defective condition. But if the appliances when installed were in proper repair, and appellant had notice that they had become out of repair, and the exercise of reasonable diligence on its part would not have discovered that they were out of repair, there would be no neglect of duty in failing to repair. Of course the employer must know whether appliances will be come out of repair through continued use, but that element does not enter into the instruction in question. The instruction tells the jury that appellant would be liable for this want of repair, and this regardless of whether it had knowledge, actual or constructive, of such want of repair. The evidence and the jury's answers to interrogatories show that the alleged defect in the switch was in the lock, and that it was a latent defect. It is quite true that the duty of appellant to provide reasonably safe appliances was a continuing one, but if a reasonably safe lock had been provided, and it afterwards got out of repair, appellant could not be charged with negligence in maintaining it in that condition unless it knew the lock was out of repair, or could have known it by the exercise of ordinary care. See Evansville, etc. Ry. Co. v. Duel, 134 Ind. 156, 33 N. E. 355, and cases cited; Creamery, etc. Co. v. Hotsenpiller, 24 Ind. App. 122, 56 N. E. 250 and cases cited; Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Chicago, etc. Ry. Co. v. Fry, 131 Ind. 319, 28 N. E. 989; Umbach v. Lake Shore, etc. R. Co., 83 Ind. 191; Louisville, etc. R. Co. v. Orr, 84 Ind. 50; 3 Elliott on Railroads, 1268; Culver v. South Haven, etc. R. Co., 138 Mich. 443, 101 N. W. 663. The fact that the court correctly stated the law in other instructions given does

in the discharge of his duty as such, and in the exercise of due care, was killed in manner and form as charged in the declaration herein, then you should find for the plaintiff and assess the damages at such sum as you believe from the evidence the parties for whose use and benefit this suit was brought have actually sustained, if any, not exceeding the amount sued for in the declaration.<sup>24</sup>

§ 3858. **Operating Car at Dangerous Rate of Speed.** You are instructed that the plaintiff in this case does not allege that the train of defendant was being operated at a negligent rate of speed and you are charged that you cannot find defendant guilty of negligence upon this ground, even though you should find the train was being operated at a greater rate of speed than a reasonably prudent person would have operated it under the same circumstances.<sup>25</sup>

§ 3859. **Recklessly Running Train at High Speed Through a Crowd of Workmen.** The court instructs the jury that, if the manner in which the defendant conducted its business in the operation of its trains caused the employment in which the deceased was engaged as a servant of the company to be attended with extraordinary and unusual danger to deceased while performing his work and duty as such servant, yet if deceased knew, or by the exercise of his ordinary senses might have known, that the defendant so operated its trains, and thereafter voluntarily continued to expose himself to such extraordinary hazard in performing his duty as a servant of the defendant, and in doing so was killed by a train of the defendant, then the plaintiff is not entitled to recover.<sup>26</sup>

§ 3860. **Injury Through Collision—Failure to Give Signals.** If you find from the evidence that the defendant's agents exercised due care and caution in operating the locomotive engine and cars which collided with the lever car and caused the death of the plaintiff's husband, and used all precautions which were proper, necessary, and

not cure the error. 'This could only be done,' said the Court in *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600, 'by plainly withdrawing the instructions named from the jury, which was not done in this case. \* \* \* Besides if two or more instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, it is a cause for reversal.' See also *Pittsburg, etc. R. Co. v. Nofstger*, 148 Ind. 101, 47 N. E. 332; *Chicago, etc. R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244; *Indiana, etc. R. Co. v. Vauble*, 31 Ind. App. 370, 68 N. E. 195; *Southern Ind. R. Co. v. Moore*, 29 Ind. App. 52, 63 N. E. 863."

<sup>24</sup>—*I. C. R. Co. v. Cozby*, 174 Ill. 109 (118), aff'g 69 Ill. App. 256, 50 N. E. 1011.

"We think the instruction is subject to just criticism in that the language 'in manner and form as charged in the declaration' might reasonably have been understood by the jury as simply referring to the manner of inflicting the injury and causing the death, that is, by being caught between the rails and run over by the cars. It ignores entirely the question of negligence on the part of the defendant."

<sup>25</sup>—*Int'l & G. N. R. Co. v. Vil-*

*larel*, 36 Tex. Civ. App. 532, 82 S. W. 1063 (1064).

"This was properly refused. The court did not mention the matter of negligent speed in its charge. The speed was, however, a factor relating to plaintiff's contributory negligence, and also to the issue of discovered peril. The charge asked was calculated to cause the jury to ignore such fact, and was therefore upon the weight of the evidence."

<sup>26</sup>—*I. C. R. Co. v. Gilbert*, 157 Ill. 354 (359), aff'g 51 Ill. App. 404, 41 N. E. 724.

"It was charged that the defendant was guilty of negligence, under the circumstances, in recklessly, negligently and at a high rate of speed running its train through a place where men were working and over G. The surrounding circumstances required a commensurate degree of care by employer and employe alike, and whether that degree of care was used was a question for the jury. . . . The instruction entirely ignored the fact of circumstances surrounding at the time affecting the duty of employer and employe alike to exercise care and caution commensurate with attendant danger."



customary under the circumstances by blowing the whistle, ringing the bell, and exhibiting signal lights, and were not guilty of any negligence, then you should find for the defendant.<sup>27</sup>

§ 3861. **Circumstantial Evidence as to Application of Emergency Brake—Injury to Brakeman.** Even if you find it to be a fact that the box car upon which J. was riding bunted against the car ahead of it, and then immediately the car in its rear bunted against it, and this jolting of the car caused J. to lose his balance and fall, yet this cannot be regarded by you as proving that engineer K. applied the air in the emergency, or otherwise improperly applied the air brakes too violently, unless you also find affirmatively that such movement of the car is inconsistent with and cannot be as reasonably accounted for on any other theory, for, if such movement of the car as described by J. may reasonably have occurred from other causes than the setting of the brakes, then its value as circumstantial evidence is destroyed. The testimony of J. to the effect that the box car that he was on bunted against the car ahead of it, and then the car to the rear bunted against it, is merely circumstantial evidence, which it is claimed by the plaintiff indicates that engineer K. had applied the emergency brake; but if the proof shows that such movement or action of the car, viz., its bunting against the car ahead of it, and then the car to the rear bunting against it, may also be caused by the mere shutting off of the steam of the engine, while they and the forward cars were on a sharp curve, and the car where J. was and those to the rear were on a comparatively straight track, and this movement of this car is as reasonable with the one theory as the other, then you are instructed that you would not be warranted in saying from this testimony of J. alone on this point that this movement of the car that he was on shows that the engineer had applied the air in the emergency, because it may have occurred from another cause.<sup>28</sup>

27—*Louisville & N. R. Co. v. Wade*, 46 Fla. 197, 35 So. 863 (864).

"Upon the giving of the charge above quoted it is contended that the instruction that if the defendant 'used all the precautions which were proper, necessary, and customary under the circumstances by blowing the whistle, ringing the bell and exhibiting signal lights,' the jury should find for the defendant, is erroneous, as impliedly instructing them that the omission of any of these acts would constitute negligence which would entitle the plaintiff to recover. Whether the charge raises so strong an implication of this nature as to constitute reversible error, we do not now determine, as a second trial of the case will doubtless be confined to the issues presented by the pleadings. It cannot be doubted, however, that such an inference is possible from the language used and, if erroneous, and prejudicial to the defendant, it had a right to ask that the point be made clear to the jury."

28—*Brandes v. Brandes*, 129 Ia. 351, 105 N. W. 497 (498).

"In our judgment these instructions cannot be approved. In giving them the trial court doubtless relied, as do appellee's counsel in argument, upon the rule laid down by this

court in *Asbach v. Railroad Co.*, 74 Ia. 248, 37 N. W. 182, and followed in *Rhines v. Railroad Co.*, 75 Ia. 598, 39 N. W. 912, and *Wheelan v. Railroad Co.*, 85 Ia. 167, 52 N. W. 119. We do not intend here to enter upon any discussion of the soundness of the rule of the cited cases, but, accepting it as the law of this state, consider whether it was properly applied in the case before us. An examination of the precedents referred will readily demonstrate that in no instance have we gone farther than to hold that, where proof of the alleged negligence and the resulting injury rests solely upon circumstantial evidence and the proved circumstances when taken as a whole and fairly considered are consistent with the exercise of due care on part of the defendant, the plaintiff cannot recover. To say, however, that each particular circumstance constituting the array of evidence on which the plaintiff relies may be taken separately and subjected to that test, and that if it be found consistent with any other theory than that of negligence its value as evidence is destroyed, is an altogether different proposition. And this, it appears to us, is the vice of the charge given by the trial court."

§ 3862. **Injury Through Act of Third Person in Unsetting Brakes on Cars.** If from the evidence you believe that the employes of the defendant left the brakes set on the said cars on the said track, and that thereafter some person unknown to the defendant removed said brakes and left them unset, and that the act of such unknown person caused, or in any manner contributed to, said cars being on the main track, you will find for the defendant.<sup>29</sup>

§ 3863. **Injury Through Sudden Jerk or Lurch of Train.** If the fall of plaintiff from the car was accidental and the accident was caused by the negligence of the engineer in allowing the train to attain a dangerous rate of speed, and by causing the train to give a sudden jerk or lurch, by which the plaintiff was hurled from the train and hurt, without negligence on his part, defendant is liable.<sup>30</sup>

§ 3864. **Kicking Car Upon Track with Great Force Against Another.** If you find from the evidence that the plaintiff was employed by the defendant as a car cleaner, and that on or about the \_\_\_\_\_ day of \_\_\_\_\_, plaintiff was on one of the cars of defendant engaged at said time in the discharge of his usual and customary duties as such, and that while so engaged an engineer in charge of one of defendant's switch engines suddenly propelled said engine with great force against a car next to one upon which plaintiff was standing, and that in so doing he caused said car upon which plaintiff was standing to move with a sudden and unusual jerk, and that by reason of said sudden and unusual jerk of said car, should you find said car was so moved, plaintiff was thrown from the platform or steps of said car, and thereby injured as alleged; and you further find that said engineer, in causing said car upon which plaintiff was standing to move with a sudden or unusual jerk, should you find from the evidence it was so moved, was guilty of negligence, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any, and you further find that plaintiff was not guilty of any negligence which contributed to his injury; and if you further find that at the time the plaintiff herein made the settlement with defendant and signed the release in evidence before you he was a minor under twenty-one years of age—then you will find for plaintiff.<sup>31</sup>

§ 3865. **Starting Car Before Plaintiff Has Had a Reasonable Time to Board It.** When the plaintiff, with others, was directed to go with the coal car to the pump house, it was the duty of those in charge of the switch engine to wait until the plaintiff had boarded the car, or placed himself in some other safe position, before starting

29—Galveston H. & S. A. Ry. Co. v. Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622 (623).

"This charge would have ignored the question of negligence in allowing the car to remain in such condition on the side track, which would have been sufficient to render defendant responsible, although the act of some third person in removing the brakes may have contributed to the occurrence."

30—Louisville & N. R. Co. v. Woods, 105 Ala. 561, 17 So. 41 (45).

"The above charge given for plaintiff was confused and contradictory. If the fall of the plaintiff was caused by negligence of the engineer, as predicated in one part of

the charge, it cannot be said that it was accidental, as stated in another part."

31—Johnson v. Int'l & G. N. R. Co., 24 Tex. Civ. App. 148, 57 S. W. 867 (868).

"The paragraph in appellant's brief pertaining to this objection to the charge is: 'Contributory negligence that would have barred a recovery by the plaintiff was such negligence as amounts to an absence of ordinary care on the part of plaintiff.' When the part of the charge to which the objection is made is read in the light of subsequent paragraphs which define ordinary care and negligence, the objection is obviated."

the engine; and, if the engine was started negligently, as alleged, before the plaintiff got aboard of the car, or in a safe place, and that by reason thereof, with no fault of his own, he was injured, then the defendant is liable for the injury caused thereby.<sup>32</sup>

§ 3866. **Injury to Servant by Projecting Door of Refrigerating Car.** If the jury believe from the evidence that the foreman of the switching crew with which the plaintiff's husband was working at the time of the accident directed him to go between the tracks and see whether some cars had been unloaded, that while he was between the tracks doing the work he was ordered to perform, the foreman, without giving him any notice or warning, directed the engineer to start the engine in motion, and that the engine and cars were started and put in motion, in pursuance of such direction of the foreman, that the door of the refrigerator car was left projecting out into the space between the tracks instead of being closed or latched back, that the defendant company was guilty of negligence in having or allowing such car door to be in the condition mentioned, which directly caused the injury to and death of plaintiff's husband, and that he was in the exercise of ordinary care for his own safety before and at the time of the injury, the defendant is liable and the plaintiff is entitled to a verdict.<sup>33</sup>

§ 3867. **Launching Tie from Moving Car.** If from the evidence the jury believe that the plaintiff was injured by reason of a certain tie, which was being launched from a moving car, striking his leg, and you believe the launching of said tie from a moving car was the proximate cause of plaintiff's injuries, and you further find that plaintiff knew said tie was being launched, from a moving car, you will find for defendant.<sup>34</sup>

§ 3868. **General Practice of Yard Crew in Giving Signals.** You are

32—*Light v. Chicago, M. & St. P. Ry. Co.*, 93 Ia. 83, 61 N. W. 380 (381).

"It is said that this imposed upon the defendant the duty of waiting the pleasure of plaintiff in getting upon the car; that under it he would be justified in delaying any length of time; and that no obligation rested upon the defendant. Taken as a naked proposition, the instruction, so viewed, would not be correct. But instructions must be considered in the light of the evidence to which they are supposed to be applicable. It was not the duty of defendant to wait for an indefinite length of time for plaintiff to mount the car; but it was its duty to wait at least a reasonable time for him to do so, having in view the circumstances, including his distance from the car."

33—*Mobile & O. R. R. Co. v. Healy*, 100 Ill. App. 586 (592).

"The first part of this instruction improperly calls attention to the acts and directions of the foreman of the switching crew of which the deceased was a member, in such a way that the jury might infer that he was negligent and that such acts and directions in connection with the open door caused the death of the deceased. The part of the in-

struction which for convenience of reference is italicized affirms as fact what is denied by appellee. It assumes that if the car door was open as described in the instruction, that its being open caused the death of the deceased. Similar words as these specified have been frequently condemned when the evidence is conflicting upon material allegations. The following cases are in point: *City of Chicago v. Bixby*, 84 Ill. 86; *American Insurance Co. v. Crawford*, 89 Ill. 64; *Illinois Central R. R. Co. v. Zang*, 10 Ill. App. 597."

34—*Galveston H. & S. A. Ry. Co. v. Dehnisch*, — Tex. Civ. App. —, 57 S. W. 64 (65).

"By the charge asked, the jury might have been led to find for defendant, notwithstanding they believed that the injury did not occur from the simple transaction of launching ties from a moving train, but from the particular negligent manner of so doing. The charge, as asked, would thus have ignored, and practically charged against, another material issue in the case. *G. H. & S. A. Ry. Co. v. Croskell*, 6 Tex. Civ. App. 160, 25 S. W. 486; *Gulf, C. & S. F. Ry. Co. v. Lankford*, 9 Tex. Civ. App. 593, 29 S. W. 933; *Ry. Co. v. Jackson*, 93 Tex. 262, 54 S. W. 1023."



charged that if you believe there was a general practice with the yard crews in the matter of giving signals, and who should give them, in doing the work in the defendant's yard, and a method of work known and usual with the switching crews in question, and if you further believe from the evidence that in some other yards, or with some other railroad employes, there was a different practice in vogue with reference to who should give signals, and how the work should be done, you are charged that it is immaterial in this case how the work may have been done in any other yard, and in such case you will not consider the testimony as to what may have been the practice in any other yards; and, if you believe from the evidence that there was a general habit and custom of doing the work in the defendant's yard, then, unless the plaintiff has established by a fair preponderance of the testimony that the signals given by Foreman McC. and by the yard master, F., were not the proper and customary signals to be given at that time, then you will find for the defendant, without regard to any other issue in the case, and say so by your verdict.<sup>35</sup>

### RULES AND REGULATIONS.

**§ 3869. Railroad not Liable for Injury Through Disregard of its Plain Instructions.** (a) If there was any order or rule of the defendant with respect to the distance that should be observed in running one car behind another, and the plaintiff knew of this rule or order, and violated the same, and a violation of the rule or order caused the injury, and the injury was not contributed to by the negligence of defendant in regard to the brake or wheels, as before explained, then plaintiff cannot recover.<sup>36</sup>

(b) It is shown by the evidence that one of the rules of the defendant company in force at the time of the accident provided: "When a train is detained by an accident or obstruction, or stops at any unusual place, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point 15 telegraph poles from the rear of the train he must place one torpedo on the rail on the engineman's side; he must then continue to go back at least 20 telegraph poles from the rear of his train, and place two torpedoes on the rail on the engineman's side, 10 yards apart (one rail length), when he may return to a point 15 telegraph poles from the rear of his train, where he must remain until an approaching train has been stopped or he is recalled by the whistle of his engine. When he comes in he will remove the torpedo nearest

35—*Gulf, C. & S. F. Ry. Co. v. Hill*, 95 Tex. 629, 69 S. W. 136 (139, 140).

"The effect of the charge would have been to place the burden upon the plaintiffs to prove that the signals given were not in compliance with any custom upon that subject which prevailed in the Galveston yards, whether reasonably safe or not, and without regard to the knowledge of the deceased of the existence of such custom. The custom could not affect plaintiff's rights

unless deceased knew of its existence, or was chargeable with notice of it. *Int'l & G. N. Ry. Co. v. Hinzie*, 82 Tex. 623, 18 S. W. 681."

36—*Texas & P. Ry. Co. v. Maupin*, 26 Tex. Civ. App. 385, 63 S. W. 346 (347).

"This charge is subject to the criticism that, if the violation by plaintiff of a rule of defendant as to the manner of running the car caused the injury, then he could not recover, although it may have been contributed to by the negligence of defendant."

his train, but the two torpedoes must be left on the rail as a caution signal to any following train." And also the following rule: "When on a curve or down-grade the flagman must go back a distance of at least 20 telegraph poles further than is above provided and as many more as may be necessary before placing torpedoes to give approaching trains ample time to stop." If you believe from the evidence that, at the time or just before the train stopped, the plaintiff knew, or by the use of ordinary care in the course of the performance of his duties on the train he could have known, that the train was stopping or had stopped at an unusual place, and if from the time he so knew, or could, in the exercise of ordinary care, have known that it was so stopping, or had stopped, there was time reasonably sufficient for him to have carried out and performed the duties required of him by such rule; and if you further believe that the plaintiff violated said rule, and that such violation of said rule caused or contributed to cause the accident—you will find for the defendant. If you believe that the plaintiff's violation of such rule, if he did, was negligence, he cannot recover.<sup>37</sup>

37—Mo. K. & T. Ry. Co. of Texas v. Brodie, 32 Tex. Civ. App. 168, 74 S. W. 100 (102).

"Whatever the law may be in other jurisdictions, it is well settled in this state that disobedience by the servant of the rules of the master is not negligence per se. In Galveston H. S. & A. Ry. v. Adams, 94 Tex. 100, 58 S. W. 831, the law is stated in this language: 'The plaintiff in error presents, in different forms, the proposition that a servant who, in discharging his duties, disobeys the regulations of his master, is guilty of negligence per se, and if injured, and the act which violates such rules contributes to the injury, no recovery can be had. We do not understand the law to be consistent with that contention. If a violation of the rule shows conclusively that the servant cannot recover under the facts of the case, the question of contributory negligence becomes a question of law to be decided by the court. If, however, under the facts of the particular case, there might be a phase under which the servant would be justified or excused in disregarding the rule of the company, then it becomes a question for the jury to determine whether such act is negligence; that is, whether, under all the circumstances, a reasonably prudent person would have done as the plaintiff in the case did.' And in Gal. H. & S. A. Ry. v. Brown, 95 Tex. 2, 63 S. W. 305, Chief Justice Gaines states the law in these terms: 'It may be that the general rules of a railway company for the conduct of its employes are not absolute. Circumstances creating an emergency may exist which may excuse the servant for disregard of a rule; hence the case would have to be clear in which the court should hold that the disobedience of a mere rule is negligence per se.' In that case the servant was injured as a result

of the disobedience of a general rule of the company, and also of a specific order. It was held that the order was absolute, and the duty of the servant to obey it absolute, and that he could not recover. In Gulf W. P. & T. Ry. v. Ryan, 69 Tex. 665, 7 S. W. 83, it was held that where the servant was injured in an attempt to board a moving train in violation of a known rule of the company, no excuse for his conduct being shown, the company was not liable. In San Antonio A. P. Ry. v. Wallace, 76 Tex. 636, 13 S. W. 565, it was held that where the servant was injured by reason of his being on the top of a box car while the train was crossing a bridge, in violation of a known rule of the company, no excuse for his conduct being shown, the plaintiff could not recover. In the following cases decided by the Courts of Civil Appeals, wherein writs of error were denied by the Supreme Court, it was held that the question as to whether the servant's violation of the rules of the master constituted negligence was one of fact for the decision of the jury; Tex. & N. O. Ry. v. Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99; Mo. K. & T. v. Pawkett, 28 Tex. Civ. App. 583, 68 S. W. 323; Mo. K. & T. R. v. Follin, 29 Tex. Civ. App. 512, 68 S. W. 810; Gulf C. S. F. Ry. v. Cornell, 29 Tex. Civ. App. 596, 69 S. W. 980. . . . The special charge, as presented to the court, was defective in singling out the facts stated therein, and confining the consideration of the jury to those facts alone, and in giving to the rules of the company the force of law; and the trial court did not err in qualifying the charge by requiring the jury to find, upon the whole case, whether the plaintiff's failure to immediately leave the caboose and go back to flag the following train was an act of negligence. The rules of the company

(c) You are further charged that if you find from the testimony that the train which was standing at B. sent out a flagman, and that such flagman signaled the train on which plaintiff was engineer in time for the plaintiff to have stopped the train on which he was engineer and prevented the collision, and that the plaintiff failed to discover such signal, if any, or failed to obey it if he did discover it, and that such failure on the plaintiff's part was negligence, then the plaintiff cannot recover.

(d) You are further charged that if you find from the testimony that it was plaintiff's duty to approach the standpipe at B. with his train under full control, and you further find that he failed to have his train under full control in approaching said B. and that said failure was negligence, and that such negligence contributed to the collision, that the plaintiff cannot recover, and you must so find.

(e) You are further charged that if you find from the testimony that defendant company had at the time and prior to the departure of plaintiff from Y. a notice posted in the bulletin book in its office at Y., or on the clip in the yard of said company at said place, directing all enginemen to protect their trains at the B. water tank or standpipe, and you further find that it was plaintiff's duty to examine said bulletin book and clip, before leaving with his train, and you further find that plaintiff failed to observe said notice so posted, if you find it was so posted, and that such failure, if any, was negligence, and that such negligence, if any, either caused or contributed to his injury, then plaintiff cannot recover, and you must so find. The burden of proof is upon plaintiff to establish his case by a preponderance of the testimony.<sup>38</sup>

are not of such a character as to impose upon the brakeman an absolute duty to comply therewith, under penalty otherwise of being held guilty of negligence, without regard to the circumstances of the case."

38—San Antonio & A. P. Ry. Co. v. Connell, 27 Tex. Civ. App. 533, 66 S. W. 246 (247).

"We have not seen any case in which it was held that a court would be justified in telling a jury that the infraction of a rule formulated by the master was negligence per se in the servant, and, on the other hand, the converse of the proposition has been time and again held by the courts of Texas. In the leading case of *The Texas & P. Ry. Co. v. Murphy*, 46 Tex. 357, 26 Am. Rep. 272, it is held that except in cases where the entire facts show negligence, or where a statute declares certain acts negligence, it is error for a court to instruct a jury that a given state of facts constitute negligence. While not giving unqualified approval to all that was said in the *Murphy* opinion, it was said in *Texas & P. Ry. Co. v. Hill*, 71 Tex. 451, 9 S. W. 351, 'We have been cited to no case where it had been held competent for the court to charge upon any combination of facts as constituting negligence, save when so declared by law.' In the case of *Gulf, C. & S. F. Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227,

it was said: 'According to the rule in this court, in order that an act shall be deemed negligent per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it.' This has been reiterated in many cases. *Mo. P. R. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Campbell v. Trimble*, 75 Tex. 270, 12 S. W. 863; *Gulf, C. & S. F. R. Co. v. Anderson*, 76 Tex. 244, 13 S. W. 196; *Calhoun v. Railway Co.*, 84 Tex. 226, 19 S. W. 341; *Garteiser v. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. 631; *San Antonio & A. P. R. Co. v. Long*, 4 Tex. Civ. App. 497, 23 S. W. 499. Speaking of the identical proposition contended for in this case, it was said in *Ft. W. & S. C. R. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137: 'This would have been in contravention of the rule forbidding the trial court to say, in the absence of statutory declaration, that any particular act or omission constitutes negligence.' In the case of *Galveston, H. & S. A. R. Co. v. Sweeney*, 36 S. W. 800, this court said: 'It is also contended that the charge should not have left to the jury whether or not the violation of the rules by the engineer was negligence, and, practically, that the court should have instructed the



(f) If you believe from the evidence that the defendant had prescribed certain rules for the running of the train on which plaintiff was engineer, and that those rules were in full force and effect, and that plaintiff knew this, and that he violated such rules, and because of such violation received his injury, you will inquire no further, but will return a verdict for the defendant.<sup>39</sup>

§ 3870. **Brakeman Disobeying Rules by Remaining in Locomotive Cab.** If you find from the evidence that under the rules or regulations of the defendants' road, of which decedent had knowledge, or that from the instructions to the decedent from the conductor of the train in question, or other superior officer of the railroad company authorized to give such instructions to decedent, it was made the duty of the decedent, as brakeman, when entering a station, or passing through it, to be on top of the train to attend to the brakes, and that he knowingly disobeyed such rules and instructions, and neglected his duty by remaining in the locomotive cab, and was there injured while disobeying said rules and instructions, then plaintiff cannot recover, and your verdict should be for defendant.<sup>40</sup>

§ 3871. **Rule Against Coupling Cars in Motion May be Waived.**

(a) The court instructs the jury that, even though you may believe from the evidence that the defendant company had published a rule forbidding brakemen upon its line of railroad going between moving cars to uncouple the same, and making it a violation of duty on the part of the brakemen to go between moving cars to uncouple the same, yet if you further believe from the evidence that it was the

jury that such an act was in itself negligence. . . . We cannot give

a rule the force of a statute in this respect. It would place it within the power of a master to make that negligence, which may not be negligence at all, by means of rules.' In

the case of *Galveston, H. & S. A. R. Co. v. Adams*, 58 S. W. 831, the supreme court of Texas said: "The

plaintiff in error presents in different forms the proposition that a

servant who, in discharging his duties, disobeys the regulations of his

master, is guilty of negligence per se, and if injured, and the act which

violates such rules contributes to the injury, no recovery can be had. This rule would give to regulations

of the master the force of statutory enactments. We do not understand

the law to be consistent with that contention.' A violation of a rule

of the master by the servant is a circumstance which, taken in connection with the other circumstances

of the case, might, when the facts taken together lead irresistibly to

the conclusion that the servant had been injured through his own negligence, justify a court in taking the

case from a jury; but the violation of a rule does not justify a court in

instructing a jury that such violation is negligence per se. The rules of railway companies have never

been put upon a parity with the laws of the state, and no court has ever so declared. We do not understand that such a proposition is

countenanced in *Galveston, H. & S. A. R. Co. v. Gormley*, 91 Tex. 393,

43 S. W. 877, 66 Am. St. 894, nor in *Railroad Co. v. Brown*, 95 Tex. 2,

63 S. W. 305. We have discussed this question at length, because it so

earnestly insisted in the brief of appellant that the court should have

declared the infraction of a rule by the employee negligence in itself."

39—*Missouri, K. & T. Ry. Co. of Texas v. Mayfield*, 29 Tex. Civ. App. 477, 68 S. W. 807 (809).

"This was properly refused. Ordinarily, it is not negligence per se

for an employee to violate a rule of the company, but it is a question

for the jury to determine. There is nothing in the evidence that takes

this case out of the general rule, and the court properly submitted

the question to the jury. *Galveston, H. & S. A. R. Co. v. Sweeney*,

— Tex. Civ. App. —, 36 S. W. 800; *Galveston, H. & S. A. R. Co. v. Adams*, 94 Tex. 100, 58 S. W. 831;

*Texas & N. O. Co. v. Mortensen*, 27 Tex. Civ. App. 106, 66 S. W. 99; *Mo. K. & T. R. Co. v. Pawkett*, 28 Tex.

Civ. App. 583, 68 S. W. 323."

40—*Conners v. Burlington C. R. & N. Ry. Co.*, 74 Ia. 383, 37 N. W. 966 (968).

"It is proper in this connection to say that the instruction given by

the court is in accord with the holding of this court in *O'Neill v. Railway Co.*, 45 Ia. 546. I am not fully

satisfied of the correctness either of the holding in that case or the instruction given."

habitual practice of brakemen upon defendant's road to disregard said rule, and to go between moving cars to uncouple the same under the conditions and circumstances shown by the evidence in this case with the experience plaintiff had, and that such habitual practice on the part of the brakemen had been continued for such length of time prior to the injury that defendant company knew such was the habitual practice upon its line of road, the defendant acquiesced in such habitual violation on the part of its brakemen, then under such facts, if you so find from the evidence, the rule so published would not in law be held operative and in force at the time of the injury.<sup>41</sup>

(b) If you find from the evidence that the use of the coupling stick was customarily disregarded by the plaintiff and other employes of the company, I charge you that the plaintiff would not be excused from carrying out his contract—if you find that an agreement was made—unless you should find from the evidence in this case that the non-observance of the rule as to the use of the coupling stick had been so general, and had continued for such a length of time, after his employment as to justify the conclusion that there had been a mutual rescission and abrogation of the contract.<sup>42</sup>

§ 3872. **Assumption of Risk as to Cars Being Left Uncoupled When Rule of Master to Contrary.** Plaintiff also assumed all those risks which arose from the manner in which the defendant conducted the

41—C. & A. R. R. Co. v. Myers, 86 Ill. App. 401 (405).

"It will be remembered that a part of this rule referred to the duty of employes to use caution to avoid injury to themselves. However accurate the statement in the instruction is as an abstract proposition of law, its use as here given in this case is certainly misleading and erroneous; for it effectually takes from the jury the question whether, independently of any contract or rule appellee was bound to use ordinary care. Embodied in this contract or rule is the familiar law of the land that he should use ordinary care, for that is what that part of the rule means, if it means anything. Regardless of the rule or contract, he is bound to do that. Yet, without reference to this common law obligation of appellee, the jury are told that the rule would not in law be held operative and in force on the grounds stated. Furthermore, the effect of the instruction is to remove from the consideration of the jury the question whether going between moving cars to uncouple the same was negligence on the part of appellee sufficient to defeat his action. Independently of the requirements of the rule, the law required him to use proper caution; and under the law it was for the jury to say whether such act of going between the cars was contributory negligence. While it might be the appellant could waive the rule it promulgated as such, it would be unreasonable and against public policy to hold that the law itself was thereby abrogated. Had the instruction been so modified, it

doubtless would be sustained; without it, the court is compelled to say the instruction is erroneous. Again, it is urged the court erred in modifying the statement of the instruction that before the violations of appellant's rule should constitute a waiver of it by appellant, it must appear that appellant had knowledge of the opposing practice and acquiesced in it as such, by using the disjunctive 'or' instead of the connective 'and' between the ideas of knowledge and acquiescence. Ordinarily the term 'acquiesce' implies knowledge and means a quiet submission or compliance to a state of facts governed by that knowledge; so that to acquiesce means to know and acquiesce. The instruction as given informed the jury that if appellant had knowledge of the common practice of employes contrary to the rule, such rule should be taken as waived, or if appellant acquiesced in the practice, the rule would be likewise waived. The test is, all that is meant by acquiescence, either actual or implied—mere knowledge—would not constitute a waiver. So to use the idea of knowledge in that regard without extending it to the meaning of acquiescence and so connecting it, would be inaccurate and misleading. For that reason, the instruction is bad."

42—Central of Georgia Ry. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641 (642).

"The court struck out of this request the words 'after his employment,' and then gave the remainder in charge to the jury. In the motion for a new trial, error was assigned upon the refusal to charge

business in which plaintiff was engaged; and, although you may find that a rule of defendant required cars to be left coupled when standing together on the sidetrack in M., yet if in the management and conduct of defendant's business they were not usually left coupled, he cannot recover, if the injuries complained of resulted from such manner, if any, of leaving the cars uncoupled. But if the cars on the sidetrack in question were usually and customarily left coupled to each other when standing together, and if the plaintiff did not know, and could not have known, by the exercise of ordinary care, that the cars in question were not all coupled together, then he did not assume the risk of the cars being left uncoupled.<sup>43</sup>

as requested, and in leaving out the words above quoted. The effect of giving this request, with these words omitted therefrom, was to authorize the jury to find that the custom of disregarding the coupling-stick rule by other employes of the defendant, prior to the making of the alleged contract of the plaintiff with the defendant, would be sufficient to relieve him of its terms. So construed, was the ruling of the court erroneous? This is the sole question presented by the assignment of error. There was evidence of the non-observance of the coupling-stick rule prior to the employment of the plaintiff by the defendant. If the plaintiff and the defendant entered into an express contract at the time of his employment, whereby he specifically agreed, in consideration of such employment, to be bound by the rule not to couple cars except with a stick, and not to go between cars under any circumstances, for the purpose when an engine was attached to them, then we think it is clear that the jury would not be authorized to consider what the custom with reference to the observance of such rule was prior to the plaintiff's employment and to the making of that agreement. If the plaintiff was justified in believing that there had been a 'mutual rescission and abrogation' of the contract, such belief must have been based upon mutual disregard of the rule subsequent to the date of the contract. It would not be possible to have a mutual rescission of a contract based upon a custom existing prior to the making of the agreement. Otherwise there would be the anomaly of parties having a mutual rescission in advance of the execution of their contract. So far as the plaintiff was concerned, it may have been the intention of the railroad company, at the time the contract was entered into, to specifically enforce the rule referred to in the agreement from its date, regardless of any custom which may have existed prior to that time. In the case of *Richmond & D. R. R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209, it appeared that the plaintiff, when he entered the employment of the defendant as a switchman, signed one of its regular applications for service, which contained rule No.

20, providing that: 'Cars must not be coupled by hand. Sticks for the purpose, long enough to prevent going between cars, will be furnished on application to yardmaster's office at end of each division. Any employe going in between cars while in motion, to uncouple them, does so at his own risk, and against the rule of the company.' The plaintiff was injured in going between cars to couple them. It was held that, as plaintiff had entered into an express stipulation with defendant to abide by such rule, evidence that there was a custom for brakemen, when they found it impossible to couple with a stick, to go between the cars, after having signaled the engineer to stop the train, was not admissible to vary the terms of the rule. The court, through Haralson J., said: 'If rule 20, by long non-observance, had gone into disuse, and was a regulation of the company in name only, and no longer binding, we know of no law which, notwithstanding, prevented the parties from making it the basis of their contract for plaintiff's service, and, if bona fide entered into, how proof of any custom theretofore existing to the contrary might set aside and annul the deliberate engagements of the parties. Surely this would be making their contract for them, and denying them the privilege. We must hold, therefore, that, when a contract of the kind we are construing has been entered into between the parties, no proof of custom can be made, to the contrary of its stipulations, to vary its binding force, and that it must be held binding between the parties, unless it be shown by their acts and conduct they have mutually altered and rescinded it.' What was said on the subject in the *Hissong* Case was quoted, approved, and followed in *Louisville & Nashville Railroad Company v. Mothershed*, 110 Ala. 143, 20 So. 67. We think we can safely conclude that the court erred in not instructing the jury in the language of the request."

43—*St. L. S. W. Ry. Co. v. Pope*, — Tex. Civ. App. —, 97 S. W. 534 (540).

"If there is any vice in this part of the charge, it is too onerous on the appellee, in that it makes him assume the risk of the cars being



§ 3873. **Servant Prevented by Negligence of Master from Complying with Rules.** The court instructs you that while the plaintiff was required to use reasonable care and diligence to comply with the rule of the company, yet in determining the question of what is reasonable care and diligence, you should take into consideration all the circumstances surrounding the plaintiff as shown by the evidence, and if you believe from the evidence that by reason of negligence on the part of the defendant, the plaintiff was, without fault on his part, prevented from complying with one or more of the rules offered in evidence, then you should find for the plaintiff, notwithstanding such failure to observe such rule, if you further believe from the evidence that the plaintiff, while in the exercise of reasonable care for his personal safety, was injured by or through carelessness or negligence of the defendant, as charged in the plaintiff's declaration.<sup>44</sup>

§ 3874. **Authority of Clinker Pullers to Move Engines.** The fact, if it be a fact, that C. D. or other clinker pullers, had at times moved engines would not tend to prove that C. D. had authority to do so, unless the plaintiff further shows by a fair preponderance of the evidence that it was the general custom for clinker pullers to move engines, and that such general custom was known to the foreman, and not forbidden by him.<sup>45</sup>

uncoupled if, by the exercise of ordinary care, he could have known that appellant's rule requiring cars on sidings to be kept coupled was not commonly observed; for a rule of the master which simply declares and provides for a duty personal to him, which he owes to the servant, cannot, because habitually violated, exonerate the master from the discharge of such duty, and cast upon the servant the burden of discharging it, and charge him with an assumption of a risk which never would have occurred had the master discharged his duty. If such were the law, the master would have only to make a rule declarative of a non-delegable duty, and then so habitually violate it as to bring knowledge to his servant, in order to exonerate himself from the consequences of his failure to discharge it, by visiting the consequences of such failure upon the very servant to whom he owed such duty. In no case does the servant assume the risk from the failure of the master to do his duty, unless he knows of the failure and the attendant risk, or, in the ordinary discharge of his own duty, must necessarily have acquired the knowledge. His knowledge must be of the failure of the master to discharge the very duty the breach of which is complained of; not his failure to discharge a similar duty on prior occasions. It makes no difference if the master has frequently before failed to discharge a similar duty; for, unless such prior failures were so persistent and frequent as to charge the servant with knowledge of the master's failure to discharge the very duty alleged to have been violated, the servant may act upon the assumption that it has

been performed by his master. As to whether such prior failures have been so frequent and persistent as to charge the servant with knowledge of the master's breach of duty in the instance in question is a matter of fact for the jury, and not for the court, to determine. With the exception of that part which is too favorable to defendant, the portion of the charge under consideration is in accord with the decisions of the courts. *Mo. K. & T. Ry. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Bonnett v. Ry. Co.*, 89 Tex. 72, 33 S. W. 334; *Tex. & P. Ry. Co. v. Eberheart*, 91 Tex. 322, 43 S. W. 510; *St. L. S. W. Ry. Co. v. Rea*, — Tex. —, 87 S. W. 324; *Peck v. Peck*, — Tex. —, 87 S. W. 248."

44—*C. & A. R. R. Co. v. Matthews*, 39 Ill. App. 541 (545).

"There was no evidence that any negligence upon the part of the appellant prevented appellee from complying with the rules, and hence this instruction tended to mislead and confuse the jury.

The claim of appellee was that in going on the high car at the time he was struck, he was doing his duty; that he was in fact complying with the general spirit and tenor of the rules of appellant; that the rule requiring him to keep off of high cars, when near to bridges, was to be given a reasonable construction, so as to harmonize with others requiring him at certain times to be on top of the train."

45—*Morbey v. Chicago & N. W. Ry. Co.*; 105 Ia. 46, 74 N. W. 751 (753).

"Although this instruction, with some modification, may well have been given, yet the court did not err in refusing to give it in the form asked."

## FELLOW-SERVANTS.

§ 3875. **Liability for Negligence of Fellow-Servants.** You are charged that the evidence in this case shows that the plaintiff A. L., and W. W. were fellow-servants in the employ of the defendant railway company. You are further charged that if you find from the testimony that the injuries of plaintiff, if any he has sustained, were caused by the negligence of his fellow-servant, W. W., then, in that event, the defendant in this case would not be liable therefor, and your verdict should be for the defendant railway company.<sup>46</sup>

§ 3876. **Negligence of Company in Employing Servant.** If it be proved that one is incompetent, you may infer that he is incompetent to the knowledge of the person who employed him, unless when that condition of affairs was established, he comes forward and shows that he did not have that knowledge. . . . If you have once established the fact that a person is incompetent, then, that being a *prima facie* case, you may stop there. Then the defendant putting up his defense would have to say, "While that may be so, yet I did not know it," but he takes upon himself the burden of proving that lack of knowledge. . . . When it is once established that a man is incompetent—a servant is incompetent in the service of the master—you have a right to infer, you have a right to presume, and it is presumed, that he is incompetent to the knowledge of the master. . . . The presumption is that he is incompetent to the knowledge of the person who employed him.<sup>47</sup>

46—Texas & N. O. R. Co. v. Lee, 32 Tex. Civ. App. 23, 74 S. W. 345 (347).

"The above, in effect, instructed the jury that defendant would not be liable though its own negligence directly contributed to plaintiff's injury, if such negligence was combined with the negligence of a fellow servant. This is not the law, and the charge should not have been given in the form requested, even had the issue of fellow servant been wholly omitted in the charge given by the court. Int'l & G. N. Ry. Co. v. Zapp — Tex. Civ. App. —, 49 S. W. 674; Int'l & G. N. Ry. Co. v. Bonatz. — Tex. Civ. App. —, 48 S. W. 769; St. L. & S. F. Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; F. W. & D. C. Ry. Co. v. Mackney, 83 Tex. 410, 18 S. W. 949; Beach on Con. Neg. par. 304."

47—Hicks v. Southern Ry. Co., 63 S. C. 559, 38 S. E. 725 (730).

"In the case of Boatwright v. Railroad Co., 25 S. C. 128, Mr. Chief Justice McIver, who delivered the opinion of the court, says: 'Whenever it is ascertained that the servant of a railroad company or any other employe has been injured by the negligence of one of his fellow servants, no recovery can be had against the employer for such injury by such servant, unless it is made to appear by the plaintiff that the employer had himself been guilty of negligence in selecting his

servants, or in retaining them in his employment, after he knows, or has an opportunity of knowing that the person whose negligence has caused the injury is not a suitable person to be employed in the service in which he was engaged at the time the injury was sustained. It follows from this that as one is presumed to have assumed all the risks naturally and reasonably incident to the employment which he voluntarily undertakes, one of which risks is, where numbers are employed, the negligence of his fellow servant, that the circuit judge erred in charging the jury that 'the employe does not take the risk of accident happening from the incompetency, ignorance or culpable misconduct of his co-laborer.' In the case of Whaley v. Bartlett, 42 S. C. 472, 20 S. E. 745, the court says: 'If the negligence complained of is that of a fellow servant, then a plaintiff must go further, and satisfy the jury that the master was guilty of negligence in employing such fellow servant with the plaintiff,' citing Gunter v. Manufacturing Co. as reported first in 15 S. C. 443, and next in 18 S. C. 262; Calvo v. Railroad Co., 23 S. C. 526; Boatwright v. Railroad Co., supra. As the negligence of a fellow servant is one of the risks incident to the employment which the servant assumes, the presiding judge erred in his charge, and this assignment of error is sustained."

§ 3877. **Conductor and Flagman as Fellow-Servants.** A conductor upon one train, while engaged in his ordinary duties, is a fellow-servant of a flagman upon another train, that is to say, while engaged in the relationship of duties of conductor and flagman, respectively. But, as I have charged you heretofore, if one is placed above the other, so as to occupy towards the other the relationship of master, and servant beneath him, for the moment, and for the time throwing aside the relationship that the conductor ordinarily bore towards the flagman, or that the flagman bears towards the conductor, for the man so placed above another, so as to act for the principal and as principal—as master—then the master would be responsible.<sup>48</sup>

§ 3878. **Fellow-Servants of Section Foreman.** I instruct you, gentlemen, as a matter of law, that if you shall find that the accident causing the death of the deceased, B., arose from the neglect of the defendant company's section foreman on the track, and that the ordinary occupations of deceased, B., and of the section foreman, in their respective service bore such relations to each other that the careless or negligent conduct of the section foreman, if any such careless or negligent conduct on his part you shall find, endangered the safety of deceased, B., then such danger was incident to the employment of the deceased, B., and his representatives, the plaintiffs, cannot recover.<sup>49</sup>

48—Hicks v. Southern Ry. Co., 63 S. C. 559, 38 S. E. 725 (730).

"The modification states what is known as the 'superior servant limitation.' 12 Am. & Eng. Enc. Law, 922 et seq. There are expressions in some of the cases recognizing this doctrine, among which may be mentioned Boatwright v. Railroad Co., 25 S. C. 128, in which the court uses this language: 'It seems to us clear that unless the conductor of a train is, while in charge of the train, the representative of the company, then the train is being run without a representative. He has entire charge of the train, and every employe on it is subject to his orders. This view is sustained by the supreme court of the United States in the case of C. & M. & St. P. R. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, where, after reviewing the cases on the subject, Mr. Justice Field uses this language: 'We agree with them in holding (and the present case requires no further discussion) that the conductor of a railway train, who commands its movements, directs when it shall start, at what station it shall stop, at what speed it shall run, and has the general management of it, and control of the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent act the company is responsible. If such conductor does not represent the company, then the train is operated without any representative of its owner.' This is not the rule now recognized by the United States supreme court. New Eng. R. R. Co. v. Conroy, 20 Sup. Ct. 85, 44 L. Ed. 181, and, in our opinion, should no longer be rec-

ognized in this state, as shown both by the reasoning of the court and the authorities cited in the last mentioned case. This assignment of error is sustained."

49—Bateman v. Peninsular Ry. Co., 20 Wash. 133, 54 Pac. 996 (997).

"We think these instructions were properly refused. It is true that in C. & A. R. R. Co. v. Murphy, 53 Ill. 336, a case from which the instruction in question was evidently taken, said instruction was sustained by the court under a state of facts somewhat different from the facts involved in this case. But in a later case, viz., C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302, this instruction was specifically overruled. In that case it was said 'In the case of C. & A. R. R. Co. v. Murphy, 53 Ill. 336, it was said: 'When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be regarded as fellow servants within the meaning of the rule which exempts the common master from liability in cases of this character.' This language was referred to with approbation in the case of Valdez v. Railway Co., 85 Ill. 500; but as a definition of what shall constitute fellow servants in this class of cases, it is regarded as laying down the rule too broadly and is disapproved.' And in that case it was held that 'where a servant of a railway company, whose duty it was with others, to repair and keep in order a section of the road, while engaged in such duty, and standing some five or six feet from the rail of the



§ 3879. **Fellow-Servants of Roadmaster.** You are instructed that plaintiff cannot recover of defendant on account of any injury caused by the acts of one or more of his fellow-servants, and you are further instructed that acts of the defendant's firemen and fire knockers in throwing and leaving the clinkers and cinders taken from its engines in the yards or near its track where plaintiff was required to perform his duties would be the acts of plaintiff's fellow-servants within the meaning of this and the general charge for which he cannot recover.<sup>50</sup>

§ 3880. **Contributory Negligence of Fellow-Servants.** If the plaintiff's negligence, or that of his associates on the car with him, in running or operating their car at the time of the injury, was the cause of the injury, and was not contributed to by the negligence of the defendant in respect to the matters before mentioned, defendant could recover.<sup>51</sup>

### ASSUMPTION OF RISK.

§ 3881. **Assumption of Risk by Railway Employee.** (a) The jury are instructed that plaintiff, in his employment in said bridge gang, not only assumed those risks which were necessarily incident to his employment, but also those risks which were commonly incident to his employment.<sup>52</sup>

track to avoid a passing train, was struck on the head by a large lump of coal which was carelessly cast by the fireman of the train from the tender, from the effects of which the person injured died' 'the company was liable to his personal representatives for damages under the statute. The track repairer and the fireman on the passing train were not regarded as fellow servants within the rule.' It would seem that this announcement of the law was squarely opposed to the contention of the appellant in this action."

50—Mo., K. & T. Ry. Co. of Texas v. Keefe, — Tex. Civ. App. —, 84 S. W. 679 (682).

"The proposition submitted is that 'the firemen of appellant and the fire knockers, who put the clinkers in its yards at M—, and its section hands and yardmaster there, whose duty it was to remove them, were fellow servants of appellee, and appellant is not responsible for their negligence, if any.' The appellee resides in the Indian Territory, where the accident occurred. The common law is in force in the Indian Territory, and determines the rights of the parties. The evidence discloses that the company had delegated to its roadmaster, B., the control of its south yards, and the duty of keeping that part where appellee was injured clear of cinders. He was superintendent over a section of about 100 miles of the road. The section-men were under him. It was the roadmaster's duty to see that the sectionmen removed the cinders. Appellant's duty to use ordinary care to provide a reasonably safe track and place for appellee to work having been delegated to its roadmaster, he, in the dis-

charge of such duty, was not a fellow servant of appellee. This fact did not relieve the company of its duty to use ordinary care to provide a reasonably safe track and yard for plaintiff to work."

51—Texas & P. Ry. Co. v. Maupin, 26 Tex. Civ. App. 385, 63 S. W. 346 (347).

"This charge is subject to the criticism that it places too great a burden upon the defendant, in that, although plaintiff's negligence may have caused the injury, yet defendant was required to show that its negligence did not contribute to the same. If plaintiff's negligence caused the injury, he could not recover, and the jury should have been so instructed. If, however, defendant was negligent, and its negligence was the cause of the injury, plaintiff was entitled to recover, notwithstanding the negligence of his fellow servants may have contributed to the same. St. Louis & S. F. Railway Co. v. McClain, 80 Tex. 85, 15 S. W. 789."

52—Smith v. Gulf W. T. & P. Ry. Co., — Tex. Civ. App. —, 65 S. W. 83 (85).

"This charge takes no account of the bar being, as alleged, an unsafe, unsuitable and improper implement for the work appellant was directed to do, nor of his being unskilled in such work. As is before shown, he did not assume dangers incident to doing the work with an unsafe, improper or unsuitable implement, unless he knew at the time he undertook it that the implement furnished him was an unsafe, improper or unsuitable one for him to use in aligning the track upon a railroad bridge. M. K. & T. Ry. Co. v. Baker, — Tex. Civ. App. —, 58 S. W. 964. It is

(b) You are instructed that, when C. D. accepted service with defendant as section foreman, he assumed all the risks ordinarily incident to that service, and also all dangers and negligences, if any, of which he had knowledge at and prior to the accident. If, therefore, you believe from the evidence that C. D. met his death as the proximate result of risks ordinarily incident to the employment as section foreman, or as a proximate result of the negligence, if any, of others, of which he knew at the time of the accident, then, in either of said events, said C. D. assumed the risk of said accident, and you will find for defendant.<sup>53</sup>

§ 3882. **What Is a Risk "Ordinarily Incident to His Employment."** The court instructs the jury that an employe on a railroad does not assume all the risks incident to his employment, but only such risks as are ordinary and remain so ordinary, usual and incident to his employment, after defendant has used ordinary care to remove them.<sup>54</sup>

§ 3883. **Servant Having Knowledge of Defects.** If the deceased knew the danger to which he would be exposed in the work under the car standing upon the track in the yard, and knew that a train might come along and run into the car, and he had charge of the work, and he entered voluntarily upon the work without a watcher or assistant, or sent the watcher or assistant that he had elsewhere, or put him at work elsewhere, and he continued to work at the repairs under the car alone, did so voluntarily, without direction of his superior, he would assume the known and obvious dangers of such employment.<sup>55</sup>

§ 3884. **Risks Assumed by Locomotive Engineer.** You are instructed that the defendant claims, as an affirmative defense, that the decedent had full knowledge of the condition of the defendant's

true, one who was experienced in and accustomed to do such work, and knew from such experience that a pinch bar was a safe, suitable and proper implement, and would have, or could from ordinary diligence have, known that a chisel bar was not a proper and safe tool, would have, had he undertaken to do the work with a chisel bar, assumed the risk incident to doing the work with it. But if the appellant, as he alleges and the evidence tends to show, was inexperienced in and had never done such work before, and had no knowledge that the instrument was improper or unsafe for the work he was to do, he could not be held to have assumed the danger incident to doing the work with such an unsafe, unsuitable and improper instrument. We think, therefore, that the charge is obnoxious to the objection urged in the assignment."

53—Int'l & G. N. R. Co. v. McVey, — Tex. Civ. App. —, 81 S. W. 991 (999).

"It leaves out of view altogether that theory of the case which authorized C. D. to assume the position of peril and encounter danger in the effort to save the lives of the persons aboard of the train. The charge, as requested, makes C. D. liable if he knowingly encountered the danger or risk that resulted

from the negligence of those operating the train, although it might appear from the evidence that his purpose was to preserve the lives of those aboard of the train."

54—Malott v. Hood, 99 Ill. App. 360 (363).

"It is difficult to understand what is meant by the last clause. It could not possibly aid the jury. But, as this instruction did not relate to the charge of negligence about failing to supply cars with hand-holds, and as the defendant assumed no risk which covered such failure, and as we think that was the efficient cause of the injury, no harm resulted to the plaintiff in error by giving it."

55—Latremouille v. Bennington, etc. R. R. Co., 63 Vt. 336, 22 Atl. 656 (659).

"The word 'obvious,' as here used, coupled, as it is, in the first part of this portion of the charge, with actual knowledge is not a fair or reasonable compliance with the requests, so far as they embody the danger which the deceased ought to have known. We think these requests ought to have been complied with in substance, and were not; that the word 'obvious' as used, added little, if anything, to the dangers assumed as actually known. Anderson v. Railroad Co., 39 Minn. 523, 41 N. W. 104."

track, complained of in the petition, long prior to the injury complained of, and continued in the service of the defendant as engineer without objection, and without promise of any change therein. The burden of proof rests upon the defendant to establish the allegations of said affirmative defense, to-wit, that the plaintiff had full knowledge of the condition of the defendant's track, complained of in the petition, long prior to the injury complained of, by a preponderance of the evidence. Therefore, if you believe from the evidence that the decedent, C. D., knew and had knowledge that the defendant's track, at the point in question, was in the condition as alleged in the plaintiff's petition long prior to the injury complained of, then you should find for the defendant on said affirmative defense.<sup>56</sup>

§ 3885. **Assumption of Risk of Accident at Crossing by Locomotive Engineer.** (a) If you should find from the evidence in this case, that the deceased, H., as engineer in the employ of defendant road, had ridden upon and over this crossing on an engine in the employ of defendant for more than a year previous to the injury complained of, every week day, and in the daytime, and had a fair opportunity to learn the condition of the crossing, and of the railroad track on each side, then and in such case you are instructed that said H., at the time of the injury complained of, is in law presumed to have known of the condition of this crossing, of its situation, and the manner of its construction, and of the railroad track on each side of the crossing, and is deemed in law to have assumed every risk of accident involved in its make, construction and maintenance by the defendant during the time he so rode over the same and at the time of the injury.

(b) You are further instructed that, if said H., after he saw that the engine was about to collide with the binder upon the crossing, or after the derailment of the engine, and before it had overturned, could safely have jumped, and thereby have escaped injury, it was his duty so to have done; and, if he was able so to do, and failed therein, the plaintiff would not be entitled to recover, because said H. would have been guilty of contributory negligence producing the injury complained of. But you are further instructed that, unless you can determine from the evidence that he was guilty of such contributory negligence, you shall not so infer or presume from the mere fact that he did not jump from the engine, unless it is further established by the evidence that he could with safety have jumped therefrom, and thus avoided injury to himself.<sup>57</sup>

56—Worden v. Humeston & S. R. Co., 72 Ia. 201, 33 N. W. 628 (631).

"We ought, perhaps, to say, that this instruction, standing by itself, does not express the law, because it omits the element of waiver, which consists in remaining after knowledge, without objection and without promise of amendment. But, so far as the instruction is defective in this respect, it is too favorable to the defendant."

57—Atchison T. & S. F. R. Co. v. Henry, 57 Kan. 154, 45 Pac. 576 (578).

"We think that the above instructions, respectively, should not have been given. It would be exacting

more than ordinary care of an engineer to require him to decide, at his peril, whether a crossing was sufficient for the use of all vehicles that might pass upon the highway, or even to know whether the track over which he was running was sufficient to endure an extraordinary strain upon it; and whether he should have jumped from the engine should not be made to depend upon his own safety in so doing. The safety of the crew and the passengers on board should be of first importance in the mind of an engineer, and the highest considerations of duty may require him to remain at his post to the last extremity. H.



§ 3886. **Assumption of Risk as to Top Heaviness of Engine by Locomotive Engineer.** The jury are instructed that if they believe from the evidence that the engine upon which the deceased, S., was riding at the time of the derailment was top-heavy, or unequally balanced, or that if the boiler thereof was unduly elevated above the rails, and that such condition of the engine was the proximate cause of deceased's injuries, then the defective condition of the engine was open to observation, and to find for the defendant.<sup>58</sup>

may have supposed that the collision would result in throwing the machine from the track, and that his engine would hold fast to it. But it should have been left to the jury to determine whether, under all the circumstances, it was negligent on the part of the engineer to remain on his engine. This court held, in *Condiff v. Railroad Co.*, 45 Kan. 256 (261), 25 Pac. 562, that when the exposure is for the purpose of saving human life, it is for the jury to say, from all the circumstances of the case, whether the conduct of the person injured is to be deemed rash and reckless. See, also as to engineer remaining at his post, *Cottrill v. Railway Co.*, 47 Wis. 634 (638), 3 N. W. 376; *Cent. R. R. v. Crosby*, 74 Ga. 738 (748); *Pennsylvania Co. v. Roney*, 89 Ind. 453 (455). *Stredder* was allowed to testify to his opinion as to the safety of the crossing, and said that he considered it, like other railroad crossings through the country, too narrow for safety, and the court refused to strike out his answer on the ground of incompetency. It was a question for the jury to determine as to the sufficiency of the crossing, after being informed of its width and of the character of the vehicles passing over it as usually drawn, and opinion evidence as to its safety was incompetent."

58—*Galveston H. & S. A. Ry. Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999 (1001).

"When a servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done. He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and attendant risks, or in the ordinary discharge of his own duty must necessarily have acquired the knowledge. *Mo. K. & T. Ry. Co. v. Hanning*, 91 Tex. 347, 43 S. W. 508. The fact that S. was an experienced engineer did not relieve the appellant of its duty to use ordinary care to furnish him with a reasonably safe engine, and to use ordinary care in the construction and maintenance of its road, in order to have it in a reasonably safe condition for the operation of its

engines thereupon. Nor does it charge him with knowledge of appellant's failure to use the proper care to furnish him with a reasonably safe engine, or to use proper care to keep its road in a reasonably safe condition for its operation. The only questions sought to be presented by the special charge, the failure of which to give is complained of in the eighth assignment of error, proper to be submitted to the jury, were presented to the court in a light more favorable than appellant was entitled to, in the following special charge given at appellant's request, viz.: 'If from the evidence you believe that the engine on which the said deceased was riding at the time of its derailment, when the injuries were received by him which resulted in his death, was defective in construction in manner and form as alleged in plaintiff's petition, or if you believe that the rails on defendant's railroad were too light to properly transport said engine, and you believe that this was the proximate cause of deceased's injuries, then you are instructed that the deceased assumed the risks of all danger and injury that he might have received from the defects in said engine or in said rails which were patent and as open to the observation of deceased as to defendant, and he further assumed the risk of all injury of any defects in said engine or in said rails which he could have learned by the exercise of that ordinary circumspection which a prudent man would use under the same or similar circumstances.' It has been repeatedly held that a knowledge of a defect does not necessarily carry with it a knowledge of danger, and that, therefore, if the employee had knowledge of a defect, or was charged with knowledge of it, because obvious, but was ignorant of the danger incident to and attending the defect, he is not precluded from recovering damages incurred by reason of such defect. *G. H. & S. A. Ry. Co. v. Hughes*, 22 Tex. Civ. App. 134, S. H. & S. A. Ry. Co. v. Parrish, Tex. Civ. App., 40 S. W. 191; *City of Hillsboro v. Jackson*, 12 Tex. Civ. App. 325, 44 S. W. 1011; *Mo. Pac. Ry. Co. v. Lehmberg*, 75 Tex. 63, 12 S. W. 838.

An engineer cannot be presumed to have knowledge of defects in an engine which arose from the application of mechanical prin-

**§ 3887. Fireman Assuming Risk of Engineer Violating Rules.**

If you believe from the evidence that W. D. M. was coming into P. without the engine under control and that under defendant's rules it was his duty to keep it under control at the place where he was operating it, and that before this trip he had violated such rules as to having his engine under control at places where it was his duty to so have it, and that plaintiff, before starting on the last trip, knew this fact, and if you further believe that defendant's engineers were in the habit of violating the rules with regard to having their engines under control, and plaintiff knew of the fact, and yet continued to act as fireman without protest or objection as to this violation of the rules, he would assume the risk of such violation, and if he was injured solely because of such violation of the rules on the part of M. if such violation there was, you will return a verdict for defendant.<sup>59</sup>

**§ 3888. Prior Knowledge of Employee of Defect in Driving Box.** If you believe, from the evidence and under the instructions of the court, that the defendant was guilty of negligence with reference to the driving box as charged in some count of the plaintiff's declaration, and that by reason thereof the plaintiff was injured through the defendant's carelessness and negligence in that regard, while in the exercise of ordinary care for his own safety, then you are instructed that knowledge on his part as to the condition of the driving box on the day prior to the injury will not bar a recovery under such counts of the declaration, provided you further believe from the evidence that he did not know and by the exercise of ordinary care could not reasonably have anticipated the danger likely to result therefrom.<sup>60</sup>

ciples in its construction. He has a right to assume that his master has exercised the proper degree of care to ascertain that it is reasonably free from defects in its construction, and to assume that for the use he is employed to make of it, it is reasonably safe."

59—Mo. K. & T. Ry. Co. of Tex. v. Follin, 29 Tex. Civ. App. 512, 68 S. W. 810 (811).

"This charge, we think, is not the law, in that it holds as a matter of law that plaintiff had assumed the risk of the accident if the engineer at the time was violating the rules of appellant in not having his train under control. Whether or not, under the circumstances, the risk was assumed, was a question for the jury."

60—Chicago & Alton R. R. Co. v. Merriman, 86 Ill. App. 454 (457).

"The case of C. & E. I. R. R. Co. v. Knapp, 176 Ill. 127, 52 N. E. 927, is cited in support of this instruction; and there, at p. 129, the court say: 'To charge an employee with negligence in using a machine or appliance known to him to be defective, it must also be shown that he knew the defect rendered its use dangerous.' And it is said that the instruction is good upon the theory that there is a recognized distinction between knowledge of defects in ma-

chinery and knowledge as to the effect which may reasonably be produced by such defects. True, that is a sound distinction; but the difficulty is to apply it to this instruction. \* \* By this instruction, the jury was told in effect that if appellant was negligent in having a defective driving box, which resulted in injury to appellee, under the declaration he could recover, notwithstanding the fact that he knew of the defect but did not know or could not reasonably have anticipated the danger of it. Thus it utterly disregarded the knowledge of appellant of both the defect and its dangers; and of what effect the lack of such knowledge would have upon its liability. That element is primarily essential to that liability, and is so recognized by the declaration in the case, which recites relative thereto that appellant 'knew or ought to have known it,' for if appellant could not, by the use of reasonable care, have learned of the danger and in fact did not so learn, then wherein would be its liability? In the case of P. D. & E. Ry. Co. v. Hardwick, 48 Ill. App. 562, at page 567, we say, quoting the citation, that 'if deceased could not learn the place was dangerous by reasonable care, how can appellant be held liable be-

**§ 3889. Assumption of Risk as to Cars Received by Company.** If cars constructed in the manner in which No. — was constructed were in common use by well-managed railroads, and were received in exchange by the defendant corporation to the knowledge of the plaintiff, or if the plaintiff, with the exercise of reasonable care, might have known of such common use of such cars, the plaintiff assumed the risk of finding one in the train upon which he was acting as brakeman, and the danger attending the same, if any, and in such case the verdict must be for the defendant.<sup>61</sup>

**§ 3890. Assumption of Risk as to Defective Switchstand.** The court instructs the jury that, if they believe, from the evidence, that the plaintiff knew, or might by the exercise of ordinary care have known the location of the switchstand with reference to the car which he was on, that the plaintiff cannot recover, and your verdict should be for the defendant.<sup>62</sup>

**§ 3891. Assumption of Risk as to Defective Drawhead.** But though you may find that the drawhead was defective, and that the plaintiff at the time of the injury knew, or by the use of ordinary care could have known, of the defect, yet if the danger from said drawhead was not apparent to plaintiff, and would not have been apparent to him by the use of ordinary care, then he would not have been guilty of negligence in making an effort to uncouple said car from said engine, if he otherwise used reasonable and ordinary care and caution to prevent injury to himself in making said attempt to uncouple said car.<sup>63</sup>

cause it did not learn the fact? Reasonable care when exercised by the company could only reach the same results that would be obtained by the use of the same care by deceased. If by his care and diligence he could not learn that it was dangerous, it is unreasonable to hold appellant liable where by the use of the same care it could not learn there was any danger.' 'It is familiar doctrine of this state that an employee must be careful to note and report any defects or wants of repair in the appliances he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances, he may expect the employee will promptly call attention to any defect that may appear or any repairs that may become necessary so far as due care on his part will discover the same, and an employee who fails in this does not exercise due care for his safety.' The question in the case was not alone whether appellee knew of the defective appliances and of its dangers, or might reasonably have known the same; but also whether appellant knew or might have known the same; \* \* so it is plain the instruction is out of harmony with a tendency to mislead. \* \* We are constrained to pronounce the giving of it erroneous."

61—Benson v. New York, N. H. & H. R. Co., 23 R. I. 147, 49 Atl. 689 (693).

"In our opinion the substitution, while localizing the use of the cars

in question, was erroneous, in that the use was limited 'to the knowledge of the plaintiff.'"

62—Batchelor v. Union Stock Yd. & Transit Co., 88 Ill. App. 395 (400).

"This instruction is, in our opinion, erroneous, in that it omits the element of appellant's appreciation of the hazard or danger to which he was exposed. It is not enough that the employee may know or might have known by the exercise of ordinary care of the location of the switchstand with reference to the car that he was getting upon, but he should have had knowledge of the risk or danger to which he was exposed by reason of the location of the switchstand with reference to the track. As said in Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876: 'There is a distinction between knowledge of defects and knowledge of the risks resulting from such defects. The servant is not chargeable with contributory negligence if he knows that defects exist but does not know or cannot know by the exercise of ordinary prudence that risks exist.' (Citing cases.) In the Haenni case, 146 Ill. 614, cited, the court say: 'Not only the defects but the dangers must be known to him.' To like effect are Union Show Case Co. v. Blindauer, 175 Ill. 327, 51 N. E. 709; Offut v. Columbian Exposition, 175 Ill. 479, 51 N. E. 651, and C. & E. I. R. Co. v. Knapp, 176 Ill. 129, 52 N. E. 921."

63—Int. & G. N. R. Co. v. Gour-



§ 3892. **Assuming Risk of Defects in Hand Car.** You are charged that if, under the evidence in this case, you believe that the plaintiff, K., was in a position to know and realize the dangers, if any, of using the hand car in question in the condition in which it was at the time of the accident, then in that event, even though you should find that C. was his superior officer, and should further find that the said C. directed him to place said hand car upon the track and to go to his work, still the said K. would assume such risks, if any, as were incident to the use of said hand car in its then known condition; and if his injuries, if any, were the result thereof, then he will not be entitled to recover in this case, and your verdict should be for the defendant company.<sup>64</sup>

§ 3893. **Assumption of Risk in Rolling Engine Wheels.** If from the evidence you believe that it was not the duty of the plaintiff to move locomotive wheels when called upon to do so by the roundhouse foreman or machinist, then you are instructed that in assuming to perform said service at the direction of said person, even though outside of his employment, he assumed the ordinary risk incident to the performance thereof, and the rules applicable to the work done in his ordinary employment must be applied to the work done by him under such orders, and it would not be negligence on the part of the defendant to direct him to do such work.<sup>65</sup>

§ 3894. **Assuming Risk of Injury from Oil House Near Track.** You are charged that the law requires an employe to exercise reasonable care and diligence to avoid injury to himself, and if he fails to use such care and diligence, he is not entitled to recover, even though the master has been guilty of negligence. You are therefore charged that if you believe from the evidence, in view of the notice the defendant had given to the plaintiff, by the written application, of the presence of obstructions near the track, that the plaintiff in getting upon the caboose in question and passing by the oil house in question, considering his knowledge of the presence of the oil house and its closeness to the track, failed to look for said oil house and the

ley, 21 Tex. Civ. App. 579, 50 S. W. 307 (308).

"If the drawhead was defective, and plaintiff knew it, he assumed the risk of using it, whether the danger was apparent or not."

64—Texas & N. O. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79 (81-82).

"In no event did K. assume the risk of a condition caused by negligence of the railroad company which was independent of and disconnected from the defects in the handcar itself. *Mo. Pac. Ry. Co. v. Somers*, 78 Tex. 442, 14 S. W. 779; *Richmond & D. R. R. Co. v. Rudd*, 88 Va. 651, 14 S. E. 361. In *Railway v. Somers*, before cited, Chief Justice Gaines said: 'Because a servant knows of one defect, he does not take the risk of another of which he has no knowledge; and, if both contribute to injure him, he is entitled to recover, provided but for the unknown defect the accident would not have happened.' The charge was properly refused."

65—Galveston H. & S. A. Ry. Co.

v. Renz, 24 Tex. Civ. App. 335, 59 S. W. 280 (281).

"A charge that plaintiff assumed the risks ordinarily incident to the services in which he engages has been said not to be applicable to work at which he is put by his employer outside of his regular employment. *Bailey Mast. Liab.*, p. 221. But it is not necessary for us in this case to hold this, for the reason that he cannot be said to assume such risks in any case where his want of experience in the particular work, and the master's knowledge thereof, are in issue and established by testimony, and such inexperience is such as affects the servant's capacity to appreciate the presence of the danger. In this case these matters were issues, and there is testimony sustaining them. Therefore a charge instructing the jury absolutely and without qualification, that plaintiff assumed the risks incident to the work, would have been misleading and calculated to expel such issues from the case."

roof thereof, and to discover its presence near the track, and that in so failing he failed to exercise such care as a reasonably prudent man would have exercised under the same or similar circumstances, you will find for the defendant, without regard to any other issue in the case.<sup>66</sup>

§ 3895. **Assumption of Risk as to "Flying Switches."** If you believe from the evidence that plaintiff, at the time of the alleged accident and injury to himself, had been in the employ of defendant in its yards at San A. for five or six months, and you further believe from the evidence that plaintiff, while engaged in his duties, was struck by a car which was being switched by defendant's servants on the track called "Davis No. 2," and if you further believe from the evidence that said car was so being switched in the usual and customary manner,—then it was not only the duty of the plaintiff to look out for his own safety, but he assumed all risk of danger from the manner in which said car was being switched, and in such case you will find a verdict in favor of defendant.<sup>67</sup>

§ 3896. **Assuming Risk of Locomotive Running off Track.** If this locomotive had frequently passed over this curve, but on this occasion it ran off the track while passing speedily over it, and this accident happened from no other cause, then you are directed that such accident was one of the risks which C. D., as a brakeman, undertook in this business of railroading, and plaintiff cannot recover therefor, and your verdict should be for defendant.<sup>68</sup>

§ 3897. **Railroad Employee's Duty to Search for Defects.** If you believe that the plaintiff accepted employment from the defendant as a brakeman, and that on the day of his injury, while engaged as

66—*Gulf, C. & S. F. Ry. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446 (448).

"This charge was properly refused, because it incorrectly sought to charge the appellee with notice of the presence of the obstruction given in his application to the company, and assumed a knowledge on his part of the dangerous proximity of the oil house as a result of such notice. It was argumentative and upon the weight of the evidence."

67—*Galveston, H. & S. A. Ry. Co. v. Pendleton*, 30 Tex. Civ. App. 431, 70 S. W. 996 (998).

"It will be observed that this charge does not submit the question of appellee's knowledge of the usual and customary manner exercised by appellant in switching its cars. The custom could not affect appellee's rights unless he knew of its existence, or was chargeable with notice of it. *Int. & G. N. Ry. Co. v. Hinzle*, 32 Tex. 623, 18 S. W. 681. A proper instruction would have been that if it was the custom of appellant to make a flying switch with a car on a dark night, when its employees were at work on or near the track over which it was propelled, at the rate of speed of this one, without warning, or having a light or lookout upon it, and if plaintiff knew such custom, and if an ordinarily prudent person would under such circumstances have

known that it was dangerous to operate the car in that manner, he would not recover. *Gulf C. & S. Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556. Under the charge requested, the jury would have been required to return a verdict for defendant regardless of appellee's knowledge of the custom or of the danger. The charge, in our opinion, was properly refused."

68—*Connors v. Burlington C. R. & N. Ry. Co.*, 74 Ia. 383, 37 N. W. 966 (968).

"The risks which C. D. assumed when he entered defendant's employment were such as were incident to the business of operating the railroad when conducted in a reasonably prudent and careful manner. He did not assume the risks of such dangers as might be created by negligence or mismanagement in its operation. The instruction does not contain this latter qualification. The doctrine expressed by it is that decedent assumed the risk of the dangers incident to the speed at which the train was run. That is true if defendants were not negligent in running at that rate of speed. But the complaint was that, owing to the condition of the track, it was an act of neglect to run the train over it at that speed, and there was evidence tending to establish that claim. We think the court did right in refusing the instruction."

such brakeman, at the town or station of M., he had a fair opportunity of observing the kind and location of the structure which occasioned his injury, and that the structure and its location were open and obvious to the plaintiff's view; and if you further believe that he failed to use ordinary care to discover and see the kind and location of such structure; or if you believe that, knowing the kind and location, he failed to use such care as a man of ordinary prudence, situated as he was at the time, would have used to avoid contact with and injury by said structure, and that in consequence of his failure to use such ordinary care he was injured, your verdict should be for the defendant, notwithstanding you may also believe that the defendant was guilty of negligence.<sup>69</sup>

**§ 3898. Continuing in Employment with Knowledge of Dangerous Conditions.** (a) If the testimony shows, under all the circumstances, that, while he did continue to work exposed to this increased risk or danger, he did complain of this increased risk or danger to the master, had asked for means to lessen or remove the increased risk or danger, and had been promised by his master that such would be done, if he continues to work after that promise, it is then a question for the jury, judging by the length of time, under all the circumstances, that he continues to work, whether or not by thus continuing he has assumed the risk, or is still entitled to ask and hold the master liable. That is a question for the jury to determine, under the circumstances shown by the testimony, whether the master, by promising to remove the danger, has assumed the risk and liability following, or whether the servant, by continuing too long without the danger being removed, continues the work, has thereby assumed the increased risk of danger.<sup>70</sup>

(b) The defendant is not an insurer of the safety of its employes, nor is it bound to furnish absolutely safe machinery for the use of its employes, and even though you may believe from the evidence that the

69—Galveston, H. & S. A. Ry. Co. v. Mortson, 31 Tex. Civ. App. 142, 71 S. W. 770 (772).

"This charge was correctly refused, because it proceeded upon the false theory that the servant was required to examine and inquire into the condition of defendant's premises with reference to his safety while prosecuting his work, the reverse being the rule."

70—Bodie v. Charleston & W. C. Ry. Co., 61 S. C. 468, 39 S. E. 715 (717).

"The sentence immediately preceding the portion of the charge above excepted to was as follows: 'I repeat that a railway servant, while he assumes the ordinary risks incident to the kind of work that he is engaged to do, does not assume the risks or dangers to which he may be exposed by unsafe or unsuitable or insufficient means and appliances for doing the work required of him, but while that be so, still he may, without complaining of such added risk and danger, continue to work after he has discovered the increased risk or danger. He may do this voluntarily, and he may be injured as the direct

result of this increased risk or danger; and, if so, he would be held to have waived his right to hold his master liable. He would be held to have assumed the increased risk of danger, and the master could not be held liable.' The charge to the jury was to that effect,—that if a railway employe, after knowledge of an extraordinary risk, remains in the employer's service, without complaint on his part and promise of amendment by the employer, he is held, as matter of law, to have assumed the risk, and cannot recover for an injury directly resulting therefrom; but, if complaint be made, and there is promise of removal, and the employe, while remaining thereafter a reasonable time in the employer's service, is injured, then it is for the jury to determine whether the employe, by remaining in the employer's service, assumed such risk. If it be conceded that this case is one in which it was proper to submit to the jury the question of assumption of risk by an employe, the charge was more favorable for the appellant than the law justifies."



nut was off the bolt which held the stirrup from which it is alleged the said C. D. fell, and even though you may believe the said C. D. was not guilty of any negligence, and even though you may believe that the character of inspection, if any, given this car, was not such as would have disclosed the absence of this nut, yet, if you believe from the evidence that the inspection given said car was the usual and customary inspection given to cars under the same or similar circumstances, and that the said C. D., deceased, knew of the character of inspection given by defendant, and remained in the employ of the defendant after acquiring such knowledge, then you are instructed that the said C. D. assumed the risk, and you will return a verdict for the defendant.<sup>71</sup>

**§ 3899. Continuing in Employment After Promise of Engineer to Repair Defects.** If you find from the evidence that it was the duty of the engineer on said engine upon which the plaintiff was working at the time of his injury to have any defects on said engine, if any there were, repaired, then the promise by said engineer to make repairs of said defects would be the promise of the defendant.<sup>72</sup>

**§ 3900. Remaining in Employment of Railroad Company After Giving Notice of Defect in Track.** The court charges the jury that if they believe that the railroad company was informed of the defect in the track, and agreed to remedy it, D. would not be guilty of contributory negligence, if he remained in the railroad employment for a reasonable time afterwards, so as to give it the opportunity to remedy the defect in the track, if any existed.<sup>73</sup>

71—Galveston H. & S. A. Ry. Co. v. Davis, 27 Tex. Civ. App. 279, 65 S. W. 217 (218).

"The charge was properly refused, because it prevented appellees' recovery if deceased knew that the car had undergone inspection in the manner that cars were usually inspected by appellant, although he may not have known such inspection was sufficient. G. H. & A. R. Co. v. Nass, — Tex. Civ. App. —, 57 S. W. 912. Besides, there was no evidence that C. D. knew the kind of inspection given this car, or the usual and customary inspection given to cars under the same or similar circumstances. Int'l & G. N. Ry. Co. v. Hawes, — Tex. Civ. App. —, 54 S. W. 325. C. D., in the absence of knowledge to the contrary, had the right to rely upon the presumption that appellant had done its duty, and that the stirrup which he was called upon to use was reasonably safe. M. K. & T. Ry. Co. v. Hannig, 91 Tex. 347, 43 S. W. 508; M. K. & T. C. Co. v. Cox, — Tex. Civ. App. —, 55 S. W. 355; San A. & A. P. Ry. Co. v. Engelhorn, — Tex. Civ. App. —, 62 S. W. 561; T. & P. R. R. Co. v. McCoy, 17 Tex. Civ. App. 494, 44 S. W. 25; San A. & A. R. R. Co. v. Brookings, — Tex. Civ. App. —, 51 S. W. 539."

72—Gulf C. & S. F. Ry. Co. v. Garren, 96 Tex. 605, 74 S. W. 897.

"This relieved the servant from the effect of an assumption of risk arising from knowledge of the defect, by force of a promise of the master to repair, assuming that there was evidence of such a promise as would give application to this doctrine. The remark of the engineer cannot be so construed. The true doctrine relates only to promises or assurances made by the master to the servant upon discovery of defects in tools or appliances, to the objection of the servant to using them, and to induce him to continue in the service. Lewis v. New York & N. E. Ry. Co., 153 Mass. 73, 26 N. E. 431, 10 L. R. A. 513; Sweeney v. Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; Bodwell v. Manufacturing Co., 70 N. H. 390, 47 Atl. 613. There is nothing of the nature of such a promise in the casual remark of the engineer to the defendant in error."

73—Alabama G. S. R. Co. v. Davis, 119 Ala. 572, 24 So. 862 (865, 867).

"This charge was abstract and erroneous and ought to have been refused. There was no evidence that the defendant, through W. or any one else, agreed to remedy the defect in the track; and, if there had been, the charge ignores the inquiry as to whether the plaintiff knew that the agreement had not been carried out."

## CONTRIBUTORY NEGLIGENCE.

§ 3901. **Encountering Danger in Order to Save Lives of Passengers.** If, from the evidence, the jury believe that C. D. knew that the push cart could not, without danger or risk to his life or safety, be removed from the track or out of the way of the approaching train, then you are instructed that he should have removed himself to a place of safety and left the car on the track; and if he failed to do so, and was killed on account of such failure, plaintiffs herein cannot recover.<sup>74</sup>

§ 3902. **Giving Undivided Attention to Work.** The court instructs the jury that if they believe from the evidence that it was the right and duty of C. D., at the time and place in question, to move the slack car in question from the switch on which it stood (if the jury believe from the evidence that such car did stand on such switch) to the main track of the defendant, that while he would not be permitted to close his eyes and ears to what comes within range of these senses, yet if the jury believe from the evidence that he had the right, by the previous course of dealing or conduct, to believe that no train would be run by the defendant on that part of the track at that time, it was his right to give his undivided attention to his work, and he would be justified in assuming that the defendant would not molest him or render his position hazardous without proper and sufficient notice and warning.<sup>75</sup>

§ 3903. **Injury to Employee While Trying to Escape Imminent Peril.** If the jury believe from the evidence that the derailing of the car did not place the deceased in peril, and that he could easily have avoided all danger by stepping from the foot-board of the engine to the south side of the engine, and that a reasonable and prudent man would, under the circumstances, have done so, then the jury must find the defendant not guilty.<sup>76</sup>

§ 3904. **Failure to Check Train Run at Dangerous Speed When in Servant's Power to Do So.** The court instructs you that if you be-

74—Int'l & G. N. R. Co. v. McVey, — Tex. Civ. App. —, 81 S. W. 991 (1000).

"C. D. was authorized, if his purpose was to save the lives of the passengers, to encounter danger and run some risk to his life or safety in order to accomplish his purpose; and the mere fact that, in such effort, danger would exist or risk arise, would not impose upon him the doctrine of contributory negligence."

75—Chicago & Alton R. R. Co. v. Anderson, 55 Ill. App. 649 (656).

"In the case at bar, it was a question of fact for the jury to determine from a consideration of the circumstances, whether the deceased did, or omitted to do, that which an ordinarily cautious man would have done or omitted. The determination of this question demanded the careful and impartial consideration of all the facts proven and the application thereto of the sound and discriminating judgment

and experience of those who sat as jurors in the case. \* \* \* In effect the instruction advised the jury that that question was controlled in a measure by the rules of law, and assumed to tell them that if the deceased 'had the right by the previous course of dealing and conduct to believe that no train would be run by the defendant on that part of the track at that time, that it was his right to give his undivided attention to his work.'"

76—C. & G. T. Ry. Co. v. Kinnare, 76 Ill. App. 394 (398).

"This instruction omits an important element, that is, that while deceased might not, as a matter of fact, have been in a place of peril, it may have seemed to him, under the circumstances which suddenly confronted him, that he was in imminent peril, and therefore not necessarily guilty of contributory negligence. C. & A. Ry. Co. v. Becker, 76 Ill. 25-31; D. T. & W. Co. v. Dandelen, 143 Ill. 409, 32 N. E. 258."

lieve from the evidence that C. D., the deceased, knew the engineer was running the train in violation of the rules of the company, and at a dangerous rate of speed, and that he could have slackened the speed of said train prior to the accident by signal to the engineer, or by directing the brakeman to put on the brakes, and failed to give such signals, then the court instructs you to return a verdict for the defendant.<sup>77</sup>

§ 3905. **Manner of Uncoupling Cars as Contributory Negligence.** Or, if you find that the manner in which plaintiff uncoupled the cars was not as safe as some other way of uncoupling same would have been, and if you find that the manner in which he did uncouple the cars caused or contributed to cause the injury of which he complains, then, if you find that the manner in which the cars were uncoupled was "negligence" upon the part of the plaintiff, as hereinbefore defined, you will return a verdict for defendant, although you may further find negligence upon the part of the engineer in the particulars complained of in the plaintiff's petition.<sup>78</sup>

§ 3906. **Conductor Bleeding Reservoir of Car.** That if the jury shall believe from the evidence in this case that Conductor M. was in charge of train No. — on the day that said train was stopped at or near F., leaving a portion of said train standing on the bridge over the Appomattox river in consequence of the fact that another train was standing on the track immediately in front of said train. That car No. —, being a part of said train, was left standing upon said bridge, and while said train and car were in that position, Conductor M. was informed by the engineer, through one of his trainmen, that there was a leakage in the air pipe somewhere, which affected the working of the air pump, and that this matter needed his attention, and in consequence of such information he went upon the bridge, and found that the defect was in the cross-over pipe leading from the main pipe to the auxiliary reservoir of said car No. —; that there was a release rod extending from the valve upon said reservoir through the bottom of said car, and protruding from the side of said car as is usual in such cases, the use of which rod was to bleed said auxiliary reservoir by pulling or pushing the same, when necessary or proper to do so; that the end of said rod protruding from the side was about twenty inches from the end of said car, and that there was a handhold and step within easy reach of the handle of the release wire; that between said car and the outside ends of the ties of the bridge there was a space of about two feet,

77—Int'l & G. N. Ry. Co. v. Vinson, 28 Tex. Civ. App. 247, 66 S. W. 800 (802).

"The charge requested would have entitled defendant to a verdict if it could have been checked at all on a signal, it matters not how little. To have been correct in this respect, the charge should have required the jury to find the deceased could have, by signals, checked the speed, and thereby prevented the accident. If he could not have done this, his failure to give the signals could not have been contributory negligence."

78—St. Louis, S. W. Ry. Co. of

Tex. v. Groves, — Tex. Civ. App. —, 97 S. W. 1084.

"Now, there can be no question that the act of plaintiff in uncoupling the hose after lifting the pin and signaling the engineer to go ahead was, if negligence, a proximate cause of his injuries. The rule is well established in this state that to submit, as a controverted issue, a matter about which there is no conflict in the evidence is error. Culpepper v. R. R. Co., 90 Tex. 627, 40 S. W. 386; Ry. v. Rowland, 90 Tex. 365, 38 S. W. 756; Tex. & Pac. Ry. v. McCoy, 90 Tex. 264, 38 S. W. 36; G. C. & S. F. Ry. v. Hill, 70 S. W. 103, 4 Tex. Ct. Rep. 799."



without any railing or protection whatever; and if they further believe that in this condition of affairs Conductor M. after said car had been cut out from connection with the main air pipe, attempted to bleed said auxiliary reservoir by catching hold at the end of said release rod and pulling it in the usual and proper manner, but did not take hold of the step or handhold, and that said release rod gave way, and came out, and in consequence thereof said M. fell off said bridge and sustained the injuries complained of,—then, they the jury, must determine whether under all the circumstances of this case, Conductor M. was acting in the proper discharge of his duties as a conductor, or had just reason to believe that he was so acting, and whether in so acting he took such reasonable and proper precautions against injury to himself as a reasonable and prudent man should have done under like circumstances, and if they believe this they must find for the plaintiff; but if they believe that said Conductor M. needlessly put himself in a dangerous position in the performance of said act, then they must find for the defendant.<sup>79</sup>

§ 3907. **Contributory Negligence on Hand Car.** (a) If the jury believe from the evidence that J. came to his death by and on account of the gross negligence of the defendant, or its servant or employe who had charge of the hand car, with which the one on which J. was, collided, then they must find for the plaintiff, although the jury should believe from the evidence that said J. was guilty of simple contributory negligence.

(b) Even if the jury should believe from the evidence that J. was guilty of simple contributory negligence, still they must find for the plaintiff, if they are reasonably satisfied from the evidence that J.'s death was caused by the gross negligence of the defendant, or its servant or employe who had charge of the front hand car.<sup>80</sup>

(c) If the jury believe from the evidence that the said J. was riding on the rear end of a hand car, in front of which was another hand car, and that both were running in the same direction across a

79—*Norfolk & W. Ry. Co. v. Mann*, 99 Va. 180, 37 S. E. 849 (850).

"That instruction was doubtless designed by the court to deal only with the question of contributory negligence, but lying at the threshold of every action of this kind is the duty imposed upon him who seeks to recover for injury by the negligence of another to prove such negligence as the proximate cause of the injury done. It is not enough to show that the plaintiff was without fault. It is essential to his recovery to show some fault or act of negligence in the defendant. This view of the case is wholly omitted from the instruction in question. It undertakes to state all that it was necessary for the defendant in error to establish to entitle him to a verdict of the jury, and if the law as applied to the facts governing this case be correctly stated in instruction No. —, then it is manifest that the jury were authorized to bring in a verdict against the defendant in the absence of any proof of any act of negligence on its part. Now, there was, as we have seen, evidence tending to show that the rail-

road company was not negligent, but that the accident was unavoidable. That was the contention of the plaintiff in error. It rested its defense—First, upon the plea that it was not guilty of any negligence upon its part; secondly, that the contributory negligence of the plaintiff was an efficient cause of any injury which he suffered by reason of his negligence. The instruction leaves out of view the primary contention of the defendant and fastens upon it responsibility to the plaintiff."

80—*Jones v. Alabama Mineral R. Co.*, 107 Ala. 400, 18 So. 30 (33).

"The above charges requested by plaintiff incorrectly define the character of negligence which will overcome contributory negligence, as we have many times decided; and besides the plaintiff has not alleged wanton, reckless or intentional negligence. We have held that this character of negligence must be alleged as well as proven, in order to overcome contributory negligence. *Louisville & N. R. Co. v. Markee*, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21, and cases cited."

bridge on defendant's road; and if they further find from the evidence that the said hand cars run together, or that the rear car overtook the first car, whereby a jar was caused; and if they further believe that said J. had been properly grasping the handle of said car (and that he was not properly grasping it) that he would not have fallen therefrom—then they must find for the defendant.<sup>81</sup>

§ 3908. **Boarding Moving Engine.** It was the duty of plaintiff, when he attempted to board the engine after throwing the switch, to use such care and caution as an ordinarily prudent person would have exercised under like circumstances; and if he failed to do so he would be guilty of contributory negligence, and could not recover, although you believe from the evidence that the defendant was guilty of negligence, as explained in the general charge.<sup>82</sup>

§ 3909. **Exposing Body Between Cars.** The jury are instructed that if deceased exposed his body between the cars, and if such act on his part was negligent, and that but for such negligence on his part he would not have been killed, then he would be guilty of contributory negligence, and you will find for defendant.<sup>83</sup>

§ 3910. **Stepping from Caboose While It is Being Uncoupled.** If you believe from the evidence that the accident happened underneath an arc electric light, and if you further believe that just before the accident, Switchman H. hallooed to Switchman L. that he, H., would pull the pin, and that at that time H. was on the southwest corner of the caboose, or on the ground at such corner, and if you further believe that the plaintiff was then on top of the caboose and heard the same, and that he thereby knew that the car next to the caboose was to be uncoupled therefrom, the plaintiff cannot recover; or if you believe from the evidence that a man of ordinary care and prudence, before

81—Jones v. Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30 (33).

"It was the duty of J., the deceased, riding upon the hand car, to exercise reasonable care for his safety. What was reasonable care was for the jury to determine from all the facts surrounding him at the time. Above charge requested by defendant, asserts that if J. 'had been properly grasping the handle of said car (and that he was not properly grasping it) that he would not have fallen therefrom,' then the jury must find for the defendant. We think this is not a fit method of defining to the jury the kind and degree of care which a person injured should have observed for his own safety. What is meant by 'properly grasping the handle of the car?' We readily conceive that a person situated as deceased was may have grasped the handle of the car in an improper manner, so far as an efficient execution of the work he was charged with doing was concerned, yet, if grasping the handle was a duty he owed to his own safety, the improper manner of grasping it, as above stated, might have been just as efficacious for his safety as it would have been had he been grasping it in a proper way for the execution of his work. The expression

'properly grasping the handle' is not the correct way of submitting to the jury the degree of care J. should have observed. That charge ought therefore to have been refused."

82—Gulf C. & S. F. Ry. Co. v. Mangham, 29 Tex. Civ. App. 486, 69 S. W. 80 (82).

"The charge under consideration was erroneous, in that it failed to instruct the jury that, if they found the facts stated constituted negligence, they must further find that such negligence contributed to the injury. Houston & T. C. R. R. Co. v. Kelly, 13 Tex. Civ. App. 1, 34 S. W. 809; M. K. & T. R. R. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956."

83—Gulf C. & S. F. Ry. Co. v. Hill, 29 Tex. Civ. App. 12, 70 S. W. 103 (107).

"The objection urged against this charge is that it submits as an issue whether the act of exposing the body between the cars, if negligence, contributed to the accident, when, as a matter of fact, it inevitably did so, and the evidence presented no issue about it. The objection is well sustained by authority. Gulf C. & S. F. Ry. Co. v. Rowland, 90 Tex. 365, 38 S. W. 756; Tex. & Pac. Ry. Co. v. McCoy, 90 Tex. 264, 38 S. W. 36; Culpepper v. Ry. Co., 90 Tex. 627, 40 S. W. 386."

attempting to step from said caboose, would have looked to see which ear was to be uncoupled and dropped into the "pocket," and that by such looking he would have seen that the caboose was to be uncoupled and dropped, and if you further believe from the evidence that the plaintiff failed to so look before stepping, and that such failure, if any, was negligence, as that term is defined in the main charge, and that such negligence, if any, caused or contributed to cause the accident, you will find for the defendant.<sup>84</sup>

**§ 3911. Pushing Trucks with Shoulders Instead of Hands.** (a) If the jury believe from the evidence that W. T. J. pushed said trucks with his shoulder, and that he could have pushed said trucks with his hands, and they further believe from the evidence that J. was killed by reason of his pushing with his shoulder, and not pushing with his hands, then their verdict must be for the defendant.

(b) If the jury believe from the evidence that there were two ways in which J. could have pushed the trucks, and one of these ways was a safe way and the other way was an unsafe way, then their verdict must be for the defendant.

(c) If you believe from the evidence that the car careened and fell because the trucks were pushed against the door or doors underneath the car, your verdict must be for the defendant.

(d) If you believe from the evidence that the trucks were pushed against the door or doors underneath the car, and that this caused the car to careen and fall, even though you might believe from the evidence that the trucks were negligently so pushed against the door or doors, you must find for the defendant.

(e) If you believe from the evidence that J., while pushing the trucks, without necessity therefor, had his head lying on the oil box with the truss rod only two or three inches above his head, and that his head was caught between the oil box and truss rod and crushed, thereby causing his death, you must find for the defendant.

(f) If you believe from the evidence that J., while pushing the trucks, through inattention had his head lying on the oil box, with the truss rod only two or three inches above his head, and that his head was caught between the oil box and the truss rod and crushed, thereby causing his death, you must find for the defendant.<sup>85</sup>

**§ 3912. Riding in Sitting Position with Leg Over Side of Car.**

(a) If the jury believe from the evidence that the plaintiff, when injured, was riding the car in a sitting position, with his leg hanging over the end or side of the car, and that this position was both voluntarily and unnecessarily assumed and maintained by him, and that, but for his occupying this position, he would not have been injured, your verdict must be for the defendant.<sup>86</sup>

84—Mo. K. & T. Ry. Co. of Texas v. Stinson, 34 Tex. Civ. App. 285, 78 S. W. 986 (1903).

"This charge was upon the weight of the evidence. It also took from the jury the right to determine whether or not the facts stated therein would constitute negligence."

85—Louisville & N. R. Co. v. Jones, 130 Ala. 456, 30 So. 586 (1901).

"Acts and conduct of the dece-

dent, such as are hypothesized in above refused charges do not show negligence as a legal conclusion, unless he was chargeable with knowledge that the jacks were liable to fall. These charges pretermit inquiry into the fact of such knowledge."

86—Southern Ry. Co. v. Howell, 135 Ala. 639, 34 So. 6 (1902).

"Above charge invaded the jury's province, and should have been refused."



(b) The court charges the jury that if they believe from the evidence that the plaintiff was riding on the car with his leg over the side of the car, on the outside thereof, and that the injury to him resulted in whole or in part therefrom, then they must find a verdict for the defendant.

(c) The court charges the jury that the evidence in this case shows that plaintiff was riding the car with his leg outside thereof, and the law is that in assuming this position he assumed the risk incident thereto, and cannot recover in this action.

(d) The court charges the jury that it is negligence *per se* for a brakeman to ride on a car with his leg hanging outside of the car, and, if he is injured in that position by reason thereof, then he cannot recover in action for damages for such injury.

(e) If the jury believe from the evidence that plaintiff saw the cross-tie twenty yards ahead, and failed to signal the engineer or give him warning of the obstruction, and that this contributed proximately to his own injury, then they should find a verdict for the defendant.

(f) The court charges the jury that if they believe from the evidence that plaintiff saw the cross-tie twenty yards ahead, and that, in his judgment, it was clear of the cars, but that he was mistaken in his judgment, and that this mistake of judgment on his part caused him to fail to warn the engineer, and that this contributed proximately to his own injury, then they must find a verdict for the defendant.

(g) If the jury believe from the evidence that the plaintiff saw the cross-tie twenty feet ahead, and failed to signal the engineer, or give him warning of the obstruction, and that this contributed proximately to his own injury, then they must find a verdict for the defendant.<sup>87</sup>

§ 3913. **Brakeman Sitting on Rear Bolster of Car and Lighting a Cigarette.** (a) The court charges the jury that if they believe from the evidence that the engine and five cars, including the car on which M. was riding, had passed safely over the place of accident without running off, and that M. by his own carelessness and negligence, allowed himself to fall on the track, and thereby caused the derailment of the last three cars of the train, then the defendant is not liable.

(b) The court charges the jury that before they can find a verdict against the defendant on account of defendant's engineer having been a man of drinking habits, that they must believe from the evidence that the said engineer was under the influence of liquor at the time of the accident, and that it was because of his then and there being

<sup>87</sup>—Southern Ry. Co. v. Howell, 135 Ala. 639, 34 So. 6 (7).

Another objection to these charges "is that they each improperly assumed that on the facts hypothesized therein contributory negligence was imputable to the plaintiff as a legal conclusion. The sufficiency of his diligence is measurable by the probable conduct of a man of ordinary prudence and judgment, as it would have been under like circumstances, and whether, by that test, he was at fault either in respect to his position on the car

or of his failure to perceive and give warning of the danger of striking the cross-tie was for the jury, and not the court, to determine. Failure to recognize the height of the cross-tie and the probability of its touching the car, may have been negligence on the part of the person charged particularly with the duty of looking after the track's condition, though a like failure on the part of one occupying the position and having the duties of a brakeman might not be negligent. See Magee

under the influence of liquor that he was negligent in the performance of his duty as such engineer, and that such negligence caused the death of the said M., and M. was not himself guilty of contributory negligence, the proximate cause of his death.

(c) The court charges the jury that if they believe from the evidence R. M. conducted himself in a negligent and careless manner on or about the car of the defendant, by sitting on the bolster instead of being at his post at the brake, and that such negligence on his part contributed proximately to his injury and death, then they must find for the defendant.

(d) The court charges the jury that if they believe from the evidence that M. was not at his post of duty as a brakeman while riding upon the car of defendant, but was conducting himself in a careless and negligent manner on places upon the car where his duty did not require him to be, and that by his own negligence he contributed proximately to the cause of his falling from the car and death, the jury must find for the defendant, even though they should further believe that the defendant was negligent.<sup>88</sup>

§ 3914. **Leaning Against Loose Plank in Chute on Stock Pen.** (a) Now, if you believe from the testimony that the plaintiff, in the performance of his duty as stock loader for defendant, fell from the chute on defendant's stock pen, and that he was thereby injured, and that you find that the fall was caused by a plank on said chute giving way, and you find that the giving way of the plank was caused by negligence, as hereinbefore defined, on the part of the defendant or its servants to secure said plank, then the defendant would be liable to plaintiff for the injuries so sustained, if he was not himself guilty of contributory negligence, under the further instruction of the court.

(b) But if you find the plank that gave way was defectively and insecurely fastened to the post, and that the plaintiff knew that fact, or had been so informed before he attempted to use it, or that he had been informed that said plank was loose or unsafe, and you find that in thereafter leaning against the plank the plaintiff himself was guilty of negligence which contributed to his injury, then he cannot recover although the railway may have been first guilty of negligence in maintaining said chute. If plaintiff did know of the dangerous condition, if any, of said plank, then his right to recover will not thereby be affected if he is otherwise entitled to recover under the evidence and charge of the court.<sup>89</sup>

v. North Pac. Coast R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. 69."

88—Davis v. Miller, 109 Ala. 589, 19 So. 699 (702).

"The question of M.'s contributory negligence was one for the jury. It could not, in this case, be affirmed that he was guilty of contributory negligence from the mere fact that he was not at the brakes, but sitting on the rear bolster of the car, when he fell; nor can the fact that while occupying that position he rolled and attempted to light a cigarette be affirmed to have been negligence proximately contributing to his death. These were facts for the consideration of the jury along with the other evidence, and some of

defendant's charges were bad because their tendency was to encroach upon the jury's province in this connection."

89—Ft. Worth & D. C. Ry. Co. v. Gary, 29 Tex. Civ. App. 122, 68 S. W. 200 (201).

"Error has been assigned to these paragraphs of the charge upon several grounds, but mainly and justly we think, because the defense of assumed risk and contributory negligence were thereby confused. In the first paragraph quoted the jury were instructed that the negligence of appellant would render liable to appellee, 'if he was not himself guilty of contributory negligence under the further instruction of the court,' and in this further instruc-

tion the jury were required to find, in order to defeat liability, not only that appellee knew or 'had been informed that said plank was loose or unsafe,' but also that appellee 'himself was guilty of negligence which contributed to his injuries.' This question has been so often considered by this and other ap-

pellate courts in Texas that we need only refer to the opinion of Chief Justice Conner in *Gulf C. & S. F. Ry. Co. v. Gray*, 25 Tex. Civ. App. 99, 63 S. W. 927, and the numerous cases there cited. The defense of assumed risk, apart from contributory negligence, was thus in effect withdrawn from the jury."



## CHAPTER CXLVIII.

### NEGLIGENCE—MUNICIPAL CORPORATIONS.

See Approved Instructions, Chapter LXV, Vol. II.

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| <p>§ 3915. Streets of city are open to use of entire public.</p> <p>§ 3916. Contradictory statements in instructions as to defendant's liability.</p> <p>§ 3917. Streets and walks to be kept reasonably safe.</p> <p>§ 3918. Municipality need not put entire width in condition for use, nor provide safe access to private property.</p> <p>§ 3919. Liability for negligence of agents and servants.</p> <p>§ 3920. Liability when intervening acts of third parties concur in injury.</p> <p>§ 3921. Joint liability of city with other defendants.</p> <p>§ 3922. Must have notice—Actual or constructive.</p> <p>§ 3923. Necessity of notice to city of defect in street.</p> <p>§ 3924. Notice to city of defect in street presumed, when.</p> <p>§ 3925. Automobile running into excavation in street.</p> <p>§ 3926. Liability for defective sidewalk.</p> <p>§ 3927. Person traveling on sidewalk may presume it reasonably safe for ordinary travel.</p> <p>§ 3928. Instructions not applicable to evidence as to injury by falling into a hole in sidewalk.</p> <p>§ 3929. When city deemed to have had constructive notice of defect in sidewalk.</p> <p>§ 3930. Effect of knowledge of municipal authorities that sidewalk is defective.</p> <p>§ 3931. Injury through hole in sidewalk.</p> | <p>§ 3932. Slippery condition of sidewalk resulting from ordinary accumulation of ice in winter.</p> <p>§ 3933. Injury to adjoining property—Changing grade.</p> <p>§ 3934. Injuries to persons or property through felling trees.</p> <p>§ 3935. Liability for damage to adjacent property by digging ditch.</p> <p>§ 3936. Receiving report of city engineer as ratification of his actions.</p> <p>§ 3937. Liability for defective bridges.</p> <p>§ 3938. Liability for lighting of bridges.</p> <p>§ 3939. Contributory negligence—in general.</p> <p>§ 3940. Intoxication as contributory negligence.</p> <p>§ 3941. Contributory negligence while driving.</p> <p>§ 3942. Effect of knowledge on part of person using sidewalk that it is defective.</p> <p>§ 3943. Effect of knowledge on part of person using street that it is defective.</p> <p>§ 3944. Effect of plaintiff having dug ditch himself in which he fell.</p> <p>§ 3945. Passing over defective walk not necessarily negligence.</p> <p>§ 3946. Placing oneself in position of danger.</p> <p>§ 3947. Burden of proof as to contributory negligence of plaintiff—States holding that it rests on defendant.</p> <p>§ 3948. Negligence of driver.</p> |
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§ 3915. **Streets of City Are Open to Use of the Entire Public.** The jury are instructed that streets of the city are open to the use of the entire public as highways, without regard to what may be the motives and objects of those traveling thereon; that those using them in the exercise of ordinary care for recreation, for pleasure, or through mere idle curiosity, so long as they do not infringe upon the right of others to use them, are equally within the protection of the law while so using them, and are equally entitled to have them in

a reasonably safe condition with those who are passing along them as travelers in the pursuit of their daily vocations. Persons using them for recreation or amusement not unlawful, or from mere idle curiosity, using ordinary care, are as much within their protection of the law as those in the pursuit of their legitimate and necessary business.<sup>1</sup>

§ 3916. **Contradictory Statements in Instruction as to Defendant's Liability.** The court instructs the jury that the evidence of the plaintiff tends to show that she is entitled to a verdict at your hands, while the evidence of the defendant tends to show that, if any liability exists, the defendant A. is primarily liable; and the evidence on the part of the defendant A. tends to show that he is not primarily liable, or in any other manner liable; and the evidence of the defendant A. also tends to show that the woman has not sustained any serious or material injury whereby she can ask a large verdict at your hands.<sup>2</sup>

§ 3917. **Streets and Walks to be Kept Reasonably Safe.** (a) The words "ordinary care" mean such prudence and care as an ordinarily careful person would use under the same or like circumstances.

The reasonable diligence here mentioned required of public officers of a city having charge of the public streets and walks means such diligence as like officers with like responsibilities usually and ordinarily employ in the discharge of their duties.<sup>3</sup>

(b) The court instructs you further that the defendant corporation, the city of C., is bound by law to use all reasonable care and caution and supervision to keep its streets and sidewalks in safe condition for travel in the ordinary modes of traveling by night as well as by day, and if it fails to do so it is liable for injuries sustained in consequence of said failure, providing the party injured is himself exercising reasonable care and caution.<sup>4</sup>

1—Joyce v. Chicago, 111 Ill. App. 443 (445).

"The court was not bound to give this instruction. It was abstract in form. Instructions should be so drawn as to have a concrete bearing upon the facts of the case."

2—Duthie v. Washburn, 87 Wis. 231, 58 N. W. 380 (381).

"In other words, the evidence tends to show that the plaintiff is entitled to recover, and that she is not entitled to recover, and that A. is primarily liable and is not primarily liable. Such an instruction that makes the same evidence tend to support two opposite and adverse propositions and conclusions, would be likely to confuse the minds of the jury, rather than aid them in applying the evidence to the law, which should be the main purpose of instructing the jury."

3—Pumorio v. City of Merrill, 125 Wis. 102, 103 N. W. 464 (466, 467).

"The terms employed in the above instruction as defining 'ordinary care' are, we think, free from fault, and are within the strict limits of the decisions."

"In speaking of the reasonable diligence required of city officers

having charge of its public streets and walks, the court said it 'means such diligence as like officers of like responsibilities usually and ordinarily employ in the discharge of their duties.' Though the expression is somewhat involved in obscurity, and may be said to be erroneous in the sense that it is not framed in the usual and accepted terms approved by this court on the subject, yet we cannot say that this is harmful error, because the jury in all reasonable probability understood it in its correct sense as above indicated. In its final analysis this is the fair and natural meaning to be given the context of this instruction, and it and the one given by the court defining ordinary care are in form and substance as required and approved by the foregoing adjudications of this court."

4—Gilson v. Cadillac, 134 Mich. 189, 95 N. W. 1084 (1085).

"This is not a correct statement of the law, but the judge gave other instructions in relation to that feature of the case. Among other things he said: 'The defendant requests the court to charge, and I

(c) The law imposes upon the city of D. the duty of keeping its streets and bridges thereon in a reasonably safe condition for persons using its streets and bridges thereon.<sup>5</sup>

(d) The law of this state is that towns and municipalities shall keep their streets and highways in a reasonably safe condition for the passage of travelers at all seasons of the year. The law does not require, nor does the town undertake to make its highways perfectly safe so that no accident can happen; but the town is required and it is its duty to make them in view of the situation, the character of the highway, and the season of the year in a reasonably safe condition.

(e) It was the duty of the plaintiff in this case to exercise ordinary care to protect herself from injury; and you are required by your answer to this question to say whether she did, under all the circumstances shown in the testimony, exercise such ordinary care.<sup>6</sup>

§ 3918. **Municipality Need Not Put Entire Width of Street in Condition for Use, Nor Provide Safe Access to Private Property.** (a) The court instructs the jury that the City of St. L. is not obliged to keep the whole of a street in a safe and passable condition, but that, if it keeps enough of the street in a safe and suitable condition to reasonably accommodate the public in passing over the same while exercising ordinary care, then the city is not liable.<sup>7</sup>

(b) If you find from the evidence in this case that the city did open for public travel only a part of the width of said street, leaving the other portion of said street in its original condition, then

do charge you that the law only imposes upon the city the duty to keep its sidewalks in a condition reasonably safe for public travel. The city is not an insurer against accident, nor is it required to make its walks absolutely safe from accident \* \* \*. We do not think the jury could have labored under any misapprehension as to the duty of the city."

5—City of Dallas v. Moore, 32 Tex. Civ. App. 230, 74 S. W. 95 (96).

"In an examination of the charter of the city of Dallas granted by the Legislature, we have discovered no provision requiring the city of Dallas to keep its streets in a safe or reasonably safe condition; nor is there in the record any ordinance of the city relating to the duty of the city in this respect. Such being the case, the city was only required to exercise ordinary care to keep its streets in a reasonably safe condition. The charge of the court, as given, might have led the jury to believe that the law imposed the duty upon the city to keep its streets in a reasonably safe condition, whether or not it had exercised ordinary care to accomplish that purpose."

6—Schrunk v. St. Joseph, 120 Wis. 223, 97 N. W. 946 (949).

"Complaint is made because the court at several points in the instructions to the jury so worded the same as to indicate the answer necessary to sustain plaintiff's claim. \* \* \* Without intending

to indicate at this time that such a method of instructing a jury under the circumstances of this case is fatally erroneous, we will take occasion to condemn it as not the best method, and as impairing to some extent the value of a special verdict."

7—Kossman v. St. Louis, 153 Mo. 293, 54 S. W. 513 (514).

"The rule applicable to the facts of this case is well stated by the court in Walker v. City of Kansas, 99 Mo., loc. cit. 652, 12 S. W. 895, in these words: 'A city is not necessarily required to open or put all of its streets in a condition for public travel, or all parts of its streets in such condition; but, when it does open and undertake to put a street in condition for such travel as a whole or a part thereof, it must keep such street or such part thereof as it does undertake to open and put in such condition, in its entirety, reasonably safe for travel.' That rule has been often approved, and must now be considered settled law. Hunter v. Weston, 111 Mo. 184, 19 S. W. 1098, 17 L. R. A. 633; Meiners v. City of St. Louis, 130 Mo. 285, 32 S. W. 637; Vogelgesang v. City of St. Louis, 139 Mo. 135, 40 S. W. 653; Welsh v. City of St. Louis, 73 Mo. 71. It is obvious that the instruction was erroneous, and well calculated to bring about an unjust verdict, and the circuit court very properly decided to correct its own error by granting the new trial."



it was only bound to keep in safe condition for travel that portion so opened for public travel.<sup>8</sup>

§ 3919. **Liability for Negligence of Agents and Servants.** The jury are instructed that the City of C. is not liable for the act or conduct of persons not in its employ. The court instructs the jury that the City of C. is not liable for the act or conduct of its servants when such act or conduct is not within the scope of their duty.<sup>9</sup>

§ 3920. **Liability When Intervening Acts of Third Parties Concur In Injury.** If from the evidence you believe the accident to plaintiff was brought about by plaintiff's handling the lines, or by the acts of by-standers endeavoring to assist plaintiff by taking hold of the bridle, thereby causing the horse to back the buggy or phaeton into the river, you will find for the defendant.<sup>10</sup>

§ 3921. **Joint Liability of City With Other Defendants.** The plaintiff may recover against either one or against any two or all of the defendants, if you believe, from the evidence, that the defendants or either of them or any two of them were guilty of negligence as charged.<sup>11</sup>

8—Atchison v. Mayhood, 69 Kan. 672, 77 Pac. 549 (550).

"The position of plaintiff in error could only be sustained by holding that a city can never be liable for injuries received by reason of the condition of the sidewalk area in a public street unless it has undertaken to build and maintain thereon an artificial walk, or otherwise by affirmative action to fit it for use as a footway. Such a view conflicts alike with reason and authority. It is justly held that where, for a term of years, there is a general use by pedestrians of the part of a public street lying outside of the improved portion, the city may be deemed to have recognized such use, and assumed the responsibility of its being made safe, although no artificial sidewalk has been constructed. 'In cities, where it is customary for travelers on foot to use for that purpose a portion of the public streets on one or both sides of the track which is used for carriages and teams as a footway or sidewalk, the use of such footway or sidewalk by the people traveling along a public street in any such city for a series of years constitutes such footway or sidewalk a part of the traveled part of such street, and imposes upon the city the duty of keeping such footway or sidewalk in repair; and if the same becomes so defective as to render travel over the same unsafe, and the city takes no measures to warn the public against the use of such footway, the city becomes liable to any traveler who may suffer an injury from such defective footway without his fault.' James v. Portage, 48 Wis. 677, 5 N. W. 31.

"If between the sidewalk of a street in a city and that portion of the street wrought for a carriage-way there is a grassed space, over which a footpath has been worn by persons having occasion to enter

another street abutting on this street, but not crossing it, or to come in the opposite direction, the city is liable to a person injured by a defect in such path, if the path was known to and recognized by the city as a part of the wrought line of travel, in the absence of any part or other provision made by the city for crossing the street at or near the locality in question, or of any barrier or other warning to indicate that the path as actually used was unsafe or unsuitable.' Astor v. Newton, 134 Mass. 507, 45 Am. Rep. 347, Syll. See, also, Madisonville v. Pemberton's Adm'r, 25 Ky. 347, 75 S. W. 229.

9—Chicago v. O'Malley, 196 Ill. 197 (200), aff'g, 95 Ill. App. 355, 63 N. E. 652.

"It was not error to refuse these instructions, because first they both stated abstract propositions of law, and, second, were calculated to mislead the jury under the evidence of the case."

10—City of San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 922 (927).

"This charge assumed, as a matter of law, that plaintiff's handling of the lines' was an act of negligence. As to whether such act was negligence was a question of fact for the jury, to be determined from all the facts and circumstances attending the occurrence. Besides, a concurrent, co-existing, intervening act of a third party, without which the injuries would not have been received, does not excuse and relieve the city from liability for personal injuries caused by its negligence. Eads v. City of Marshall, — Tex. Civ. App. —, 29 S. W. 171; 15 Am. & Eng. Enc. Law (2d ed.), p. 460."

11—Decatur v. Hamilton, 89 Ill. App. 561 (569).

"Under this instruction the jury was authorized to find against all

§ 3922. **Must Have Notice—Actual or Constructive.** (a) The jury are instructed that, although you may believe, from the evidence, that the plaintiff's alleged injury was caused by an accumulation of ice and snow which amounted to an obstruction to travel, yet such obstruction in itself will not render the city liable for such alleged injury. In order to find the city of C. guilty of negligence on account of such obstruction, you must believe, from the evidence, not only that such obstruction existed at the time and place of the accident, but you must also believe from a preponderance of the evidence in this case that the city of C. either had direct notice of such obstruction given to one of its officers having charge or oversight of the place in question, or that the place had been obstructed for a time sufficiently long for the city of C. in the exercise of reasonable care to have discovered it and removed it before the accident.<sup>12</sup>

(b) If the jury believe, from the evidence, that the street in which the defect is alleged to have been, and where the plaintiff is alleged to have been injured, was properly and safely constructed, and prior and up to the time of the alleged injury it appeared to be in a proper and safe condition, then if the jury further believe, from the evidence, that the officers of the defendant had no actual knowledge of any defect in said street, then in that case the defendant is not liable for the alleged injury, and the jury should find the defendant not guilty.<sup>13</sup>

§ 3923. **Necessity of Notice to City of Defect in Street.** The court instructs you that, as a matter of law, the notice which the undisputed evidence in this case shows was filed in the proper office of the defendant city was sufficient notice of the accident complained of in this case, as required by the statutes of this state. In order to recover in this action, it will be necessary for the plaintiff to establish by a preponderance of the evidence—First, that she was injured at or about the place and time alleged in the petition; second,

the defendants even though they believed only one was guilty. It authorized a finding against the city, if the evidence showed that a dangerous appliance of the railway or the telephone company caused the injury, independent of whether the city had notice of the same. It was error to give it."

12—*Mareck v. Chicago*, 89 Ill. App. 358 (360).

"The substance of this instruction so far as it relates to direct notice has been considered by this court in *Lundon v. Chicago*, 83 Ill. App. 208; and it was there held that the limitation of any direct notice to such as might have been given to an officer 'having charge or oversight of the place in question' was erroneous. The court, through Mr. Justice Freeman, said: 'The city has no right to claim exemption upon the ground that some particular officer had not been notified of the dangerous condition of the sidewalk. It is the duty of the city's representatives, as for example its police, or other employees, to notify the proper officer whose duty it is to repair,' etc."

13—*City of LaSalle v. Porterfield*, 138 Ill. 114 (119), 27 N. E. 937.

"This, it will be observed, assumes that appellee's officers owed no affirmative duty of observation and enquiry to ascertain whether the defendant's bridges, culverts and so forth were in fact safe for public travel. It is the duty of municipal officers to use ordinary care in keeping its bridges, culverts and so forth in a safe condition for public travel, and this involves the anticipation of defects that are the natural and ordinary result of use and climatic influences; and so where there is neglect on the part of the proper officer to make a sufficiently frequent examination of a particular structure, a municipality will not be relieved from liability although the defect may not be open and notorious. *Elliott on Roads & Streets*, 462, and authorities there cited. See also to like effect *Stebbins v. Keene*, 55 Mich. 552, 22 N. W. 37; *Village of Fairbury v. Rogers*, 98 Ill. 557; *City of Sterling v. Marrow*, 124 Ill. 552, 17 N. E. 6."

that her injuries were the direct result of the meter box referred to in the evidence and the pleading, being out of repair and in an unsafe condition for the uses of travel in the public street; third, that the condition of said meter box was due to the negligence on the part of the defendant city; fourth, what amount of damages, if any, she suffered by reason of said injuries.<sup>14</sup>

§ 3924. **Notice to City of Defect In Street Presumed, When.** You are instructed that if the lumber mentioned in the evidence was not piled or placed in the street by some person or persons for building purposes, and at the time the injury occurred the lumber had been in said street only from two to four days, then, as a matter of law, the defendant did not have constructive notice of the fact that the lumber was in the street.<sup>15</sup>

§ 3925. **Automobile Running Into Excavation In Street.** Now I am asked to charge you, on behalf of the defendant, that, as a matter of law, a red light at night is a sign of danger, and it was the duty of plaintiff, when he discovered the red light, to ascertain the reason of its being there. I think that is so. But if you find, gentlemen of the jury, that a reasonably prudent person, seeing the two lights as they existed, away to the side of the street, and saw no light in the center, I cannot say to you gentlemen of the jury, that he was negligent in assuming, under those circumstances, that the difficulty existed only on the side, but leave that expressly, gentlemen of the jury, for you to say what a reasonably prudent person under the circumstances would have done.<sup>16</sup>

§ 3926. **Liability for Defective Sidewalk.** (a) The court instructs the jury that the defendant corporation was bound by law on or about the — day of ———, ———, to use all reasonable care, caution and supervision to keep its streets and sidewalks in a reasonable condition for travel, in the ordinary modes of travel, and, if it failed to do so, it was and is liable to plaintiff for damages resulting

14—*Omaha v. Meyers*, 3 Neb. (Unof.) 699, 92 N. W. 743 (744).

"It is contended that this instruction took away from the jury the issue of contributory negligence raised by the answer of the city, and also the question of notice to the city of the defective condition of the meter box. The instruction quoted seems in a measure, at least, vulnerable to the objections urged. But it does not necessarily follow that it is such error as will require the reversal of the case. In the case of *Sioux C. & P. Ry. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724, this court said: 'It is the duty of the district court upon the trial of a cause by a jury, to inform the jury by its instructions of the issues of the case on trial; but if on such trial the issues of the case are imperfectly stated, the party desiring a more specific instruction must call the attention of the court thereto by a request for a correct instruction in order to secure a review of such failure by the supreme court.'"

15—*City of Evansville v. Senhenn*, 26 Ind. App. 362, 59 N. E. 863 (865).

"The instruction was properly refused. It was for the jury, upon all the evidence, to determine whether the lumber had been in the street a sufficient length of time for the city to have had notice by the use of reasonable diligence."

16—*Karrer v. City of Detroit*, 142 Mich. 331, 106 N. W. 64 (66).

"There is testimony that the lamps were at the curb, but there was quite as convincing testimony that they were estimated to be at least seven or eight feet from the curb, while, if the testimony of the only witness who measured the ground were to be taken, the lamps were within a foot of the center of the street, if east of the driveway. See *Perkins v. Delaware*, 113 Mich. 378, 71 N. W. 643, which holds that such must usually prevail over estimates of distance. We are impressed that the jury would naturally infer that the trial judge believed that these lights were at the curb, or, at least, remote from the center of the street, and, though doubtless an inadvertence was none the less injurious to the defendant."



to him, if any, in consequence of such failure, by reason of his wife, A. B., falling upon said defective sidewalk at the N. W. corner of the intersection of M. and F. streets, if you find from the evidence that she did fall, provided that the said A. B., herself was, at the time she received her injuries, if any, exercising reasonable care and caution.<sup>17</sup>

(b) If you believe from the evidence that plaintiff was injured by reason of striking his foot against a bolt or wire, or either of them, in said sidewalk, at or about the place mentioned in his petition, and that he was exercising ordinary care at the time, and did no act which contributed to his injury, and that defendants had notice of the obstruction or defects of which complaint is made a sufficient length of time to have repaired or removed the same, by the exercise of ordinary diligence, before the time plaintiff was injured, then your verdict should be for plaintiff. If you do not so find in reference to any one of the foregoing particulars, your verdict should be for the defendant.<sup>18</sup>

**§ 3927. Person Traveling On Sidewalk May Presume It Reasonably Safe for Ordinary Travel.** (a) If the jury believe from the evidence that K. City failed to use ordinary care in keeping the sidewalk in reasonably safe condition, and that the plaintiff, A. B., also failed to use ordinary care, in not discovering the condition of the sidewalk, by reason of which failures he was hurt, then the jury must find for the city.<sup>19</sup>

(b) Persons walking over a sidewalk have a right to presume that it is in a reasonably safe condition for traveling, and a traveler is not called upon to look especially as to whether such walk is in a sufficiently safe condition, and properly built and maintained, or not, and so ordinary care on the part of a traveler is presumed upon this ground, and upon this ground a recovery is not defeated unless it appears that the traveler was guilty of some want of ordinary care at the time of the accident which was a contributing cause to the accident. Likewise, if a person has seen the defect complained of before the time of the accident, and omits to notice it at the time of the accident, this, in itself, does not preclude a recovery, unless the jury find such person to be guilty of a want of ordinary care in traveling over the walk at the time of the accident, and in view of her knowledge of the situation. The question is one to

17—*Baker v. City of Independence*, 106 Mo. App. 507, 81 S. W. 501 (502).

"The objection to this instruction is that it assumes that the sidewalk in question was defective. The objection is well founded, and the instruction should not have been given."

18—*Bauer v. Dubuque*, 122 Ia. 500, 98 N. W. 355 (356).

"The city was bound to do no more than to keep its sidewalks in a reasonably safe condition for travel, and whether the one in question was or was not in such condition was a vital question in the case which the jury alone could determine; and nowhere was this subject referred to except in the general

language which we first quote. The eleventh instruction clearly assumed that the walk was not in a reasonably safe condition, and directed a finding for the plaintiff without the determination of that question by the jury, and this was error. The same oversight is apparent in the instructions as a whole."

19—*Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448 (450, 451).

"The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which, in the absence of knowledge of its dangerous condition, he had the right to assume was reasonably safe for travel; hence no error was committed in refusing this instruction."

be submitted to the jury and determined upon the facts as you find them.<sup>20</sup>

(c) The city is liable not only for the injuries occasioned by negligently constructing defective sidewalks on its streets or by causing such defects in them after they are constructed, but also for negligently permitting them to remain in a dangerous or unsafe condition, no matter how such condition was caused. Any person traveling upon a street has a right to use any portion of the street or sidewalk for that purpose, not already otherwise in use; and a person traveling upon a street or sidewalk of a city has the right to assume that such street or sidewalk is in a safe condition, and to act upon that assumption, relying upon the belief that the city has performed its duty, and placed and maintained such street or sidewalk in a safe condition.<sup>21</sup>

(d) Persons walking on a sidewalk have a right to presume that it is in a reasonably safe condition for travel, and the traveler is not called upon to look especially as to whether such walk is in a sufficiently safe condition and properly maintained or not; and so ordinary care on the part of a traveler is presumed upon this ground.<sup>22</sup>

§ 3928. **Instructions not Applicable to Evidence as to Injury by Falling Into Hole in Sidewalk.** (a) You are instructed that if you believe from the evidence that the defendant did not push a third person against the plaintiff, or that plaintiff was thrown into said alleged opening in said sidewalk by some person other than defendant, or by the careless and negligent acts of plaintiff he fell into said hole

20—Collins v. Janesville, 111 Wis. 348, 83 N. W. 695 (696).

"While that part of the charge above with regard to the presumption in which a traveler may indulge that the street on which he travels is not defective is correct, in the abstract, it was undoubtedly misleading in the present case, because not applicable to one who knows of the existence of a defect."

21—Kansas City v. Smith, 8 Kan. App. 82, 54 Pac. 329 (331).

"This instruction was not complete within itself. The court should have instructed the jury that the city was liable only to persons who receive injuries through its negligence without fault on their part."

22—Collins v. Janesville, 111 Wis. 348, 87 N. W. 241 (244).

"It being undisputed that respondent knew of the defect before the accident, that instruction was clearly erroneous, and prejudicially misleading. The same instruction was given upon the former trial, and was condemned in unmistakable language. Collins v. Janesville, 107 Wis. 436, 83 N. W. 695.

No good reason is perceived why it was repeated. The idea that a person with knowledge of a dangerous defect in a sidewalk can use it regardless thereof, that is, with the presumption that there is no such defect, is erroneous to a high degree. The better way was to omit

the instruction. Having given it, the court should have stated that it did not apply to the facts of this case because the respondent knew of the defect; that such circumstance displaced the presumption that would otherwise exist in her favor and required some evidence, direct or circumstantial, reasonably sufficient to overcome the presumption of negligence raised by such knowledge by showing that she was proceeding upon the walk paying attention to the necessity of avoiding the danger, or that she forgot the existence of it and that her forgetfulness under the circumstances was consistent with ordinary care. Some courts have held that if a person knows of a dangerous defect in a sidewalk he is bound at his peril to remember it. Gilman v. Deerfield, 15 Gray 577; Brooker v. Covington, 69 Ind. 35, 35 Am. Rep. 202.

But this court in harmony with the weight of authority holds to the more reasonable and humane rule that a person may forget the existence of a defect in a street or sidewalk, and thereby receive a personal injury, and yet be in the exercise of ordinary care. Cuthbert v. City of Appleton, 24 Wis. 383; Wheeler v. Town of Westport, 30 Wis. 392; Simonds v. City of Baraboo, 93 Wis. 40, 67 N. W. 40; Crites v. New Richmond, 98 Wis. 55, 73 N. W. 322."

and was injured, then plaintiff cannot recover, and your verdict should be for the defendant.

(b) You are instructed that if you believe from the evidence that defendant pushed a third person against plaintiff in any manner so as to precipitate him into the opening in the walk as alleged, and resulting therefrom the plaintiff was injured as alleged, and if you believe that said injuries were the result in whole or in part of the careless and negligent acts of plaintiff contributing thereto or that he was not at the time exercising ordinary care to avoid personal injury, or that he in fact sustained no injury from the fall, then plaintiff cannot recover, and your verdict should be for the defendant.<sup>23</sup>

§ 3929. **When City Deemed to Have Had Constructive Notice of Defect in Sidewalk.** The court charges the jury that a person passing along the public street of a city is under no obligation to keep a constant lookout for defects in the street, but may walk upon the sidewalk in the manner in which persons ordinarily do; and if he is injured by a defect in the streets of which he has no knowledge, and which had existed long enough for the city to have known it, without fault on his part, your verdict must be for plaintiff.<sup>24</sup>

§ 3930. **Effect of Knowledge of Municipal Authorities That Sidewalk is Defective.** If the jury believe, from the evidence, that the sidewalk in question where the plaintiff claims to have received her injury was repaired and placed in good condition by the city within a reasonable time prior to this alleged accident, and if the jury believe from the evidence that said walk afterwards became out of repair without actual notice to the city, then the plaintiff cannot recover.<sup>25</sup>

§ 3931. **Injury Through Hole in Sidewalk.** The court instructs the jury that if you believe from a preponderance of the evidence in this

23—*Mannion v. Talboy*, — Neb. —, 107 N. W. 750 (750 and 751).

"There is no word of evidence in the record tending to show that the plaintiff himself was guilty of any negligence. There is no evidence tending to show that he himself contributed to the injury. There is no evidence tending to show that the accident occurred in consequence of the act of any third party. Under these circumstances it was error for the court to frame his instructions in such manner as to allow the jury to infer or find facts of which there was no evidence. The charge of the court to the jury should always be founded on and applicable to the testimony, and when it is not and is calculated to mislead the jury in considering the facts of the case, the judgment ought to be reversed. *Kilpatrick v. Richardson*, 37 Neb. 731, 56 N. W. 481; *Farmers' & Merchants' Bank v. Upham*, 37 Neb. 417, 55 N. W. 1044; *Esterly v. Frolkey*, 34 Neb. 110, 51 N. W. 594; *Farmers' Loan & Trust Co. v. Montgomery*, 30 Neb. 33, 46 N. W. 214; *York v. Spellman*, 19 Neb. 357, 27 N. W. 213."

24—*Abbott v. Mobile*, 119 Ala. 595, 24 So. 565 (566, 567).

"This charge requested by plain-

tiff is bad for the reason that the principle asserted imposed a greater liability upon the city than that required by the law. A city is not held unqualifiedly to a knowledge of all defects in its sidewalks, but to a knowledge of those which may and would be discovered by the exercise of reasonable diligence and care. The charge is faulty in that it imposed a liability if the 'defect existed long enough for the city to have known it,' that is, as we construe the charge, if, by the exercise of the utmost care and watchfulness, it might have been known. This rule imposes too great a degree of care upon the city."

25—*City of Sterling v. Merrill*, 124 Ill. 522 (525), 17 N. E. 6.

"This instruction is obscure and calculated to mislead. It is not essential to the recovery in a case of this character that the evidence should show actual notice to the city. *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578.

If the opening in the sidewalk had existed for such a length of time before the accident that the city authorities might have discovered it by the use of reasonable diligence, then the city will be presumed to have had notice of it."



case that the plaintiff was walking along P. Street, in the city of S., in the exercise of reasonable care and caution for her own safety, and while so doing her foot slipped, or in some way, without fault on her part, got into a hole in the sidewalk along said P. Street, which said city had negligently allowed to be and remain in said sidewalk after notice that it existed, as explained in these instructions, then the plaintiff is entitled to a verdict for such sum as in your judgment the evidence and the facts and circumstances in evidence warrants, if any.<sup>26</sup>

§ 3932. **Slippery Condition of Sidewalk Resulting from Ordinary Accumulation of Ice in Winter.** (a) The jury are instructed that the freezing of smooth, level ice does not constitute a defect in any way; and the fact that there are such hollows or basements in the sidewalk as to make them fill with level water which cannot pass off, and that level water freezes, if it freezes, into smooth level ice, does not constitute a defect in the way. And if you find that there was such a formation of this sidewalk as to produce merely, in the natural and ordinary operation of things, smooth, level, ice, then that formation would not be a defect.<sup>27</sup>

(b) The court instructs the jury, if you find and believe from the evidence that at the time plaintiff slipped and fell the sidewalk at the point where she slipped and fell was covered with rough and uneven ice, and that said rough and uneven ice, if any, has remained upon said sidewalk at said point for a sufficiently long time prior to the time plaintiff slipped and fell for the defendant, by the exercise of ordinary care and caution, to have known of the presence of said ice, if any, and in time for defendant to have had a reasonable opportunity to have removed said ice, or to have caused the same to be removed; and if you further find and believe from the evidence that said ice, if any, was a direct and proximate cause of plaintiff's slipping and falling—then the court instructs you that defendant is not relieved of its liability, if any, to plaintiff on account of the fact, if you find and believe from the evidence it is a fact, that said sidewalk at said time was covered with sleet, even though you further find and believe from the evidence that said sleet, if any, was also one of the direct and proximate causes of plaintiff's slipping and falling.<sup>28</sup>

26—*Springfield v. Brooks*, 72 Ill. App. 481 (483, 484).

"We are free to say that the above instruction is not drawn with that care that it ought to have been, and for that reason ought to have been refused."

27—*Adams v. Town of Chicopee*, 147 Mass. 440, 18 N. E. 231 (232).

"The question of law involved in the exception was decided in the case of *Pinkham v. Topsfield*, 104 Mass. 78.

In that case the jury were instructed 'that, if there was some special cause for the formation of ice in that particular locality, owing to the construction or condition of the road, it would be a defect, if it rendered the way unsafe and dangerous, though it was only smooth and slippery;' and the ruling was unanimously sustained by this court. The doctrine is stated in *Fitzgerald v. Woburn*, 109 Mass. 204, in similar

terms; and in the leading case of *Stanton v. Springfield*, 12 Allen 586, it is said that 'a way must be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality.' In the decision in *Billings v. Worcester*, 102 Mass. 329, there is nothing in conflict with this doctrine, although some of the reasoning in the opinion seems to lead away from it; but through the change in the law by the enactment of St. 1877, c. 234, that reasoning has become inapplicable to recent cases. Pub. St. c. 52, para. 18; *Post v. Boston*, 141 Mass. 189, 4 N. E. 815; *Blake v. Lowell*, 143 Mass. 296, 9 N. E. 627."

28—*Quinlan v. Kansas C.*, 104 Mo. App. 616, 78 S. W. 660 (661).

"The criticism is just. Rough and uneven ice may have existed at the point in question but that fact did not render it unsafe, within the

§ 3933. **Injury to Adjoining Property—Changing Grade.** If you find from the preponderance of the evidence that the grading in front of plaintiff's premises was done either by virtue of the resolution of the city council introduced in evidence, or by the employes of the defendant city, under the instruction of its officers, or any of them, and any damage was occasioned to the plaintiff's property thereby, your verdict should be for the plaintiff.<sup>29</sup>

§ 3934. **Injuries to Persons or Property Through Felling Trees.** The jury are instructed that it is incumbent upon appellee to show by a preponderance of the testimony that the horse she was driving was ordinarily gentle before she can recover.<sup>30</sup>

§ 3935. **Liability for Damage to Adjacent Property by Digging Ditch.** If plaintiff knew, or had reason to know that the committee of the city council of D. was only authorized to dig the ditch through his property on condition that the damage occasioned thereby, if any, should be paid for by private parties, and that the said B. suffered said work to proceed, and took no steps to stop it, and to notify the city that he would not look to private parties for damages, then you are instructed that he is estopped to recover of defendant, and you find for the defendant.<sup>31</sup>

§ 3936. **Receiving Report of City Engineer as Ratification of His Actions.** You are instructed that by the minutes of the city council of the ——— day of ——— it appears that the report of L., city engineer, was received and filed. You are instructed that by such action the city council is not held as having ratified or approved of such action of the said L. in the things set forth in said report, but by said action the said council intended to file the said report away, and not at that time take any action thereon.<sup>32</sup>

§ 3937. **Liability for Defective Bridges.** If the bridge was defective and unsafe on account of decay of the timbers, and considering

meaning of the law, unless it amounted to an obstruction such as to render it unsafe for pedestrians."

29—*Omaha v. Ruthjen*, 71 Neb. 545, 99 N. W. 240 (241).

"It is argued by defendant that under this instruction the jury would have been warranted in holding the defendant liable if the work had been done under the instruction of a single councilman or any other officer of the city. As an abstract proposition the counsel is right and the instruction is wrong, but in the light of the evidence in this case we do not see how the jury could possibly have been misled by it."

30—*Colorado Springs v. May*, 20 Colo. App. 204, 77 Pac. 1093.

"The burden was not upon appellee. It was the duty of appellant's employes to be careful in felling the tree, and this whether the horse driven was ordinarily gentle or not; and it was liable for injuries resulting proximately from its negligence in felling the tree, whether the horse of appellee was ordinarily gentle or not, provided appellee was free of contributory negligence."

31—*City of Dallas v. Beeman*, 23

Tex. Civ. App. 315, 55 S. W. 762 (763).

"This charge does not state a correct proposition of law. The city of Dallas had the power to cut the ditch and take the property. The city granted authority to its committee on streets to straighten Mill creek. The fact that the resolution authorized the street committee to act embraced a proviso that the adjacent property owners should raise a part of the cash to pay for the work cannot avail defendant. B. was not a party to this resolution. The city did authorize his property to be taken and did cause it to be taken. In this condition of the record, the court did not err in refusing said special charges."

32—*Dallas v. Beeman*, 23 Tex. Civ. App. 315, 55 S. W. 762 (763).

"The charge was upon the weight of evidence. The court in its main charge instructed the jury, unless the city council authorized and directed the ditch to be dug, to find for the city. The liability of the city was not placed by the court on the ratification by the council of the acts of its engineer and street committee. The court did not err in refusing this charge."

the length of time the bridge had been built, this condition ought to have been anticipated and known by the officers of the town, using ordinary care and precaution.<sup>33</sup>

§ 3938. **Liability for Lighting of Bridges.** (a) The jury are instructed that it is the duty of the city, when it undertakes to light bridges, to so light the same that they will be reasonably safe for a person to pass, in the use of ordinary care, when the night is dark, as well as when it is light, and it must under such circumstances so light the bridges as to be safe for the passage of such persons over the bridges as the city will reasonably expect would have occasion to use said bridges, and if not sufficient to so light the bridges that they would be reasonably safe for a person whose eyesight is in perfect condition, but should be reasonably safe for all persons to pass who might reasonably be expected to pass over bridges, and you should not judge of this phase of the case as to whether it was sufficiently lighted for any particular person, but it must be sufficiently lighted for the passage of all persons who might reasonably be expected to have occasion to pass over the same.<sup>34</sup>

(b) The jury are instructed that if you believe from the evidence that the plaintiff in passing along W. street fell into the draw of the W. street bridge while the same was open for the passage of a vessel, then you are instructed that if you believe from the evidence such fall resulted from the failure of the city to sufficiently light said bridge or said place so as to make it reasonably safe for a person exercising ordinary care and caution for his own safety to pass over and along, and you further believe from the evidence the plaintiff used such care as an ordinarily prudent person would have used, under all the circumstances in evidence, and the plaintiff was injured by such fall, then the city is liable.<sup>35</sup>

§ 3939. **Contributory Negligence—In General.** (a) If the jury believe from the evidence that the place where the accident in question occurred was necessarily more dangerous, under all the circumstances of the case, as shown by the evidence, than the ordinary streets and sidewalks, and that by the exercise of ordinary care and prudence this condition of things could have been known by the plaintiff, or was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit, and your verdict should be for the defendant.<sup>36</sup>

33—Bredlau v. Town of York, 115 Wis. 554, 92 N. W. 261 (262).

"There was manifest error, also, in the charge of the court upon the third question. The principles of law applicable to this question are few and simple, and could easily have been given to the jury with clearness and brevity. Town officers are required to use reasonable and ordinary care in looking after the highways and bridges of the town, and this covers the duty of inspection of bridges and culverts which have been long in use and are liable to decay. A failure to exercise this reasonable and ordinary care is a failure of duty, but it is only in extreme cases that the court can say that there has been a failure of duty in that regard."

34—Chicago v. Apel, 50 Ill. App. 132 (135, 136).

"This instruction does not state correctly the obligation of the city, and in view of the evidence tending to show that the plaintiff was both very heedless, and to some extent intoxicated, was quite prejudicial to the defendant."

35—Chicago v. Apel, *Supra*.

"The city might reasonably expect that intoxicated and reckless persons would have occasion to use its bridges, but as it is not an insurer against accidents, it is not bound to have its streets or bridges so well lighted that persons proceeding with reckless want of care, may go safely along."

36—Spring Valley v. Gavin, 182 Ill. 232 (234), 54 N. E. 1035.



(b) If the jury find from the evidence that the plaintiff was guilty of any negligence, however slight, which contributed to the alleged injury complained of, then the jury must find their verdict for the defendant, unless the jury further find from the evidence that the defendant was guilty of negligence, which, in comparison with the plaintiff's, was gross.<sup>37</sup>

(c) If you find there was negligence on the part of the plaintiff, she cannot recover; and in determining this fact you will settle in your minds whether she used such care, caution and prudence as a person would ordinarily use under the same circumstances, such care as people ordinarily use under the same circumstances.<sup>38</sup>

(d) The jury are instructed that one who uses the public streets has a right to expect from others using the same highway ordinary prudence and care to avoid accidents, and to rely upon that presumption in determining their own manner of using such streets.<sup>39</sup>

"This instruction is faulty, in that it tells the jury that under certain circumstances appellee was required to use more than ordinary care and caution. This is not the law. It is true that the care required of a person under circumstances where great danger exists, is, if the same is known to him or could become known by the exercise of ordinary care and prudence, greater than that required where the danger is very slight. But in either case, the care required of him is only the ordinary care to avoid danger commensurate with the peril to which he is exposed. The law is well settled in this state, that where an injury is not willful, a party cannot recover for the injury received, unless it appears, from the evidence, that he exercised ordinary care. But in no event is he required to use more than ordinary care and caution to avoid accident. The instruction was therefore incorrect and properly refused."

37—*Beardstown v. Smith*, 150 Ill. 169 (176), 37 N. E. 211.

"This instruction was clearly erroneous and was properly refused. It held that contributory negligence, however slight, was of itself sufficient to defeat a recovery, in the absence of gross negligence on the part of the defendant. The exercise of ordinary care may be consistent with slight negligence, that is, a failure to exercise the highest degree of care, but the burden which the law imposes upon a plaintiff seeking to recover for an injury resulting from the negligence of the defendant is, to show that at the time of the injury he was in the exercise of ordinary care. This instruction, however, if given, would have cast upon the plaintiff in this case the burden of proving that she was in the exercise of the highest degree of care."

38—*Duthie v. Town of Washburn*, 87 Wis. 231, 58 N. W. 380.

"This language does not express the care the plaintiff was required to use by any authority. She was

required to use 'ordinary care.' It must be 'such care as persons of ordinary care and prudence observe in their business,' or 'such care as the great mass of mankind, or the majority, observe in the transactions of human life.' *Dreher v. Fitchburg*, 22 Wis. 675, 94 Am. Dec. 571. This language, which the court held in that case was a full expression of ordinary or common care, shows at a glance the insufficiency of the instruction. The care that 'a person (any person) would ordinarily use' or 'that people ordinarily use' might be gross negligence. The language should have been qualified by saying 'a person or people of ordinary care and prudence ordinarily use, or the great mass or majority of the people observe.' The care that any person or any kind of people observe is not the criterion of ordinary care, and falls far short of it, as any one can see. This court has taken great pains in a great many cases to be accurate as to the true definition of ordinary care, or common care and prudence, and it is remarkable that any court should now fall into such an error. *Ward v. Ry. Co.*, 29 Wis. 144; *Wheeler v. Westport*, 30 Wis. 392; *Hammond v. Mukwa*, 40 Wis. 35; *Griffin v. Willow*, 43 Wis. 509; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Bloor v. Town of Delafield*, 69 Wis. 273, 34 N. W. 115; *Cremer v. Portland*, 36 Wis. 92; *Jung v. City of Stevens Point*, 74 Wis. 547, 43 N. W. 513. It would have been better and safer not to attempt to define ordinary care than to give the jury such a defective and misleading definition of it. The plaintiff might have been guilty of such contributory negligence as would defeat her action, and yet have fulfilled the requirement of such a definition. It is difficult to see how any plaintiff could use less care than this definition requires."

39—*No. Chi. St. R. Co. v. Irwin*, 202 Ill. 545 (548), Rev. 104 Ill. App. 150, 66 N. E. 1077.

"This instruction omits the ele-

§ 3940. **Intoxication as Contributory Negligence.** (a) For plaintiff you are instructed that one defense herein relied upon is that plaintiff was so far intoxicated at the time of his injury that the law will not permit him to recover damages therefor. On this point the court instructs you that because a man had been drinking, this fact alone does not necessarily prevent him from recovering damages or exempt the defendant from the payment thereof if the defendant was guilty of negligence by reason of its defective sidewalk. The law is, under such circumstances that the degree of intoxication must be to such an extent that the plaintiff was incapacitated to use ordinary care and diligence, and thereby received his injury. And upon this issue the burden of proof to establish by a preponderance of the evidence that such was plaintiff's condition, is upon the defendant. If, from the evidence, you shall believe defendant had a defective sidewalk, as defined in this instruction, and plaintiff, using due care and diligence in passing along the same, received the injury complained of, then your verdict must be for plaintiff for such damages as he sustained, not exceeding \$5,000, and this, even though plaintiff had been drinking.<sup>40</sup>

(b) Now, if he was under the influence of liquor at the time, it is of no consequence, unless he was in such a condition that he was incapable of exercising ordinary care and prudence. If he was in such a condition, then the presumption is he did not exercise ordinary care and prudence, but, if he had not reached that degree of intoxication, that would not prevent a recovery.<sup>41</sup>

ment of ordinary care and invades the province of the jury whose duty it is to determine such fact."

40—City of Abingdon v. McGrew, 42 Ill. App. 109 (110).

"For two reasons this instruction is erroneous. In the first sentence the jury were presented with a false issue—whether the 'plaintiff was so far intoxicated at the time of his injury that the law will not permit him to recover damages therefor.' The intoxication of the plaintiff was not a legal defense, nor was it made a defense by the pleadings. To show that he was intoxicated at the time was proper, not only for the purpose of meeting the proof required of the plaintiff that he was in the exercise of ordinary care and diligence, but, inasmuch as he was a witness in his own behalf, for the purpose of showing that his condition of mind at the time of the accident was such that his testimony was unreliable. The other reason why the instruction is erroneous is that the jury were told that the degree of intoxication must be to such an extent that the plaintiff was incapacitated from using ordinary care and diligence and that the burden of proof to establish that by a preponderance of the evidence was with the defendant. The burden of proof was upon the plaintiff to show that at the time of the accident he was in the exercise of ordinary care. If the evidence was evenly balanced as to whether the plaintiff, owing to his drunken condition, was exer-

cising ordinary care, there could be no recovery; not only does the instruction present a false issue, but it improperly places the burden of proof upon the defendant."

41—Rhyner v. Menasha, 107 Wis. 201, 73 N. W. 41 (42).

"To instruct the jury, as in this case, that the influence of liquor on the plaintiff at the time of the injury was 'of no consequence' unless 'he was incapable of exercising ordinary care,' was, in effect, to direct them to disregard his actual condition, unless his intoxication was so excessive as to produce imbecility or stupefaction. This was contrary to well settled rules of law. His condition was an important element in determining whether he was, at the time, in the exercise of ordinary care. Accordingly, this court has frequently held that the intoxication of the plaintiff in any degree at the time of the accident is a fact or circumstance proper to be considered by the jury. Fitzgerald v. Town of Weston, 52 Wis. 354, 9 N. W. 13; Seymer v. Town of Lake, 66 Wis. 651, 29 N. W. 554; McCracken v. Village of Markesan, 76 Wis. 499, 45 N. W. 323. These cases have been followed in other states. Buddenberg v. Trans. Co., 108 Mo. 394, 18 S. W. 970; Welty v. R. R. Co., 105 Ind. 55, 4 N. E. 410; No. Pac. R. R. Co. v. Craft, 16 C. C. A. 175, 69 Fed. 129. In the first of these cases, the judgment was reversed for giving an instruction substantially like the one in the case at

§ 3941. **Contributory Negligence While Driving.** (a) If the jury believe from the evidence that, at the time the accident happened, the plaintiff was driving a team of four horses, hitched to a wagon loaded with cordwood; that the two wheel horses were a runaway team; that one of the front stakes in the rack that held the cordwood was a weak and insufficient stake for the purposes for which it was used; that the plaintiff was seated on the top of the load of cordwood, with his legs and feet hanging down in front of the load; that while driving said team with said stake in said rack, seated in said position, he drove off a stone table into a hole in the defendant's road, eighteen to twenty inches deep, extending across the traveled track of the road, which hole he had knowledge of from his own observation—then I charge the jury, as a matter of law, that the plaintiff would be guilty of contributory negligence, and cannot recover, and the jury will find for the defendant.

(b) If the jury believe from the evidence that the plaintiff, by his own negligence, directly contributed in any degree to the injury sued for, they will find for the defendant; as, if the jury believe from the evidence that the plaintiff was driving a team of four horses, hitched to a wagon loaded with cordwood, down the hill in question; that the two-wheel horses were a runaway team; that one of the front stakes in the rack that held the cordwood on the wagon was a weak and insufficient stake for the purpose for which it was used; that plaintiff was seated on the top of the load, with his legs and feet hanging down in front of the load; that the plaintiff, while so driving, drove off a stone table in the road into a hole next to the stone table eighteen to twenty inches deep, extending across the traveled track of the road, which hole the plaintiff had knowledge of from his own observation; and, if the jury believe from such evidence that the plaintiff in so doing directly contributed in any degree to the injury sued for—then the jury will find for the defendant.<sup>42</sup>

§ 3942. **Effect of Knowledge on Part of Person Using Sidewalk that it is Defective.** (a) If the jury believe from the evidence in this case, that the sidewalk in question was in an unsafe condition at the time of the alleged accident, and if the jury further believe, from the evidence, that the plaintiff knew of such unsafe condition of said sidewalk before and at the time of said accident, then the court instructs the jury that it was the duty of the plaintiff to keep off said sidewalk and not go upon same.

(b) The court instructs the jury that the law requires a person who knows that the sidewalk is in an unsafe or dangerous condition to keep off such sidewalk, and the law will not permit such person to knowingly go upon such unsafe or dangerous sidewalk and then recover damages for any injury that he may sustain by reason of going upon such sidewalk.<sup>43</sup>

bar. In this case, as in that, the trial court took from the jury a fact or circumstance which necessarily entered into the determination of the question of contributory negligence; and hence it was error."

<sup>42</sup>—*Wieting v. Millston*, 77 Wis. 523, 46 N. W. 879.

"These instructions are more in the nature of an argument based upon some of the evidence given on

the trial, and from which it is claimed contributory negligence was established, than of a legitimate statement of the law on the subject of such negligence."

<sup>43</sup>—*City of Sandwich v. Dolan*, 141 Ill. 430 (435), 31 N. E. 416.

"These instructions were properly refused. They announce in substance the proposition that where a party goes upon a sidewalk which



(c) First. If the jury find that the plaintiff at the time of the alleged accident knew that the sidewalk at the place of the accident was in a dangerous and defective condition, and voluntarily walked along it, when he could have easily avoided doing so, he took the chances of injury; and, if any injury happened to him on account of such dangerous and defective condition of the walk, he cannot recover damages therefor from the defendant. Second. If the plaintiff knew that the sidewalk was in a defective or dangerous condition, it was his duty, in passing over it, to use more than ordinary care and caution to avoid injury; and, if he failed to do so, he was guilty of contributory negligence, and he cannot recover damages for any injury he may have sustained by reason of such defective walk.<sup>44</sup>

(d) If the jury believe from the evidence that the place where the accident in question occurred was necessarily more dangerous under all the circumstances of the case, as shown by the evidence, than the ordinary streets and sidewalks, and that by the exercise of ordinary care and prudence this condition of things could have been known by the defendant, or was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident; and if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit, and your verdict should be for the defendant.<sup>45</sup>

**§ 3943. Effect of Knowledge on Part of Person Using Street that it is Defective.** (a) The court instructs the jury that this is an action brought by C. against the village of L., claiming damages for injuries claimed to have been sustained by him on account of the alleged unsafe condition of S. street between N. and T. streets, in

he knows to be in a dangerous condition, he is thereby guilty of negligence per se. Such is not the law. *Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 526, 23 Am. St. 598; *City of Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *St. L. Bridge Co. v. Millar*, 138 Ill. 465, 28 N. E. 1011. The use of a sidewalk with knowledge of its dangerous condition may be evidence of negligence, but it is not negligence as a matter of law. *St. L. Bridge Co. v. Millar*, supra. In *the City of Bloomington v. Chamberlain*, 104 Ill. 268, an instruction was held to be erroneous which told the jury that the law required the plaintiff to go out into the street and pass around the walk if she knew it to be defective."

44—*Lyons v. Red Wing*, 76 Minn. 20, 78 N. W. 863 (870).

"Neither of the requests was an accurate statement of the law, and both were correctly refused. The mere fact that the plaintiff knew that the walk was in a defective and dangerous condition did not, as a matter of law, impose upon him the duty of abandoning the use of the street, or else use it at his peril, unless his act in so doing was not reasonably prudent. *Jones, Neg. Mun. Corp.* para. 221; *Kelly v. Railway Co.*, 28 Minn. 98, 9 N. W. 588; *McKenzie v. Northfield*, 30 Minn.

456, 16 N. W. 264. The second request imposed a higher degree of care upon the plaintiff than the law required of him; that is, more than ordinary care. He was bound to exercise only ordinary care; that is, reasonable care, in view of all the circumstances of the case, including his previous knowledge of the condition of the sidewalk; for the term 'ordinary' or 'reasonable' care is relative. What would be ordinary care in one case might be negligence in another. We discover no errors in the record."

45—*Spring Valley v. Gavin*, 182 Ill. 232 (234), aff'g. 81 Ill. App. 456, 54 N. E. 1035.

"This instruction is faulty in that it tells the jury that, under certain circumstances, appellee was called upon to use more than ordinary care and caution. This is not the law. It is true that the care required of a person under circumstances where great danger exists, if the same is known to him or could become known by the exercise of ordinary care and prudence, is greater than that required where the danger is very slight, but in either case the care required of him is only the ordinary care to avoid danger, commensurate with the peril to which he is exposed. The instruction was properly refused."

said village; and if you believe from the evidence that the plaintiff was injured in manner and form as alleged in his declaration, or in some one count thereof, by reason of said street being in an unsafe condition, as therein described, and that the village of L. had notice of the said unsafe condition of said street for a sufficient length of time to have repaired the same, or that said unsafe condition of said street existed for such a length of time prior to the receiving of said injuries by the plaintiff that the village authorities, in the exercise of reasonable diligence, could have known of the existence of said unsafe condition and repaired the same, if the jury believe from the evidence that the plaintiff at the time of the injury was driving along and over said S. street, as alleged in the declaration or in some one count thereof, and was in the exercise of ordinary care for his own safety, then you will find the defendant guilty.<sup>46</sup>

(b) Knowledge by a person of a defective or dangerous condition of a public highway, and the use of it notwithstanding such knowledge, are not of themselves negligence. If the necessities of a person's business require him to use a defective or dangerous highway, he may use it, notwithstanding he knows its defects and dangers. Such knowledge requires an increased caution and diligence to avoid injury. In other words, although a person is required to exercise only ordinary care and prudence, yet such care and prudence must be commensurate with the necessities of the case, and maintain a constant level with the dangers of the situation.<sup>47</sup>

46—*Village of Lockport v. Licht*, 221 Ill. 35 (40, 42), 77 N. E. 581.

"This instruction, as applied to the facts of the case, was misleading. It told the jury that if they believed, from the evidence, that the plaintiff, 'at the time of the injury,' was driving along the street, as alleged in his declaration, etc., and was in the exercise of ordinary care for his own safety, they should find the defendant guilty. This could mean nothing else than that if the plaintiff was using ordinary care at the very time of attempting to drive along the street, and at the moment of the accident, the verdict should be for the plaintiff, even though the jury may have believed that the plaintiff was grossly negligent in loading his wagon and driving upon a street which he knew to be out of repair. It is insisted in support of the correctness of the instruction that it is sustained by *Lake Shore & M. S. Ry. Co. v. Ouska*, 151 Ill. 232, 37 N. E. 897; citing, *Lake Shore & M. S. Ry. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510; *Chicago & A. R. Ry. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *St. Louis National S. Y. v. Godfrey*, 198 Ill. 288, 65 N. E. 90; and *Pittsburg, C. C. and St. L. R. Ry. Co. v. Robinson*, 204 Ill. 254, 68 N. E. 468. In these cases we held that if an instruction informs the jury that if the plaintiff was in the exercise of due care 'at the time of his injury' it would be sufficient, etc., and that the words 'at the time of the injury' did not restrict the use of due care to the moment

of the injury, but had reference to the whole transaction—that is, all that occurred from the time the injured party reached the railroad tracks upon which he was injured until the collision. It is also contended that, even if the instruction is inaccurate in limiting the plaintiff's care to the immediate time of the accident, it is corrected by other instructions given on behalf of the village itself. The objection to the instruction which we have pointed out, that it takes away from the jury all question as to the plaintiff's care in loading his wagon knowing that he was to drive over this particular street, is in no way met by the decisions cited, nor is there any instruction pointed out or to which our attention has been directed which cured that omission."

47—*Baldwin v. Lincoln County*, 29 Wash. 509, 69 Pac. 1081 (1082).

"The first and last parts of this instruction may state a correct abstract principle of law, but we cannot accede to the view that, if the necessities of a person's business require him to use defective or dangerous highway, he may use it notwithstanding its defects and dangers.' It certainly cannot be claimed that where a bridge across a stream is absolutely and notoriously dangerous, and where people are forbidden to travel thereon, and the necessities of one's business require him to cross such a structure in the face of imminent danger, and he does so, and is injured, he has not assumed the risk. Such a rule does away with the doctrine of as-

§ 3944. **Effect of Plaintiff Having Dug Ditch Himself in Which He Fell.** If the jury believe from the evidence that the plaintiff himself dug the ditch at the particular spot where he was injured, then and in such case, the law is that he had such notice of the condition of said ditch as would bar him from recovering, etc.<sup>48</sup>

§ 3945. **Passing Over Defective Walk not Necessarily Contributory Negligence.** If the jury believe from the evidence that the most direct route for the plaintiff in going to and from the C. Church in the city of S. to her home in the said city was over the sidewalk along the south side of T. street in said city, then the fact, if shown by the evidence, that such sidewalk on said street over which the plaintiff passed was defective, and had been in a defective condition for some months previous to the alleged injury, would not oblige her to take another less convenient sidewalk.<sup>49</sup>

§ 3946. **Placing Oneself in Position of Danger.** The jury is instructed that one who attempts to cross over a part of a road known to him to be dangerous, when the dangerous place could have been easily avoided, as by passing around it, or taking another side of the road, is wanting in due care. If, therefore, the jury believe from the evidence in this case that on the ——— day of ———, on S. avenue, just south of the paved portion of the bridge, and at or near the intersection of said paved portion with the macadam roadway or approach to said bridge, there was a hole or depression in the street, which was a dangerous obstruction in said street to persons passing over it, and that plaintiff was injured by reason of such defect or obstruction; and if the jury further believe from the evidence that said street at said place was in a dangerous condition for persons passing over the same when driving a vehicle such as that driven by the plaintiff, and that such dangerous condition was known to the plaintiff, and that such dangerous place could have been easily avoided by

sumed risk. There must be some place where life and limb shall be regarded above the necessities of business, and where a person may not encounter a known and obvious danger except at his own risk. With this clause in the requested instruction, it was not error for the court to refuse to give it."

48—*La Salle v. Kostka*, 190 Ill. 130 (138), aff'g. 92 Ill. App. 91, 60 N. E. 72.

"While instructions similar to this have been endorsed by the courts in some of the states, such instructions have not received the approval of this court. For example in *Pennsylvania Co. v. Frana*, 112 Ill. 398, it was held that the trial court properly refused an instruction which told the jury that, if the plaintiff either could have discovered the approach of the defendant's train and avoided the injury by stopping his horse before driving upon the track and looking and listening for the approach of the train, he could not recover; and it was there said that, although it was the duty of a person about to cross a railroad track to approach cautiously, and endeavor to ascertain if there was present danger in

crossing, yet it was a question of fact for the jury to determine from the evidence whether the person injured had exercised proper care and caution in crossing the track, and not a question of law. The case of the *Pennsylvania Co. v. Frana*, has been approved in the following cases: *Myers v. Indianapolis & St. L. Ry. Co.*, 113 Ill. 386, 2 N. E. 654; *Ill. C. R. R. Co. v. Haskins*, 115 Ill. 386, 2 N. E. 654; *C. & A. R. R. Co. v. Adler*, 129 Ill. 335, 21 N. E. 846; *C. St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855; *Chi. & Ia. R. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *Pennsylvania Co. v. Backes*, 133 Ill. 255, 24 N. E. 563; *Chi. & N. W. Ry. Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713."

49—*City of Sandwich v. Dolan*, 133 Ill. 177 (179), 24 N. E. 256, 23 Am. St. 598.

"Whether it was obligatory on plaintiff to travel over one walk or the other was a question which it was not the province of the court to determine as a matter of law, and we think the instruction was calculated to mislead the jury."



the plaintiff by passing around it, taking another side of the road, and that plaintiff did not avoid it—then plaintiff cannot recover in this action, and the verdict must be for the defendant.<sup>50</sup>

§ 3947. **Burden of Proof as to Contributory Negligence of Plaintiff—States Holding That it Rests on Defendant.** The court instructs the jury that the burden of proof is on the defendant, the city of M., to prove contributory negligence, and the fact (if it is a fact) that it makes proof on the trial from which you may or may not infer that there was negligence on the part of the plaintiff does not cast the burden on the plaintiff, A. B., to make affirmative proof of his want of negligence.<sup>51</sup>

§ 3948. **Negligence of Driver.** The jury are instructed that municipal corporations such as the defendant are only liable for such defects in their streets as are in themselves dangerous to a person exercising reasonable care and caution in driving or passing over them; if the jury believe from the evidence that the alleged defect in the street in question was not in itself dangerous to the safety of a person driving over it with reasonable care and caution for his own safety, or that the alleged injury was the result either of a mere accident without negligence on the part of the defendant, or that it resulted from a want of reasonable care and caution for her own safety on the part of the plaintiff, or the person driving the team, then the jury should find in favor of the defendant.<sup>52</sup>

50—Kassmann v. St. Louis, 153 Mo. 293, 54 S. W. 513 (514).

"The above instruction was erroneous in that it entirely ignored and wholly omitted the question of plaintiff's exercise of reasonable care and caution in undertaking to drive over the hole or depression. The instruction, moreover, was not supported as to any knowledge on the part of plaintiff that the street was dangerous. The burden was to the opposite effect. Instructions should be made applicable to the evidence."

51—Rhyner v. Menasha, 107 Wis. 201, 73 N. W. 41 (42).

"We are not certain that we fully comprehend the meaning of this portion of the charge. It is very doubtful whether the jury had a clear conception of the instruction thereby sought to be given. To say the least, its direct tendency was to mislead the jury. The rule on the subject referred to in the instruction is well settled by numerous decisions of this court. 'In an action for negligence, if the plaintiff can prove his case without disclosing his own contributory negligence, then such contributory negligence is purely a matter of defense, to be proved by the defendant.' Kelly v. Ry. Co., 60 Wis. 482, 19 N. W. 522. In such a case, the burden of proving contributory negligence is upon the defendant. Hoyer v. Ry. Co., 67 Wis. 15, 29 N. W. 646. 'But, where the plaintiff's own evidence conclusively shows contributory negligence on his part, a non-suit will be granted.' Hoth v. Peters, 55 Wis. 406, 13 N. W. 220."

52—Buckler v. City of Newman, 116 Ill. App. 546 (548).

"The action of the court in giving this instruction raises the question as to whether the want of due care on the part of her son, who was driving the team, is proved, would be imputed to appellant, and she, by reason thereof, be held to have been guilty of contributory negligence.

"It is the well settled rule in this state that where an injury is caused to a passenger by the combined negligence of the driver of a vehicle and a third party, the negligence of the driver is not necessarily to be imputed to the passengers so as to prevent a recovery for injuries occasioned to him thereby, provided that he is in no way at fault himself. Union R. Transit Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; Chi. City Ry. Co. v. Wall, 93 Ill. App. 411; Springfield Con. Ry. Co. v. Puttenney, 200 Ill. 9, 65 N. E. 442. The rule, however, has been held not to apply where between the passenger and driver the relation of master and servant or principal and agent exists. Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. 449; Louisville N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Reading Township v. Telfer, 57 Kan. 798, 48 Pac. 134. The test, therefore, of the responsibility of the appellant for the negligence, if any, of the driver, depended whether she had the right of control over him so as to constitute the relation of master and servant between them, and this was a question of fact for the jury. "The instruction referred to was inaccurate and incomplete in that it authorized the jury to impute the

negligence of the driver to appellant without regard to whether their relations were such as to give appellant power and control over his actions in driving. It cannot be said, as a matter of law, that the mere fact the he was her son and a minor gave her such control over him as to make her responsible for his careless driving. The record fails to disclose the ownership of the team and wagon, whether the

driver was in her or her husband's employ, or whether she was a passenger by right of ownership of the team and wagon or by invitation or permission of the owner. As we take it, the mere relation of parent and child is not sufficient, but before the negligence of the driver could be imputed to appellant, the relation of either master and servant, or of principal and agent, must have been established."

## CHAPTER CXLIX.

### NEGLIGENCE—PUBLIC HIGHWAYS.

See Approved Instructions, Chapter LXVI, Vol. II. ,

§ 3949. Obstruction of highway by construction of fence.	§ 3953. Liability for injury due to fall of barber's pole through backing wagon against it.
§ 3950. Obstruction of highway by milk wagon.	§ 3954. Running automobile along highway.
§ 3951. Collision on the highway.	§ 3955. Unsafe condition of highway.
§ 3952. Duty of driver of bus toward children riding on step.	

§ 3949. **Obstruction of Highway by Construction of Fence.** The jury are instructed that although you believe from the evidence that the defendant company, in erecting the fence in question, under the facts and circumstances existing in this case, owed a duty to those who attended the services conducted that night on said property, nevertheless, if you find that defendant company, by its agent, exercised ordinary care to prevent injury to persons who might be reasonably expected to attend said services, and during the time persons might be reasonably expected to pass along said fence going to said services, then plaintiff cannot recover.<sup>1</sup>

§ 3950. **Obstruction of Highway by Milk Wagon.** (a) This action is brought to recover damages by reason of the claimed negligence of the defendant in leaving, or causing to be left, a horse and wagon upon one of the public highways of the borough of W., called "S. Avenue," in such a position and under such circumstances as to be dangerous, and an obstruction to the highway at that place; and if the jury find that on the night in question the defendant left standing in the public highway known as "S. Avenue," in the borough of W., a horse and milk wagon, with a large number of milk bottles, so that the horse and wagon were diagonally across the street, and left in such a manner without any one in charge of it, and without any light thereon to warn travelers of the danger, it was an obstruction to the highway; and if, on account of its being there, the plaintiff's horse and wagon were injured, while the plaintiff's team was being driven along the highway with reasonable care, the plaintiff is entitled to recover.

(b) While, under some circumstances, a person may leave his horse and team in the highway for the purpose of making a temporary

<sup>1</sup>—Abilene Cotton Oil Co. v. Briscoe, 27 Tex. Civ. App. 157, 66 S. W. 315 (317).

"This charge was properly refused. If the obstruction of the public way is dangerous, the party who places it there must warn and protect people against coming in

contact therewith at all times, whether they might be reasonably expected to attend services and pass along there or not. He has no more right to injure the people who pass along there at unreasonable hours by such dangerous obstructions than he has those who pass only at reasonable hours."



stop, yet it must always be done with that reasonable degree of care and prudence that men of ordinary prudence would use in regard to their own affairs; and where the highway is one that is much used, and there is a liability of frequent passing, and the team is left in an obscure or dark place, where there is less opportunity to obscure it, it is the duty of the person thus leaving the team to exercise reasonable care and precaution to warn travelers of its presence either by leaving some person in charge of it or placing a warning light thereon, so that travelers may know of the presence of the obstruction in the highway.

(c) While, under some circumstances, a person may leave a horse attached to a wagon in the public highway, and necessary for the purpose of transacting business, it should always be so placed as to obstruct the traveled path as little as possible; and to allow a horse and wagon to stand in a much-used public highway diagonally across the street, so that the hind wheels project past the center of the street, is a use of the highway which is not warranted by law and justifiable; and if the jury find that the horse and wagon were left in the highway, as is described by the plaintiff's witnesses, diagonally across the street, the head of the horse being at or near the gutter, with the hind wheels of the wagon out past the center of the traveled highway, then this act was a negligent and improper obstruction of the highway, and the plaintiff is entitled to recover if he used ordinary care himself.<sup>2</sup>

§ 3951. **Collision on the Highway.** (a) If the defendant discovered that the plaintiff was traveling in a course in which, if the defendant pursued the course in which he was driving, he would come in collision with the plaintiff, and knew, or had good reason to believe that the plaintiff was unaware of his approach, and if by the use of ordinary care after discovering this, the defendant could have prevented the injury to the plaintiff, and did not use such care for that purpose, he is chargeable with reckless injury, and the plaintiff is entitled to recover, even though the jury are of the opinion that he, the plaintiff, might have been negligent in being in that position.

(b) If plaintiff neglected to use ordinary care in entering upon the traveled part of the highway, and was injured by the defendant, who was also traveling in the same highway, he cannot recover in this action, notwithstanding you should find from the evidence that the defendant was also negligent, unless you should find from the evidence that the defendant saw the plaintiff in or approaching a place of danger, and knew or had good reason to believe that the plaintiff

2—Nesbit v. Crosby, 74 Conn. 554, 51 Atl. 550 (551, 554).

"The court below acted properly in submitting the whole question of negligence to the jury, giving them, as he did, instructions suitable for their guidance in determining the issues involved under the various claimed state of facts. He instructed them as to the rights and duties of the members of the general public in the use and occupancy of a highway, and left them to determine whether or not the defendant's conduct in the exercise of those rights and in the performance of those duties, whatever it should be found to have been, was that of

a reasonably prudent man. A casual glance at the requests made emphasizes the propriety of the court's action in not complying therewith. It is too apparent for argument that a charge which held that the facts enumerated in either one, regardless of all possible explanatory, justifying or modifying facts or circumstances, must be held to conclusively impute negligence, would have been inexcusably improper. The absurdity of such instructions would have been no less manifest than that attributed to us in *Park v. O'Brien*, 23 Conn. 339, to a request of similar character, made under similar circumstances."

was not aware of the danger, and saw the plaintiff in such a position of danger in time to prevent, by using ordinary care, the injury to the plaintiff, and did not make use of that care for that purpose.<sup>3</sup>

§ 3952. **Duty of Driver of Bus Toward Children Riding on Rear Step.** The court instructs you that if you believe and find from a preponderance of the evidence that the steps on the rear end of the bus were an attractive place for children of tender years, and that the driver knew that fact, or in the exercise of ordinary care might have known it, and that the plaintiff's intestate was a child of tender years and was attracted to said place and was riding thereon, and that the driver knew that fact or by the exercise of ordinary care might have known it, and also knew that it was dangerous for plaintiff's intestate to get off from said bus while the busses were in motion, and nevertheless ordered plaintiff's intestate to get off from said bus while the busses were in motion, and that pursuant to said order plaintiff's intestate did get off from said bus, and in doing so exercised that care and caution which might reasonably be expected from a child of his intelligence and discretion to avoid injury, and if you further believe and find from the preponderance of the evidence that such conduct upon the part of the driver was wanton or willful negligence, which caused the injuries to plaintiff's intestate, and that by reason of said injuries plaintiff's intestate died, then you should find the defendant guilty.<sup>4</sup>

3—Denman v. Johnston, 85 Mich. 387, 48 N. W. 565 (566).

"The plaintiff has characterized the negligence imputed in the allegation that defendant drove his team at 'a furious pace' as being careless, wrongful and unlawful; but he has not alleged it to have been reckless, wanton or willful. It was held in Carter v. Chambers, 79 Ala. 223, that driving rapidly through a street of a city is not per se culpable negligence. In Brennan v. Town of Friendship, 67 Wis. 223, 29 N. W. 902, it was said: 'Riding upon a highway at a high rate of speed is not necessarily negligence, although it is a circumstance to be considered by the jury in passing upon the question of negligence.' And in Crocker v. Ice Co., 92 N. Y. 652, the court said: 'The only proof of negligence is that the driver was driving the team at a 'lively trot.' It cannot be held as a matter of law or fact that merely driving at the rate of speed stated, in the streets of the city, is negligence. Persons driving in the streets of the city are not limited to any particular rate of speed. They may drive slow or fast, but they must use proper care and prudence, so as not to cause injury to other persons lawfully upon the street.' The injury in this case was received not in a city, but in the country; and we know of no statute regulating the rate of speed at which teams may be driven in the country, and no by-law of the township was introduced upon the subject. We have held that in actions on the case for negligence the plaintiff is bound to set out the

combination of the material facts relied on as a cause of action, and to follow up the allegations by evidence pointing out and proving the same combination of circumstances. The object to be accomplished is: First, to apprise the parties; and, second, to apprise the court of the precise subject of the controversy. *Batterson v. Ry. Co.*, 49 Mich. 184, 13 N. W. 508; *Smith v. Holmes*, 54 Mich. 104, 19 N. W. 767. The law, as declared in this state, casts the burden of proof upon the plaintiff, when he sues to recover damages for an injury caused by defendant's negligence, to show not only that the injury was caused by defendant's negligence, but also that he himself was not guilty of any negligence which materially contributed to such injury; and these facts he must ordinarily allege in his declaration. If he cannot set up such a combination of facts as show that he is free from negligence on his part, he must by proper allegations set up that the injury was caused by the wanton and willful negligence of defendant, such as in law amounts to gross negligence, and a reckless disregard of the consequences of his neglect."

4—Hebard v. Mabie, 98 Ill. App. 543 (545).

"It is not the duty of the driver of a bus or other vehicle moving along the public street or highway to keep a lookout behind so as to know whether children or adults are riding on the rear end of the bus or other vehicle. On the contrary, the duty of such driver is to look ahead so as to avoid collision with other vehicles or persons. \* \* It

§ 3953. **Liability for Injury Due to Fall of Barber's Pole Through Backing Wagon Against It.** (a) The court instructs you that the driver had the right to back up at the place he did regardless of any poles or posts, unless you find from the evidence that there was something in the appearance of the pole and drum and surroundings, which would lead a man of ordinary prudence to choose another place. No man if he exercises ordinary care under all the circumstances is obliged to avoid poles or posts, or choose one place in preference to another. The driver, if in the exercise of ordinary care, had the right to rely upon the appearance of the barber's pole and govern his horses and truck accordingly. It is not sufficient in this case for the plaintiff to prove simply that he was injured by the falling of the barber's pole, and that the defendant's truck hit the pole and knocked it over. That is not enough. You cannot presume that the driver of the truck was careless simply because the pole was knocked over and the plaintiff injured, but the plaintiff must show by a preponderance of the evidence that in backing around and in hitting the pole the driver was negligent—that he did it in a careless and negligent manner; and if you find from the evidence that the driver under all the circumstances managed his horses and truck in the ordinary and usual manner and with ordinary skill and care, then your verdict must be for the defendant. You cannot render a verdict for the plaintiff unless you are able to say from the evidence that in handling his truck and horses the driver was negligent, and if the evidence shows that the driver exercised the usual care and caution of an ordinarily careful man under the circumstances, you must render a verdict for the defendant.<sup>5</sup>

(b) If you find from the evidence that the plaintiff's injuries were caused by the negligence of whoever owned the pole and maintained it there, under the circumstances and not the result of any negligence on the part of the defendant's driver, then your verdict must be for the defendant.

(c) If you find from the evidence that the post was not fastened to the sidewalk but simply stood there with two or three small lugs or spikes projecting an inch and a half or two inches into the sidewalk, and if you also find that leaving the post in that manner under the cir-

was so expressly held in *Heldmaier v. Taman*, 88 Ill. App. 209, aff'd, 188 Ill. 283, 58 N. E. 960. If exercise of ordinary care by a driver requires him to look ahead while driving and also requires him to look behind him, an owner in order to escape liability must employ an Argus as driver if such can be found. The instruction assumes that the exercise of ordinary care required the driver to look backward toward the rear steps of the bus. In *C. & W. I. R. R. Co. v. Roath*, 35 Ill. App. 349, the plaintiff attempted to get upon the rear of a moving railroad train at a street crossing and was injured; the court, *Moran, J.*, delivering the opinion, says: "If steam roads owe the duty of preventing children from climbing over moving trains at crossings, then the operator of a street car or the driver of a farmer's cart or any other vehicle

which runs upon the street and by its movement or its rumble excites a childish desire to mount and ride, must in logic and in reason owe a similar duty, and be alike liable for its non-performance. Such a doctrine is not founded on justice or reason, and is without the support of legal sanction." See also *Chicago West. Div. Ry. Co. v. Hair*, 57 Ill. App. 587."

5—*L. Wolff Manfg. Co. v. Wilson*, 152 Ill. 9 (12), 38 N. E. 694.

"The above instructions were properly refused, as they sought to state as a matter of law that the driver had a right to assume the post was securely fastened, and sought to make the negligence of the driver turn on the manner of managing his team without any care in determining the effect of a heavy wagon with great force striking such an object."



circumstances, was negligence on the part of the owner of the barber shop, or whoever put it there, and that the defendant's driver in approaching the post and endeavoring to back the truck up to the sidewalk used the care of an ordinarily careful man under the circumstances, then the court instructs you that the defendant is not liable for any injury which resulted from any negligence of the owner of the barber shop, or the owner of the pole, and your verdict must be for the defendant.

(d) The court instructs you that the defendant's driver had a right to assume that whoever owned the post and maintained it there had exercised reasonable care and caution in fastening it to the sidewalk, so that it would not be dangerous to people upon the sidewalk or to teams in the street, and if you find from the evidence that there was nothing about the post to indicate that it was not fastened to the sidewalk, and that the defendant's driver in all that he did exercised the care and caution of a reasonable and careful man, then your verdict must be for the defendant.<sup>6</sup>

(e) If you find from the evidence that the defendant's driver when he saw that the post was about to fall called to the plaintiff to catch the post, and that the plaintiff in obedience to a request of the driver left a place where he would not have been hit by the post if he had remained, and tried to catch the post, and was thereby injured by its fall, your verdict must be for the defendant.<sup>7</sup>

§ 3954. **Running Automobile Along Highway.** The court instructs the jury that an owner of an automobile has the right to use the highway of this state, provided in using it he does not violate the law of the state.<sup>8</sup>

§ 3955. **Unsafe Condition of Highway.** The jury is instructed that a county is not liable to respond in damages because of every depression, inequality, or defect, in the surface of its public highways and bridges in a reasonably safe condition of public travel, and it is not

6—*L. Wolff Manfg. Co. v. Wilson*, supra.

"It was the province of the jury to compare and determine as to the negligence of others not parties to the action, and as we have stated the rule herein to be, that subsequently to the original wrongful or negligent act, a new cause intervened of itself sufficient to stand as the cause of the injury, the former must be considered too remote; no enquiry as to the former wrongful or negligent act upon the part of the owner of the pole or of the city could properly be submitted to the jury, and the refused instructions which sought to state as a proposition of law that the negligence of the owner of the pole in placing it on the sidewalk relieved the defendant from liability, did not state a correct proposition of law."

7—*L. Wolff Co. v. Wilson*, supra.

"The instruction sought to state as a matter of law that the plaintiff failed to exercise ordinary care, without leaving it to the jury to determine whether, under all the circumstances, the plaintiff exercised the care of an ordinarily prudent person. There was no error

in the refusal of this instruction."

8—*Christy v. Elliott*, 216 Ill. 31 (48, 49), 74 N. E. 1035.

"The court modified this instruction by changing it, so that the last clause read as follows: 'provided in using it he uses reasonable care and caution for the safety of others and does not violate the law of the State.' The modification was proper. The declaration was framed upon three theories, first, that the machine was going at a speed in excess of the limit of fifteen miles an hour fixed by the statute; second, that it was not brought to a full stop when the team showed fright; and third, upon the ground of common law negligence. The instruction, as offered, would tend to make the jury believe that, if there was no infraction of the statute, the appellant would not be liable if he was guilty of common law negligence, or if he failed to perform his duty under the common law to avoid injury to the appellee. The modification of the instruction simply called attention to this common law duty, in addition to the duty imposed by the statute."

necessary that it should keep the entire width of its highways and bridges in good condition for travel unless the public convenience and travel demands it; and if you find from the evidence that a sufficient width of the road and bridge at the point of the alleged injury was in a reasonably safe condition for public travel, and that the plaintiff could have passed over and along the same without injury, by the exercise of ordinary care and prudence, then you will find for the defendant.<sup>9</sup>

9—*Clingan v. Dixon County*, — Neb. —, 105 N. W. 711.

"While as a general abstract proposition the statement as to there being no requirement that the entire width of the highways and bridges be kept in good condition may be correct, still, under the circumstances of this case, we think it was misleading and should not have been given without some modification to fit the circumstances of the case. If the defect in the bridge was such that the county authorities, by the exercise of reasonable care, could have remedied it, and was such that the bridge was dangerous for a person using ordinary care, then the county would be liable, and the question of whether or not the county was obliged to keep the entire width of the bridge or highway safe is not

material. If there was nothing in the appearance of the bridge to suggest that it was unsafe to use the portion having only single planking, a person would not be compelled to remain upon the double planking, but might use any part of the bridge, provided he used ordinary care in the manner of his use. The presumption which applies as well to the plaintiff as to the defendant, is that all parties acted with ordinary care, and this presumption must be overcome by evidence either direct or circumstantial. *Spears v. C. B. & Q. R. R.*, 43 Neb. 720, 62 N. W. 68; *Swift v. Holoubek*, 60 Neb. 784, 84 N. W. 249. But the whole matter is for the jury to determine, and a verdict for either party might be supported under the evidence."

## CHAPTER CL.

### NEGLIGENCE—COMMON CARRIERS.

See Approved Instructions, Chapter LXVII, Vol. II.

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| <p>§ 3956. Acceptance of goods by carrier when carrier knows they cannot be delivered in time.</p> <p>§ 3957. Presumption that injury occurred on line of last connecting carrier.</p> <p>§ 3958. Liability of last carrier for failure to deliver goods on demand.</p> <p>§ 3959. Liability of common carriers of goods.</p> <p>§ 3960. Limitations as to filing claims for damages—Rule in Nebraska.</p> | <p>§ 3961. Facts to be considered by jury on question of delay in shipment.</p> <p>§ 3962. Duties and liabilities of carrier in transportation of live stock.</p> <p>§ 3963. Liability of carrier for shrinkage of cattle while stopping for feed.</p> <p>§ 3964. Condition of cattle as excuse for delay in their transportation.</p> |
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§ 3956. **Acceptance of Goods by Carrier When Carrier Knows They Cannot be Delivered in Time.** The court instructs the jury that even if they should believe from the evidence that the defendant could not ship the cotton on account of the yellow fever, or any consequences arising from reports of same, yet if they further believe from the evidence that defendant knew it could not be shipped at the time the cotton was received and the bill of lading issued, and if they believe that plaintiff has been injured, and that such injury would not have been received had the cotton been rejected, then the jury should find for the plaintiff.<sup>1</sup>

§ 3957. **Presumption that Injury Occurred on Line of Last Connecting Carrier.** If you find from the evidence that any of plaintiff's cattle in either or both shipments were injured en route to market, but are unable to determine from the evidence which, if either, of the carriers caused such injuries, then you are charged that under the law, the last carrier handling said cattle is liable for such injuries, if any.<sup>2</sup>

§ 3958. **Liability of Last Carrier for Failure to Deliver Goods on Demand.** If you find from the evidence that the goods were shipped, and further find that they were not delivered to plaintiff, and that

1—Ala. & V. Ry. Co. v. Hayne, 76 Miss. 538, 24 So. 907 (908).

"The abstract doctrine that if the carrier received the goods for shipment when it knew it could not ship them, and it gave no notice to consignor or consignee, and damage resulted solely therefrom, the carrier is liable, is correct enough. But this instruction only announces a part of the rule. It does not count on any failure to notify consignor or consignee, but counts alone upon

the failure of the company to reject the cotton, if it knew it would not be shipped; and that, too, in the absence of satisfactory proof that the company did so know at the time it received the cotton."

2—Tex. & Pac. Ry. Co. v. Bailey, — Tex. Civ. App. —, 96 S. W. 1089 (1090).

"This charge, under a similar state of evidence, was condemned by us in the case of the Tex. & Pac. Ry. Co. v. Scroggin & Brown, 14 Tex. Ct. Rep. 297, 90 S. W. 521."



he appeared at the point of destination within a reasonable time after the goods were received, or could have been received, in the ordinary course of transportation, and a demand was made therefor by the shipper or his agent, and you further find that the defendant failed to deliver the goods on such demand, you will then find the defendant guilty of conversion, and fix the penalty in the sum of the value of the goods, in addition to such damages, if any, as have been actually sustained by the plaintiff through the negligence of the defendant and its agents, provided you believe from the evidence that said defendant was guilty of negligence.<sup>3</sup>

**§ 3959. Liability of Common Carriers of Goods.** The jury is instructed that the law imposes upon a carrier the duty of transporting goods from one point to another as promptly as the ordinary course of traffic will permit, and that the carrier is liable for all damage or loss of goods to the owner unless he can show that such damage or loss is not the fault or negligence of the carrier and its agents. And the burden is upon the common carrier to show a want of negligence upon its part.<sup>4</sup>

**§ 3960. Limitations as to Filing Claims for Damages—Rule in Nebraska.** You are instructed that the evidence shows conclusively that no claim was made to the agents or officers of the defendant company prior to the mingling of the stock in question with other stock, and you will therefore find for the defendant.<sup>5</sup>

**§ 3961. Facts to be Considered by Jury on Question of Delay in Shipment.** In passing upon the question of delay in shipment and transportation of the shipment, you are instructed that the duty of the defendants was to use reasonable diligence to transport the shipment of the plaintiffs, considering all the facts and circumstances in a reasonable time, over their respective lines of railroad; and in determining what was a reasonable time you will consider the distance the shipment had to be carried by each defendant, the size of the shipment, the other freight being handled over the railroad at the

3—C. B. & Q. R. R. Co. v. Goldman, 46 Ill. App. 625 (626).

"This was clearly erroneous. The goods were not delivered by the plaintiff to appellant, but to another company. The instruction holds the railroad company liable, if the goods were not delivered to the plaintiff within a reasonable time after they could have been received in the ordinary course of transportation. That is, this defendant is made liable for the acts of transportation companies and others into or through whose hands the goods passed, although they may never have reached the hands of appellant."

4—C. B. & Q. R. R. Co. v. Goldman, *supra*.

"This was calculated to mislead. The rule announced is only applicable to a carrier into whose hands goods actually come. There was no pretense that appellant did not, if the goods came to its hands, forward them promptly; the evidence of the plaintiff tended to show, only, that it lost them after their

arrival at Spring Valley. The instruction had, under the evidence, no place in the trial of this cause.

"We regard it as questionable if the admissions of an agent, concerning a past transaction, are admissible in evidence against the principal, when such admissions have never been acted upon. It is seldom that the authority of an agent extends to the making of admissions as to what has been done at a past time, in a transaction then at an end. Wharton on Evidence, Sec. 1180."

5—Union Pac. R. Co. v. Thompson, — Neb. —, 106 N. W. 598 (601).

"This clearly indicates that the court regarded contracts of the kind under consideration as violative of our constitutional provision, and also, that the burden was upon the defendant instead of the plaintiff to show that the notice provided was not given. We feel bound by this decision, which has been the rule in this state since 1889, and hold, therefore, that the court properly refused the instruction asked."

same time, the necessity of the trains stopping to secure coal, water, and for other purposes, and the facts and circumstances surrounding the shipment.<sup>6</sup>

§ 3962. **Duties and Liabilities of Carrier in Transportation of Live Stock.** The jury are instructed in this cause that, if, from a preponderance of the evidence, they believe that any or all of plaintiff's 54 calves in question died of sporadic pneumonia, if they further believe that the negligent handling or rough handling of said calves by the defendant railway companies, or either of them, was the proximate cause of the death, destruction, or loss of said animals by disease of pneumonia, they will find for the plaintiff, assessing his damages in such sum as the evidence shows he sustained.<sup>7</sup>

§ 3963. **Liability of Carrier for Shrinkage of Cattle While Stopping for Feed and Water.** You are instructed that it was the legal duty of the defendant to unload, feed, and water the cattle at C., and the defendants are not liable for any shrinkage in weight of said cattle that would be caused by stopping said cattle at C. for a sufficient and reasonable length of time in order to feed and water said cattle, not exceeding five hours for such purpose.<sup>8</sup>

§ 3964. **Condition of Cattle as Excuse for Delay in Their Transportation.** If you find and believe from the evidence that the cattle were weak and needed to be unloaded and held in the pens the length of time they were held at the points and places held, to recuperate the said cattle, then you are told that it was the duty of defendants to so unload and hold said cattle in the pens such time as was reasonably necessary to recuperate them, and the defendants would not be liable for such delay, if any there was.<sup>9</sup>

6—Dupree & McCutchan v. Tex. & Pac. Ry. Co., — Tex. Civ. App. —, 96 S. W. 647 (648).

"This charge singled out certain facts and circumstances, some of which were shown in evidence, and told the jury that they could consider the same in determining what was a reasonable time for the shipment of the cattle. This charge gave too much emphasis to the particular facts and circumstances referred to, and was error. *Galveston, H. & S. A. Ry. Co. v. Kutac*, 76 Tex. 478, 13 S. W. 327; *Medlin v. Wilkins*, 60 Tex. 415; *St. L., A. & T. Ry. Co. v. Taylor*, 5 Tex. Civ. App. 668, 24 S. W. 975."

7—*Houston & T. C. R. Co. v. Burns*, — Tex. Civ. App. —, 90 S. W. 688 (689).

"Looking at the charge of the court as a whole, if upon any theory of the evidence the verdict appeared to be justified thereby, we would not hold that the jury was influenced by this erroneous charge, and we would not reverse the judgment on account of the error; but the verdict appears to us to be so opposed to the great preponderance

of the evidence that it cannot be reasonably accounted for on any other hypothesis than that the jury was influenced thereby to the prejudice of appellant."

8—*Whaley v. Thomason*, — Tex. Civ. App. —, 93 S. W. 212 (215).

"With the exception of the last clause, this charge was requested by appellant, but the court refused to give it as requested and over objection added said clause, 'not exceeding five hours for such purpose,' counsel for appellee assuring the court that this clause was in the language of the federal statute. But, in this, counsel was evidently mistaken, and the charge as given is subject to the objection urged against it, that it was on the weight of evidence."

9—*Dupree & McCutchan v. Tex. & Pac. Ry. Co.*, — Tex. Civ. App. —, 96 S. W. 647.

"The evidence was insufficient to raise the issue that the cattle were weak and needed to be unloaded and held to recuperate. This charge submitted an issue not raised by the evidence, and was error. *Ry. v. Gilmore*, 62 Tex. 391."

## CHAPTER CLL

### NEGLIGENCE—RAILROADS—PASSENGER CARRIERS.

See Approved Instructions. Chapter LXVIII, Vol. II.

#### IN GENERAL.

- § 3965. Degree of care required of carriers of passengers—Varying statements of different courts.
- § 3966. Carrier not an insurer against accidents.
- § 3967. The passenger takes all the risks necessarily incident to the mode of conveyance.
- § 3968. Degree of care required as to passenger on freight trains.
- § 3969. Riding on freight or mixed trains—Risks assumed by passengers.
- § 3970. Requiring verdict of guilty upon proof of negligence alleged in declaration irrespective of whether plaintiff was passenger or trespasser.

#### TRESPASSER AND PERSONS NOT PASSENGERS.

- § 3971. Degree of care due trespasser.
- § 3972. Duty toward trespassers boarding moving train.

#### THE PASSENGER RELATION.

- § 3973. Authority of brakeman to invite person to become passenger on freight train.
- § 3974. Riding in caboose with consent of conductor.
- § 3975. When relation of carrier and passenger ends.

#### STATIONAL FACILITIES.

- § 3976. Passenger using dilapidated or unsafe platform.
- § 3977. Failure to heat waiting room.

#### CARS AND APPLIANCES.

- § 3978. Liability for appliances on engines.
- § 3979. Injury to passenger through insufficiency of axle.

#### MANAGEMENT AND OPERATION OF CARS AND VEHICLES.

- § 3980. Freight trains not required to stop at platform to receive or discharge passengers.

- § 3981. Duty to stop train a reasonable time for passenger to get on.
- § 3982. Announcing change of cars.
- § 3983. Carrying passenger past destination or platform.
- § 3984. Injury to passenger while alighting.
- § 3985. Starting train before passenger has alighted.
- § 3986. Helping passengers to alight.
- § 3987. Failure to provide a stool for passengers to alight.
- § 3988. Overcrowding cars.
- § 3989. Liability for collision at crossing with train of another railroad.
- § 3990. Injury to passenger by falling of transom or ventilator window of car.

#### CONTRIBUTORY NEGLIGENCE.

- § 3991. Contributory negligence of passenger.
- § 3992. Voluntary riding in exposed or dangerous place.
- § 3993. Getting off a moving train.
- § 3994. Age of plaintiff to be considered on question of negligence in stepping from moving train.
- § 3995. Effect of direction of carrier's servant to passenger to get off moving train.
- § 3996. Jumping from a moving train when suddenly placed in a perilous position by carrier.
- § 3997. Getting off train on side away from station.

#### TICKETS.

- § 3998. Ticket as contract.

#### EJECTION OF PASSENGERS.

- § 3999. Carrier may eject person refusing to produce a ticket or pay his fare.
- § 4000. Injuries to passenger brought on by refusal to leave train when ordered by conductor.
- § 4001. Ejection of passengers from train while in motion.
- § 4002. Ejection of passenger by subordinate employee.



## SLEEPING CAR COMPANIES.

- § 4003. Distinguishing between places of safety in berth for deposit of valuables.
- § 4004. Taking ring off finger and placing it in pocket book.
- § 4005. Responsibility of plaintiff for negligence of person occupying berth with him.
- § 4006. Porter going to sleep—Third person walking up and down aisle.

## BURDEN OF PROOF.

- § 4007. Burden of proof as to negligence.
- § 4008. Burden of proof where passenger is injured by flying cinders.

## ELEVATORS.

- § 4009. Injury to passenger through fall of elevator.

## IN GENERAL.

§ 3965. Degree of Care Required of Carriers of Passengers—Varying Statements of Different Courts. (a) The court instructs you as a matter of law that carriers of passengers are held to the exercise of the utmost or highest degree of care, skill or diligence for the safety of the passengers that is consistent with the mode of conveyance employed.<sup>1</sup>

(b) The court instructs the jury as a matter of law that it is the duty of a railway company employed in transporting passengers, to reasonably do all that human care, vigilance, and foresight can do for the protection and safety of passengers in its charge, and if the jury believe from the evidence that the plaintiff was a passenger on the cars of defendant and was a child of tender years, and that she received an injury resulting from the negligence of the defendant, or any of its employes, then the jury should find a verdict for the plaintiff.

(c) The court instructs the jury that a railroad company is a common carrier, and is in duty bound to receive and safely carry any passenger that desires to go upon its road, and while carrying such passenger, a railroad company is bound to use all human care and vigilance and foresight to reasonably protect such passenger from peril of any kind, incident to such mode of conveyance. And if for want or absence of such care, prudence and vigilance on the part of the railroad company, or any of its employes, the plaintiff was injured, then the defendant is liable to the extent of the injury.<sup>2</sup>

1—No. Chicago St. R. R. Co. v. Polkey, 203 Ill. 225 (233), 67 N. E. 793.

"A railroad company, as a carrier of passengers, is held by the law to the use of the highest degree of care consistent with the practical operation of the railroad. It is bound to do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance, the practical operation of its road, and the exercise of its business as carrier. Fuller v. Talbot, 23 Ill. 298; Chicago, B. & Q. R. R. Co. v. Dunn, 61 Ill. 385; Chicago & A. R. R. Co. v. Arnot, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Pittsburgh, C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138. The instruction without the qualification 'can reasonably do consistent with practical operation of its road' ought not to be given."

2—Cleveland, C. C. & St. L. R. R. Co. v. Scott, 111 Ill. App. 234 (241).

"These instructions are erroneous for the reason that they utterly ignored the question of contributory negligence on the part of appellee, a child seven years of age. They are also erroneous in that they authorize a recovery if the defendant was guilty of any negligence which might have been foreseen by human care, vigilance and foresight. They fail to limit the right of recovery to the acts or negligence charged in the declaration. The recovery should be confined to the particular negligence alleged in the declaration. Chicago, B. & Q. R. R. Co. v. Levy, 160 Ill. 385, 43 N. E. 357. They are also faulty in stating the degree of care to which carriers of passengers are held under the law. They omit the essential qualification that the degree of care requi-

(d) The court instructs the jury that, having received the plaintiff upon board of one of its cars as a passenger for the purpose of transportation along its line, the due obligation of the defendant railroad was to the plaintiff and its other passengers on that car, as far as it is capable by human care and foresight to carry such passenger safely, and the defendant is responsible for all injury resulting to such passenger from any, even the slightest, neglect or negligence; and, when the passenger suffers injury by a collision resulting from two cars being run in opposite directions on the same track, the presumption is that it was occasioned by some negligence of the defendant railroad, and the burden of proof is cast upon defendant to rebut this presumption of negligence, and establish the fact that there was no negligence on its part, and that the injury was occasioned by inevitable accident, or by some cause which human precaution or foresight could not have avoided.<sup>3</sup>

§ 3966. **Carrier Not an Insurer Against Accidents.** The court instructs the jury that the fact that the law does not make a common carrier an insurer of the safety of its passengers does not, even to the slightest extent, relieve such common carrier of its legal duty to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its vehicle.<sup>4</sup>

§ 3967. **The Passenger Takes All the Risks Necessarily Incident to the Mode of Conveyance.** You are charged that although you may believe from the evidence in this case that plaintiff was injured by reason of the cars coming together, yet if you believe from the evidence that plaintiff, when he entered the car, knew, or should have known, that it was necessary that the car should be coupled to other

site is such as is practically consistent with the efficient use of the mode of conveyance adopted. *Lake St. El. R. R. Co. v. Burgess*, 200 Ill. 628, 66 N. E. 215."

3—*Magrane v. St. L. & S. Ry. Co.*, 183 Mo. 119, 81 S. W. 1158 (1159).

"The language used in this instruction, declaring it was the duty of the defendant, 'as far as it is capable of human care and foresight, to carry such passengers safely, and the defendant is responsible for all injury resulting to such passengers from any, even the slightest, neglect or negligence,' is copied from the opinion of the court in *Clark v. Railway Co.*, 127 Mo. 197, 29 S. W. 1013.

"The court, however, in using that language, was not discussing an instruction containing these words, and was not prescribing the form of an instruction. It is not always safe to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen. The care which a carrier owes to its passenger is of a very high degree. In attempting to give it definition a variety of forms of expression have been used, as the learned judge who wrote the opinion in that case mentioned, and

after giving some of them, he said: 'The various formulas amount to the very same thing in principle.' It is a very high degree of care, but not the utmost care that human imagination can conceive. It is the highest degree of care that can reasonably be expected of prudent, skillful and experienced men engaged in that kind of business. The term 'as far as it is capable by human care and foresight,' in this connection, is liable to be misconstrued by a jury as meaning care to the utmost limit imaginable—that is, care without limit—whereas the highest degree of care practicable among prudent and skillful men in that business is all that can reasonably be expected of any men, and it is all that the law demands. The term, 'even the slightest neglect or negligence,' should also be avoided in an instruction. There are no degrees of negligence."

4—*Chi. U. T. Co. v. O'Brien*, 219 Ill. 303 (309), 76 N. E. 341.

"The purpose of instructions is to state and explain the law applicable to the case, and the practice of injecting an argument in an instruction is not approved. (*Ludwig v. Sager*, 84 Ill. 99.) There was no question in the case to which this prefatory statement was in any way related, and while the statement of law was not incorrect it should have been omitted."

cars in making up the train, he thereby assumed the risk, if any, incident to making such coupling; and if he was injured by reason of the cars coming together, he would not be entitled to recover, provided the jolt or collision was only such a one as was incident to coupling such car.<sup>5</sup>

§ 3968. **Degree of Care Required as to Passengers on Freight Trains.** If the court finds as matter of fact the facts stated in the plaintiff's first prayer, and that the defendant received and accepted the deceased as a passenger, to be carried as therein stated, then defendant was bound to exercise on said trip for deceased's safety the highest degree of care and skill which was consistent with the nature of its undertaking.<sup>6</sup>

§ 3969. **Riding on Freight or Mixed Trains—Risks Assumed by Passengers.** (a) It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of a jar and jerk incident to the starting and stopping of trains, and that such jars and jerks are, as a rule, greater on freight trains. A passenger on such trains assumes the ordinary risk and discomfort incident thereto; and if the train is managed with such care and prudence, by skillful and prudent employees, as to subject him only to the risk and discomfort thus incident, the railroad company would not be responsible for any accident resulting therefrom.<sup>7</sup>

(b) The jury have the right to test all the evidence in the light of common sense and common experience, and if, in the light of their common sense and common experience, the evidence does not reasonably satisfy their minds that the jar or jolt which caused the plaintiff to fall from her chair was greater than is ordinarily incident to the prudent management of a freight train, they cannot find a verdict against the defendant, so far as negligence in that particular is charged.<sup>8</sup>

5—St. L. S. W. Ry. Co. of Tex. v. Morrow, — Tex. Civ. App. —, 93 S. W. 162 (1913).

"There was no error in refusing this charge. It was not strictly correct, and the court had charged the jury on the phase of the case sought thereby to have submitted."

6—W. M. R. Co. v. State, 95 Md. 637, 53 Atl. 969 (1910, 1911).

"The above instruction should not have been given. It required the railroad company to exercise 'the highest degree of care and skill which was consistent with the nature of its undertaking,' in transporting S. as a passenger. The degree of care thus described is the degree of care imposed upon a carrier of persons on passenger train, and not the degree of care required of it in transporting a passenger on a freight train. The instruction should have been more definite. It is possible, upon very close reasoning, to say that by reference to the first instruction the attention of the court, sitting as a jury, was called to the fact that S. was a passenger on a freight train, and that the qualification limiting the care and skill to that which was consistent with the nature of the un-

dertaking restricted the railroad's obligation to that measure of care and skill which it was bound to exercise toward a passenger on a freight train, because the undertaking was to carry him on a freight train. But there is no suggestion in either the first or the second instruction that any different measure of care and skill is applicable to the two conditions, and thus a jury would have been left free to adopt in this case the more rigid rule respecting a passenger on a passenger train. The instructions did not say that there was a difference in the degree of care and skill in the two instances, nor did they define or point out wherein the difference consisted. The instruction was, therefore, misleading."

7—So. Ry. Co. v. Crowder, 130 Ala. 256, 30 So. 592 (1903).

This charge "is bad for the reason that it is argumentative in respect of the comparison it makes between passenger and freight trains, and also because it is not common knowledge, as is therein in effect asserted, that there is always more or less of a jerk incident to the starting and stopping of passenger trains."

8—Ibid.



(c) Under the evidence in this case, there can be no verdict against the defendant based on any charge of wrong or negligence of the conductor.

(d) Under the evidence in this case, I charge you, gentlemen of the jury, as a matter of law, that the conductor was guilty of no wrong or negligence of which this plaintiff can complain. It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of a jar and jerk incident to the starting and stopping of trains, and that such jars and jerks are, as a rule, greater on freight trains. A passenger on such train assumes the ordinary risk and discomfort incident thereto; and if the train is managed with such care and prudence, by skillful and prudent employes, as to subject him only to the risk and discomfort thus incident, the railroad company would not be responsible for any accident resulting therefrom.

(e) I charge you, gentlemen of the jury, as a matter of law, that the company was under no legal obligation to furnish or provide any better or safer accommodations for its passengers than the evidence in this case shows were furnished.

(f) I charge you, gentlemen of the jury, as a matter of law, that you cannot find a verdict for the plaintiff based on any omission of defendant to provide or furnish the plaintiff a better or different kind of seat or chair, or a better or different place or compartment to sit in.

(g) I charge you, gentlemen of the jury, that under the circumstances of the case the plaintiff was bound to accept the accommodations furnished her just as she found them, or as provided for her, there being nothing in the case to show that she was exposed to any obvious and unnecessary danger by reason of such accommodations.

(h) Gentlemen of the jury, I charge you that the only issues of fact before you, apart from the question of damages, are: First, whether or not the jolt or jar imparted to the caboose, and which caused the plaintiff to fall, was unusual or extraordinary, as compared with the ordinary jolts or jars incident to the operation of freight trains; second, whether or not the plaintiff herself was guilty of any negligence proximately contributing to her injury. And if you believe from the evidence that the jar or jolt which caused the plaintiff to fall from her chair was not unusual or extraordinary, as herein defined, your verdict should be for the defendant.<sup>9</sup>

9—So. Ry. Co. v. Crowder, supra. "There were verdict and judgment for the plaintiff, assessing her damages at \$15,000. The defendant made a motion for a new trial. The grounds of this motion were that the verdict was contrary to the evidence and contrary to the law, and that the verdict was excessive. This motion was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Whether, in this instance, the defendant fulfilled its duty in respect of the seat furnished or in respect of moving the train were

questions of fact for the jury to determine in view of the fact that the train was not for freight exclusively, but was used for and was actually carrying passengers, whose safety defendant was bound to conserve by adopting, if necessary, methods different from those used for the carriage of the freight. Like principles were declared in the case of Mo. Pac. Ry. Co. v. Holcomb, 44 Kas. 332, 24 Pac. 467, a case involving a similar accident on a mixed train. In each of charges of 11 and 14 refused to defendant it is wrongly assumed that the train in question was a freight train merely."

§ 3970. **Requiring Verdict of Guilty upon Proof of Negligence Alleged in Declaration Irrespective of Whether Plaintiff Was Passenger or Trespasser.** If the jury believe, from the evidence, that the plaintiff while in the exercise of ordinary care and without negligence on his part was injured by negligence of the defendant, as alleged in the declaration, then the jury should find the defendant guilty, and assess the plaintiff's damages.<sup>10</sup>

### TRESPASSERS AND PERSONS NOT PASSENGERS.

§ 3971. **Degree of Care Due Trespasser.** (a) The court instructs you that even if you do believe, from the evidence, that the plaintiff had no right on that train, and the conductor, in discharge of his duty as manager of the train, undertook to put him off, the law requires the conductor to act in a prudent manner, to exercise due care for the safety of the plaintiff, and if he failed to do so, and in consequence the plaintiff was injured, the defendant is liable.<sup>11</sup>

(b) The court instructs the jury that it is the duty of servants in charge of a train, in putting a person off the train, even though he be a trespasser, to see that the train had stopped running before ejecting him, or that its speed is so checked as to guaranty his safety in alighting, and to see that he has a safe place to alight.<sup>12</sup>

§ 3972. **Duty toward Trespassers Boarding Moving Train.** Even if you should believe from the evidence that the plaintiff had not applied to purchase a ticket in time to get one and get on the south-bound

10—Chicago, B. & Q. R. R. Co. v. Mehlsack, 131 Ill. 61 (64), 22 N. E. 812, 19 Am. St. 17.

"This instruction is clearly erroneous for the reason that it wholly omits the hypothesis that the plaintiff at the time of his injury was a passenger on the defendant's train. \* \* \* The above mentioned instruction required a verdict of guilty upon mere proof that the injury complained of was caused by the negligence alleged in the declaration, irrespective of whether the plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render the carrier liable only in case of injury to a passenger. This, in effect, took from the jury all consideration of the questions presented by the evidence, which tended to show that the plaintiff at the time of his injury was attempting to obtain a free ride, without the consent of the defendant or its agents. If such was the fact, the defendant can be liable only for the consequences of gross negligence, amounting to wanton or willful misconduct, and such is not the negligence charged in the declaration."

11—Wabash R. R. Co. v. Kingsley, 177 Ill. 558 (560), 52 N. E. 931, rev'g 78 Ill. App. 236.

"There is no claim in this case that appellee was a passenger upon the train. The rights of the parties are therefore to be determined upon the facts conceded, that appellee

was wrongfully upon appellant's train when expelled, and that he was a trespasser. As a general rule, a railroad company owes no duty to people who trespass on its cars, except, of course, its servants have no right to wantonly or willfully injure them. (3 Elliott on Railroads, Sec. 1255; Toledo, W. & W. Ry. Co. v. Brookes, 81 Ill. 245; Chicago, B. & Q. R. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. 17.) Under the instruction, if the servants of appellant failed to exercise due care, the jury were informed that the plaintiff could recover. The plaintiff being a trespasser on appellant's train, he could not recover unless the act resulting in his expulsion from the train by the servants of appellant was wanton or willful, but the instruction tells the jury that a recovery may be had if the servants of the company failed to exercise due care for the safety of plaintiff. The obligation imposed by the instruction was one which the appellant owed alone to a passenger, and the court erred in informing the jury that the railroad company owed the same duty to one who was a trespasser on the train."

12—Ill. C. R. Co. v. McManus, Adm'x., 24 Ky. L. 81, 67 S. W. 1000 (1901).

"The objection to this instruction is to the use of the word 'guaranty.' The instruction would have been better form had it read 'or that its speed is so checked as to render it safe for him to alight.'"

passenger train of defendant before it started, yet if you believe from all the evidence before you that when he attempted to get on said train the agents or agent of defendant on said train saw him make such an attempt, and could, by a reasonable effort on their part, have assisted him on, or by such effort prevented his getting on, and negligently failed to refuse to use such effort; and if you further believe that if they had used such effort, and thereby have prevented plaintiff from being injured,—then and in such event you will find for plaintiff, unless you find for defendant on the charge of contributory negligence before given you.<sup>13</sup>

### THE PASSENGERSHIP RELATION.

**§ 3973. Authority of Brakeman to Invite Person to Become Passenger on Freight Train.** If you find from the evidence that the defendant was a common carrier of passengers for hire on the — day of —, and was using for that purpose the kind of freight train that plaintiff boarded, in accordance with the instructions given you in the general charge; and if you find from the evidence that plaintiff approached B and was authorized by him to board said train; and if you find that plaintiff paid the fare to him; and if you further find that B. was a brakeman on said train, and had no express authority to invite persons on said train or to collect fares; and you find that the conductor of said train had no knowledge of plaintiff's presence on said train and did not authorize him to board said train—yet if you find from the evidence that the defendant's brakeman on its freight trains on its lines in H. county were exercising such authority or performing such duties for such a length of time that the defendant, in the proper conduct of its business, must have known of such facts, then and in that event the plaintiff had the right to presume that such servant was authorized to perform such duties.<sup>14</sup>

13—Mo. K. & T. Ry. Co. of Texas v. Mills, 27 Tex. Civ. App. 245, 65 S. W. 74 (75).

"It is not a sound proposition of law to assert, as this instruction does, that it is the duty of employees running a railroad train to assist trespassers who are wrongfully attempting to board the train. Under such circumstances employees may owe the duty to their employer of preventing such persons from getting on the train, but they do not, merely because such persons are attempting to board the train, in the absence of imminent and apparent danger, owe any such duty to such wrongdoers."

14—Missouri, K. & T. Ry. Co. of Texas v. Huff, 98 Tex. 110, 81 S. W. 525 (526).

"We are of the opinion that this charge is erroneous for several reasons: First. It declares, as a matter of law, that from the facts stated the plaintiff was authorized to presume authority in the brakeman, when the question was for the jury itself to determine whether or not such facts as the evidence disclosed justified an inference of such authority in a person of ordinary pru-

dence. Second. It authorizes such presumption on plaintiff's part without regard to circumstances which there was evidence tending to show, from which plaintiff may have been sufficiently informed that this brakeman was acting in violation of his duty to his employer, in his own behalf, and for his own private gain. Third. It excludes from consideration evidence tending to show that the supposed course of conduct of brakemen was very difficult to prevent, and was pursued in spite of efforts on the part of their superiors to suppress it. Fourth. It is not true that the inference of authority to do such forbidden acts would necessarily arise from the mere facts that they were done and the company knew it. Those facts might exist while the company was doing enough to show that it was not acquiescing, but was endeavoring to enforce its rules and suppress violations of them. It must be remembered that no one would be authorized to presume, without evidence, that a brakeman has authority to make such a contract of carriage, express or implied, as that which is claimed to have arisen in



§ 3974. **Riding in Caboose with Consent of Conductor.** (a) If you find, from the evidence, that the plaintiff entered the caboose car in question and rode therein from R. Station, a distance of ninety miles or more, to the knowledge and with the consent of the defendant's conductor in charge of defendant's train to which said caboose car was attached, and if you further find that the plaintiff was at the time of the collision and injury in the exercise of ordinary care, and you further find that the collision and injury to the plaintiff was caused by negligence of the agents or servants or any of them of the defendant, then you should find for the plaintiff.<sup>15</sup>

(b) If you find, from the evidence, that the plaintiff rode in the caboose car in question from R. Station to the place of collision in question with the consent of defendant's conductor in charge of the train to which said caboose was attached, the plaintiff had the right to assume that such conductor was not violating his duty by allowing him to ride in said car, and the plaintiff was lawfully in said car, even though there was a rule or regulation, unknown to him, prohibiting such conductor from carrying passengers on said train.<sup>16</sup>

§ 3975. **When Relation of Carrier and Passenger Ends.** (a) It is the duty of a passenger upon arriving at destination to leave the train promptly after the arrival of same, and if you find that the accident in this case was the result of unreasonable delay in leaving the train, you should find a verdict for the defendant.

(b) If the jury believes from the evidence that the train had ar-

this case, and he who asserts such authority has the burden of showing it otherwise than by inference arising from the position held by such employe, because no such inference arises from the character of the employment. It is true that the evidence tends to show that this brakeman represented himself to the plaintiff to be the conductor, but other questions would arise as to the effect of that fact, to which this charge is not addressed, and which therefore are not before us for consideration. The charge was well calculated to deprive the defendant of the judgment of the jury upon the several matters which we have pointed out, if not others, and cannot be held harmless in a case like this, where most of the facts which plaintiff must establish are, to say the least, debatable. Nor does the reference to the general charge relieve the special instruction of its erroneous features; the reference being only to those parts of the general charge relating to the question whether or not the freight train carried passengers, and not to any instruction concerning the authority of brakemen."

15—Cleveland, C. C. & St. L. Ry. Co. v. Best, 169 Ill. 301 (306), rev'g 68 Ill. App. 532, 48 N. E. 684.

"Under the instruction, it was necessary for the jury to find the plaintiff entered the caboose and rode therein with the consent of the conductor, and was injured by the negligence of the defendant's servants, regardless of the fact that

freight trains do not carry passengers, and that the conductor had no authority to give the consent, and even if plaintiff knew that the conductor exceeded his authority and violated his instructions. The power of the conductor to bind defendant rests upon the general doctrine of agency. He had no authority to bind it except within the general scope of his agency. The conductor of a passenger train is the agent of the railroad company to receive and transport passengers, and the conductor of a freight train is the agent of the company to transact the business of such train. A railroad company has a clear right to make a rule that no one shall be carried as a passenger on its freight trains. (Ill. C. R. R. Co. v. Johnson, 67 Ill. 312.)"

16—C. C. C. & St. L. Ry. Co. v. Best, supra.

"This instruction has all the vices of the first one, and in addition assumes that the rule and regulation prohibiting conductors from carrying passengers on freight trains were unknown to plaintiff. It disregarded every fact and circumstance tending to prove notice to the plaintiff that the train was not used or designed for carrying passengers, and all evidence that he knew the conductor was violating his duty, and told the jury that he had a right as a matter of law to assume that the conductor was not violating his duty, and that the plaintiff was lawfully in the caboose, regardless of such facts and evidence."

rived at the destination of the plaintiff, and a reasonable time had elapsed for plaintiff to alight from the cars after the arrival before the injury to plaintiff had occurred, then the relation of a common carrier between the parties had ceased, and defendant cannot be held liable as a common carrier.<sup>17</sup>

### STATIONAL FACILITIES.

**§ 3976. Passenger Using Dilapidated or Unsafe Platform.** The court instructs the jury that while it devolves upon the plaintiff in this cause to establish his case by a preponderance of the evidence, yet by this it is not meant that he must necessarily produce the greater number of witnesses, but simply that he must prove his case by evidence shown on the trial which outweighs that produced on behalf of the defendant, when the whole evidence is considered together; and if the jury believes that the greater weight of evidence in this case establishes that the platform was out of repair, as alleged, and that such condition of the platform was the cause of his injury, and that the condition of such platform was the result of defendant's negligence, and that the defendant had notice thereof and that at the time the plaintiff stepped upon such platform (if you believe, from the evidence, that he did step upon it), he was in the exercise of due care for his own safety, then the plaintiff will be entitled to recover.<sup>18</sup>

**§ 3977. Failure to Heat Waiting Room.** You are instructed that it was the duty of the Company to have heated and warmed its waiting room in its depot at C. for the comfort and accommodation of its passengers for at least one hour before the arrival of its trains, and to keep the same open to the ingress and egress of passengers who are entitled to go therein and where said trains are bulletined as late. It is their duty to keep the same in said condition for a reasonable length of time that the said trains may be late, in order that such passengers may take passage on their train, and in keeping the said waiting room of its depot warm and comfortable the defendant company must use that high degree of care as would be exercised by a very cautious and prudent and competent person under the same or similar circumstances or conditions so as to protect their passengers from discomfort or injury from cold during the time that they were required to wait for the defendant's train upon which they are to take passage, and the failure of the defendant company to use such care to keep their said waiting room warm and comfortable during such time, and if you further find that the plaintiff or his wife grew cold and un-

17—Hodges v. So. Pac. Co., 3 Cal. App. 307, 86 Pac. 620 (622).

"These instructions are objectionable. There was nothing in the evidence to justify them. There was no evidence tending to show that there was unreasonable delay on the part of plaintiff. Nor are we prepared to say, as a matter of law, that the relation of common carrier between the parties ceases upon the arrival of the train at the point of destination and the expiration of 25 or 30 seconds, or even four minutes thereafter."

18—Ill. C. R. Co. v. Smith, 208 Ill. 608 (618-19), 70 N. E. 628.

"We think the instruction subject to two criticisms, first, it states if appellant had notice of the defective condition of the platform it would be liable, regardless of the time it received such notice, and second, it ignores the question of assumed risk. Goldie v. Werner, 151 Ill. 551, 38 N. E. 95; Chicago & E. I. R. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74."

comfortable by reason of the chilly conditions of defendant's said waiting room and that it was caused by the defendant's negligence and want of that high degree of care as herein defined, then the company would be liable to plaintiff for injury, if any, that they or either of them have thereby suffered.<sup>19</sup>

### CARS AND APPLIANCES.

§ 3978. **Liability for Appliances on Engines.** If the engine in question was equipped with one of the best approved appliances in common use on well-equipped railways for preventing the escape of cinders, and the defendant had used ordinary care to keep the same in good repair, and that the same was carefully and skillfully handled by the engineer in charge thereof then the burden was upon the plaintiff to show negligence.<sup>20</sup>

§ 3979. **Injury to Passenger Through Insufficiency of Axle.** In order to rebut the presumption of negligence on its part, the defendant must show that the death of S., while traveling as a passenger on its train, if the court sitting as a jury shall find such death could not have been prevented by the utmost care and diligence in the running and management of the train and the sufficiency of an axle on a car of said train, and in all the subsidiary arrangements necessary to the safety of the deceased.<sup>21</sup>

19—Gulf, C. & S. F. Ry. Co. v. Turner, — Tex. Civ. App. —, 93 S. W. 195 (196).

"The controverted and pivotal issue of this case was, not whether appellant had failed to keep its depot warmed, for admittedly no effort had been made to do so, but whether the depot needed warming on the night in question. The charge given, besides being inapplicable, seems also subject to the objection that it was on the weight of the evidence, in that it instructed the jury that it was the duty of appellant to have heated and warmed its waiting room in its depot at C. for the comfort and accommodation of its passengers for at least one hour before the arrival of its trains and \* \* \* to keep the same in said condition for a reasonable length of time that the said trains may be late,' etc. Whether it would be appellant's duty in any case to do this would depend on whether the waiting room would need to be 'heated and warmed,' and in this case whether very cautious and prudent persons would have heated it under the same circumstances. What is further stated in this charge as to the degree of care with which appellant was required to discharge the duty absolutely imposed on it by the charge, so far from curing the error was subject to a like objection, since the duty to warm the depot was there assumed, whether it needed warming or not. Railway Co. v. Wolf, 89 S. W. 778, 14 Tex. Ct. Rep. 52. It will be observed, also, that the charge given extended the statute to a case not within its terms, and we doubt whether the court was

warranted in giving it that interpretation, but do not find it necessary to decide that question."

20—St. Louis S. W. Ry. Co. of Texas v. Parks, 97 Tex. 131, 76 S. W. 740 (742).

"The charge was correct insofar as it sought to place the burden of proof upon the plaintiff as to the question of negligence, but it contained two propositions which were erroneous and misleading. First, the company, as we have just pointed out, did not discharge its duty by using ordinary care to keep the engine in repair; and in the second place it was not all of its duty to select 'one of the best approved appliances,' but it was its duty to exercise that high degree of care incumbent upon carriers of passengers in selecting the appliance. One of the best might not be the safest, and proper care might have led to the selection of a better. On the other hand, if the company did exercise that high degree of care incumbent upon it in making the selection, it ought not to be held liable, although the jury might have concluded that it had made a mistake and had not chosen the very best."

21—Western M. R. Co. v. State, 95 Md. 632, 53 Atl. 969 (970, 975).

"This instruction granted at the instance of the appellees was also erroneous. While it is true that a presumption of negligence may arise from the circumstances of a case, and that it is incumbent on the defendant to rebut that presumption when it does arise, it is not true that the defendant must show, in order to rebut the presumption in a case



## MANAGEMENT AND OPERATION OF CARS AND VEHICLES.

§ 3980. **Freight Trains Not Required to Stop at Platform to Receive or Discharge Passengers.** The court instructs the jury that if the preponderance of the evidence shows that the train in question was a regular local freight, conveying passengers, and that it was the only mixed train carrying passengers regularly, and that it had a regular schedule time to arrive and depart from C. station, then it was the duty of defendant to be governed by the same regulations as passenger trains, in respect to discharging its passengers from its train, and it was its duty to discharge its passengers at its depot and station. All passenger trains are required to discharge their passengers at a depot and platform for their safety and convenience, and if a freight train becomes a local passenger carrier, it is governed by the same rules, with respect to its passengers, as passenger trains, where the weight of the evidence shows it is running on a regular schedule time and leaves and departs from the station at an advertised hour, and advertises to carry passengers regularly.<sup>22</sup>

§ 3981. **Duty to Stop Train a Reasonable Time for Passenger to Get On.** The law requires all railroad companies transporting passengers to and from stations in this state for hire shall stop their passenger trains at all of their regular passenger stations where passengers get on or off said train a sufficient length of time to permit any passenger to get on or off said train. And it is your province to determine, under the evidence in this case, whether the defendant's servants failed, as alleged in plaintiff's first amended original petition, to stop its train at M. a sufficient length of time for plaintiff's wife and children to get on the cars of defendant, and plaintiff's wife was injured by reason thereof, as claimed in his petition. And if you believe from the evidence that sufficient length of time was not given the plaintiff's wife and children by the servants and employes of the defendant to get on the cars at the time and place alleged by

like this, 'the utmost care and diligence in the running and management of the train, \* \* \* and in all the subsidiary arrangements necessary to the safety of the deceased,' especially as the declaration alleges the insufficiency of the car axle as the sole ground of negligence. When the cause of the injury is charged in the narr to be the insufficiency of an axle, it is error to require the carrier to show, not only due and proper care with respect to that axle, but, in addition, the sufficiency of all the subsidiary arrangements necessary to the safety of the deceased, though it is not pretended that any of those subsidiary arrangements (whatever they were) had anything at all to do with the injury. Under this instruction the defendant company would have been liable, though there had been no negligence in respect to the axle, the thing which did cause the injury, if there had been negligence in regard to some subsidiary appliance which did not cause the

injury, because the thing which did and the things which did not cause the death of S. are conjunctively put in the instruction, and the company was required, in order to rebut the asserted presumption of negligence, to show the utmost care and diligence with respect to all of them."

<sup>22</sup>—Cleveland, C. C. & St. L. Ry. Co. v. Maxwell, 59 Ill. App. 673 (676, 677).

"This instruction should not have been given. The proof made by the appellee clearly shows the usage was to do the switching before pulling up to the depot platform, which was invariably done thereafter. The appellant was only required to conform to that usage. Ill. C. R. R. Co. v. Nelson, 59 Ill. 110. The act of the deceased in getting out of the caboose was voluntarily on his part, and as a cause, the failure to pull up to the platform in the first instance is in no legal way related to the injury. By remaining in the caboose until after the switching was done, he would have been safely landed at the platform."

plaintiff, and you believe this was negligence on the part of the defendant, and that such failure was the direct and proximate cause of the injuries complained of (if any), then in such event you will find for the plaintiff, and assess the damages at such sum as you believe will compensate the plaintiff for the injury received by his wife (if any), not, however, to exceed the sum claimed in the plaintiff's first amended original petition, under the rules hereinafter given you. If, however, you believe from the evidence in this case that the defendant's servants and employes stopped its train at M. on the day and date alleged by plaintiff a sufficient length of time which would have permitted the wife of plaintiff to get on said cars of defendant by the use of ordinary care, and that the failure to do so was through the negligence of the wife of plaintiff and through no fault of the defendant, its servants and employes, you will find for the defendant. And in addition the court instructs you that it was the duty of plaintiff's wife to use every means within her power to avoid damages which may have been occasioned by defendant's negligence, if you find that defendant was negligent; and unless you believe from the evidence that plaintiff's wife failed to use every means within her power to relieve her anxiety concerning her children she is not entitled to damages for any anxiety which she could have averted. By "ordinary care," whenever used in this charge, is meant that degree of care which a person of ordinary prudence would have exercised under like circumstances.<sup>23</sup>

§ 3982. **Announcing Change of Cars.** You are instructed, at the request of defendant, that it was not the duty of defendant to personally notify plaintiff of a change of trains or cars, as to what cars went through and beyond P. and which did not, and that, if defendant's conductor made such announcement in said coach in which plaintiff was riding so that he could have heard the same if he had not been asleep, you will return a verdict for the defendant.<sup>24</sup>

§ 3983. **Carrying Passenger Past Destination or Platform.** (a) It is for you, gentlemen, to say what is negligence in this case,—whether it was negligence for the conductor to fail to ask the plaintiff what

23—Int'l. & G. N. R. R. Co. v. Anchonda, — Tex. Civ. App. —, 68 S. W. 743 (744).

"The law is that trains should stop a reasonably sufficient length of time to enable a passenger to board the train, which, of course, means sufficient time to enable the passenger, in the exercise of reasonable diligence and care, to board it. If the train was thus held in the present case, defendant was not liable at all, under the pleadings; there being nothing alleged to the effect that the employes saw her in a position of danger, and did not use proper care not to injure her. No duty existed on appellant's part under the allegations except to comply with the above rule. The charge should have been, if the train stopped long enough to have permitted plaintiff's wife to get on the car by the use of reasonable care, to find for defendant, regardless of what the wife did. In fact, a special charge to this effect was asked and given. But the last section of the charge quoted made it necessary

for the jury to find also that the wife was guilty of contributory negligence; and if she was guilty of contributory negligence, still no verdict could be awarded defendant unless the jury believed defendant, its servants or employes, were not at fault. The error in this charge is plain and affirmative, and the giving of a correct charge upon request, which in no manner referred to the erroneous charge, did not correct the error. Scott v. Ry. Co., 93 Tex. 625, 57 S. W. 801."

24—Gulf, C. & S. F. Ry. Co. v. Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653 (657).

"It may be that the conductor was not required to personally inform plaintiff of the change of trains or cars, or which went through or beyond that station; but it is clear that if, by his words or conduct, he misleads, or misinforms, or deceives a passenger upon this subject, he is guilty of a breach of duty for which his principal might be held responsible. There was no error in refusing this charge."

station she wanted to stop at, and to pass that station without making such inquiry of plaintiff.<sup>25</sup>

(b) The jury are instructed, as a matter of law, that if you find from the evidence, that the defendant corporation was engaged in the business of transporting passengers and freight, for hire, upon a railroad operated by said company, then the law denominated the defendant a common carrier. The court instructs the jury that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. So, too, persons who become passengers must at all times exercise ordinary care and caution for their own safety. And if the jury believe, from the evidence in this case, that the defendant was at the time of the accident a common carrier, and if you further believe, from the evidence, that the deceased was a passenger on the defendant's train and in the exercise of due care on his part, if the jury so believe from preponderance of the evidence, and that the defendant carelessly or negligently operated its said train or car by running the same past the station platform, so as to cause the deceased to alight upon the ground and tracks of the defendant instead of upon the platform where the passengers are usually unloaded, and that by reason of such negligent acts, if any are proven by the preponderance of the evidence in the case, of the defendant, their agents and employees, the deceased, J., while exercising due care for his safety, if you so find from the preponderance of the evidence, was struck by an engine controlled and operated by the defendant and was then and there killed, then you may find the defendant guilty, and assess the plaintiff damages at such reasonable sum as she may be entitled to recover under all the facts and circumstances proved in the case, not exceeding \$5,000.<sup>26</sup>

25—Southern Ry. Co. v. O'Bryan, 112 Ga. 127, 37 S. E. 161 (1902).

"This charge is subject to the objection that it assumes as a fact, which was disputed, that the conductor did not ask the plaintiff at what station she wanted to stop, and that he passed the station in question without making such inquiry. But the more serious objection is that it is not appropriate to the facts in evidence, it appearing that the plaintiff had paid her fare to the station which was her destination; and, this being true, the conductor was under no duty whatever to return to her and inquire at what station she wished to alight. See, in this connection, Central R. R. Co. of Georgia v. Dorsey, 106 Ga. 826, 32 S. E. 873."

26—Ill. C. R. R. Co. v. Johnson, 221 Ill. 42 (47-51), 77 N. E. 592.

"The instruction was erroneous in three respects. It was proved, and not disputed, that the train ran three or four feet past the north end of the platform, and that deceased alighted upon the ground instead of on the platform where passengers were usually unloaded. The questions in dispute were whether the act of defendant in running past

the platform constituted negligence on its part, and whether such act caused the deceased to alight upon the ground at an improper place, or whether he was negligent in going down the steps where he did. They were questions of fact for the jury to determine from the evidence, and it was the exclusive province of the jury to determine whether the act of the defendant was negligent and whether the deceased was guilty of negligence. No other act of the defendant was alleged and no other fact stated in the declaration which could have been construed to be a negligent one, and the court could not say that either of the parties was negligent as a matter of law. The Appellate Court, in considering whether the evidence warranted the jury in finding the defendant guilty of negligence which caused the injury, expressed no opinion as to whether the running of the train past the station platform constituted negligence or not, but held that the defendant was negligent in the management of the south-bound train, saying that it was the duty of the engineer to have been on the lookout for the north-bound train; that he must have known his train was



§ 3984. **Injury to Passenger While Alighting.** The court instructs the jury that if they are satisfied from all the evidence and circumstances of this case that the accident and injuries to the plaintiff were caused by the carelessness and negligence of the agents of the

late; that 'he ran the train at the rate of from twelve to fifteen miles an hour, and that the evidence tended to show he did not exercise the required degree of care in the operation of his train so as to be able to stop for the safety of passengers getting on or off the north-bound train. There was no averment in the declaration as to the speed of the south-bound train or failure to keep a lookout, or mismanagement of it in any respect. The crossing place for passengers was south of the platform, more than three hundred feet distant, and where the train would have come to a full stop; and if the question as to the management of the south-bound train had been submitted to the jury, they would doubtless have considered the question whether the engineer had, or ought to have had, any reason to expect that a person would be on the track at the north end of the platform. It appears, however, that such questions were not submitted, and that the verdict was based on the negligent character of the act in running past the platform. On that question the instruction assumed both that the act was a careless and negligent one, and that it caused the deceased to alight upon the ground on the tracks of the defendant instead of upon the platform, and it afterward refers to the acts as 'such negligent acts.' The plaintiff was entitled to recover if the jury should decide that the act of the defendant was negligent, that it caused the injury, and that the deceased was in the exercise of ordinary care; but it was the exclusive province of the jury to determine those facts, and they should have been submitted to the jury for determination without any intimation or assumption as to the proper conclusion. In the case of *Chicago & N. W. R. R. Co. v. Moranda*, 108 Ill. 576, the court said: 'Where there is evidence before a jury upon which it is legally admissible there may be difference of opinion, it is error to allow any opinion of judge or court to be obtruded upon the jurors to influence their determination.' Where the evidentiary facts will justify different conclusions the question of negligence is one of fact, and instructions should always be drawn so as to state the law upon a supposed or hypothetical state of facts, leaving the jury to find the fact. Instructions assuming the existence of any material fact have always been condemned. (*Sherman v. Dutch*, 16 Ill. 283; *Michigan So. & N. I. R. R. Co. v. O'Connor*, 119 Ill. 586; *Swigart v. Hawley*, 140 Ill. 186, 29 N. E. 883; *Ill. Cent. R. R. Co. v. Griffin*, 184 Ill. 9, 56 N. E. 337;

*Allmendinger v. McHie*, 189 Ill. 308, 59 N. E. 517; *Pittsburg, C. C. & St. L. Ry. Co. v. Banfill*, 206 Ill. 553, 69 N. E. 499). Under this instruction, when the jury found that the train was run past the platform, they would understand that the court regarded such act to be a careless and negligent operation of the train, and that it caused the deceased to get off the train at the place where he did. It did not call upon the jury, as it should have done, to decide whether the act constituted negligence on the part of the defendant. Under the instruction authorizing the jury to assess the plaintiff's damages at such reasonable sum as she might be entitled to recover under all the facts and circumstances proved in the case, not exceeding \$5,000, the jury went to the limit and returned a verdict for that sum. In the case of *Muren Coal and Ice Co. v. Howell*, 204 Ill. 515, 68 N. E. 456, the trial court instructed the jury that if they found the defendant guilty it would be their duty to assess the plaintiff's damages, and gave the following direction: 'And in doing so you may take into consideration the pecuniary injuries resulting to the widow and next of kin, if, from the evidence, you believe there is a widow and next of kin, and that they have suffered pecuniary injury or loss on account of the death of said August Schmidt, and give to the plaintiff such a sum as in your judgment will fairly compensate the widow and next of kin for such pecuniary injury or loss, not to exceed, however, the amount sued for in this case.' It was held that the instruction was erroneous, and for that error the judgment was reversed. The court reviewed the previous decisions where it was considered that such an instruction did not limit the jury to the actual pecuniary damages sustained as established by the evidence, but left them free to give such sum as in their opinions of right or wrong would fairly compensate the widow and next of kin for the pecuniary injury or loss. The instruction in this case is much more objectionable than the one in that case, as it does not even limit the jury to estimating the compensation for pecuniary injury or loss, but authorizes the jury to assess the plaintiff's damages at such reasonable sum as in their judgment she may be entitled to recover. It refers to the facts and circumstances proved in the case which were the facts and circumstances already detailed. It did not require that the assessment should be based on the evidence as to damages for which the law allows a recovery, but authorized the jury

defendant company, and that the plaintiff used due care and caution when he alighted from its car or attempted to leave the car after it stopped, if you believe from the evidence that it came to a stop, and if they further believe from all the evidence that plaintiff was injured by the car from which he was alighting and by reason of which injury has suffered the partial loss of hearing and of his memory, and that such injuries are of a permanent character, your verdict should be for the plaintiff, and you may assess such damages as the evidence shows the plaintiff has sustained from said injuries, not exceeding the amount claimed in the declaration.<sup>26a</sup>

**§ 3985. Starting Train Before Passenger Has Alighted.** If you believe from the evidence that the conductor in control of the train gave the signal to put the train in motion under the belief that the wife of the plaintiff had departed from the train, and further believe from the evidence in so doing, if he did so, he acted as a reasonably prudent person would have acted under the same circumstances, then you will find for the defendant.<sup>27</sup>

**§ 3986. Helping Passengers to Alight—Failure to Provide Step Box.** (a) If you believe from the evidence that the defendant was guilty of negligence by failing to have a step box for its passengers to step

to give such damages as in their opinion plaintiff ought to have under all the facts and circumstances. In the case of *North Chicago Rolling Mill Co. v. Morrisey*, 111 Ill. 646, the judgment was reversed for error in giving an instruction that the jury 'may give such damages as they shall deem a fair and just compensation for the pecuniary loss resulting from such death to the widow and next of kin of the deceased, not exceeding \$5,000;' and in the cases of *Keightlinger v. Egan*, 65 Ill. 235, *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426; *Waldren v. Marcier*, 82 Ill. 550; *City of Freeport v. Isbell*, 83 Ill. 440, and *Cleveland, C. C. & St. L. Ry. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, similar instructions were held to be erroneous. In view of the amount of the verdict, the error in giving this instruction must be held to have been material and prejudicial. The third objection to the instruction is, that it stated the duty of a common carrier of passengers too broadly, in omitting the qualification that the degree of care is to be consistent with the practical operation of the road. (*Chicago & A. R. R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578.) But that objection is of minor importance, and if it were the only one, might not require a reversal.

"An instruction was given which stated that the law does not require that a boy of the age of the deceased should necessarily exercise the same degree of care and caution as a person of mature years, but only such care and caution as persons of his age and discretion would ordinarily use under all the facts and circumstances proved in the case. In the case of adults there is a fixed standard by which to measure the degree of care required, but

in the case of a child there is no exact standard. Children who have arrived at sufficient age to be capable of exercising some degree of care for their own safety must exercise the ordinary and reasonable care which ought to be expected of children of like age, capacity, intelligence and experience. (1 *Thompson on Negligence*, § 309; *Ill. Iron & M. Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008.) In this case there was no evidence to take the deceased out of the ordinary class of boys of his age in respect to capacity, intelligence or experience, and the omission of some of the elements to be considered may not have been of much importance."

<sup>26a</sup>—*Lebanon Coal & M. Ass'n v. Zerwick*, 77 Ill. App. 486 (488).

"The instruction is erroneous, in not confining the jury to consideration of the negligence alleged in the declaration. It is settled beyond peradventure that when an act or omission is specifically averred in the declaration as constituting negligence, the plaintiff can only recover on proof of such act or omission. *Chi. U. T. Co. v. Grommes*, 110 Ill. App. 113 (114-5), citing *Wabash, etc., R. Co. v. Coble*, 113 Ill. 115; *Chi. & A. R. R. Co. v. Rayburn*, 153 Ill. 290, 38 N. E. 558; *Chi. & A. R. R. Co. v. Mock*, 72 Ill. 144."

<sup>27</sup>—*St. Louis S. W. Ry. Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. 38 (39).

"This charge made the question of negligence on the part of the railway company depend on the belief of the conductor, and in this respect it does not announce a correct proposition. It was also erroneous in requiring of the conductor only ordinary care, which is not the care owed by a carrier to its passengers."

upon in alighting from the train, after descending the steps to the train at the time plaintiff claims his wife was hurt, or if the defendant's conductor was guilty of negligence by failing to properly assist plaintiff's wife to alight from said car, and if you further find that the failure to have a step box or to properly assist plaintiff's wife caused plaintiff's wife, while attempting to alight from said car, to fall and be injured, and if she did not contribute to her injury by her own failure to exercise ordinary care, then you will find for plaintiff and assess his damage at such sum as you may believe from the evidence to be a fair and reasonable pecuniary compensation for the injury occasioned to his wife thereby, if any.

(b) Unless you believe from the evidence that defendant was guilty of negligence by failing to have a step box for its passengers to alight upon, or by failing to properly assist plaintiff's wife to alight from said cars, and that such failure caused her to fall and be injured, you will find for defendant.

(c) You are instructed that the law does not say whether a failure of the defendant to have a step box for its passengers to step upon in alighting from said train was negligence or not, neither does the law say whether the failure of the defendant's conductor to assist or properly assist the plaintiff's wife to alight from said train was negligence or not, but whether or not these things, or either of them, would constitute negligence, is a question of fact for you to determine under the evidence.<sup>28</sup>

§ 3987. **Failure to Provide a Stool for Passengers to Alight.** It is not negligence in itself for a railway company to fail to provide a stool for passengers to get on and off its trains.<sup>29</sup>

§ 3988. **Overcrowding Cars.** The court instructs the jury, if you shall find from the evidence in this case that the defendant railroad received or allowed such a number of passengers to get upon its car as to cause not only the car itself but the rear and front platform of said car, to be crowded with passengers, and so as to render it likely that such passengers on its said platforms would be hurt, in case their cars collided with any object on the tracks of defendant, that then and

28—Mo. K. & T. Ry. Co. of Tex. v. Wolf, — Tex. Civ. App. —, 89 S. W. 778.

Above paragraphs of the court's charge are complained of "because in them the court assumes to be true that appellant did fail to provide appellee's wife with a step box, and that its conductor did fail to properly assist her in alighting from its train. We think these assignments are well taken and should be sustained. The question of negligence or not is expressly submitted to the jury in paragraph 5 of the charge, but the questions of whether or not appellant failed to provide a step box, or failed to properly assist appellee's wife, are nowhere submitted to the jury. We think the charge as a whole clearly implies that the company failed in these respects, and the jury might well have considered that the only question for them to pass upon was whether or not such failure constituted negligence under the court's definition of that term. Upon each of these

issues the evidence sharply conflicted, and the error therefore is reversible. Campbell v. Ellsworth, — Tex. —, 20 S. W. 120; Gulf, C. & S. F. Ry. Co. v. Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588; Tex. & Pac. Ry. Co. v. Berry, 32 Tex. Civ. App. 259, 72 S. W. 423. In view of the court's definition of the degree of care due by appellant to appellee's wife, contained in the first paragraph of the charge, the jury could hardly have been misled by the failure to define the expression 'properly assist,' used in the second paragraph; at least, the omission is not such as would call for a reversal of the case."

29—Mo. K. & T. Ry. Co. of Tex. v. Sherrill, 32 Tex. Civ. App. 116, 72 S. W. 429.

"It is too clear for controversy that the question is one of fact which must be left to the determination of the jury. The requested charge was an invasion of the province of the jury and was properly refused."



in such case the defendant owed an increased and greater duty to such passengers on its said platform than it ordinarily would if such danger did not exist, and, under such circumstances, if you find from the evidence that such was the condition of said car and its front and rear platforms, the court instructs you that it was the duty of the defendant to so run and operate its cars as to prevent plaintiff and those who were with him on the front platform of such car from being injured by any collision which might result from or be produced by the negligence or carelessness of the defendant, or of its agents and servants who might then and there be in charge of its said car or cars. The plaintiff had the right to presume and rely upon the fact, when he became a passenger on the cars of said defendant, that it would not be guilty of any negligence, or negligently run or allow any of its cars to be run at the same time on the same track and in opposite directions, so as to cause a collision therefrom: and if you find from the evidence in this case that the plaintiff, in what he did on the occasion in question, acted as an ordinarily prudent person would have acted under the circumstances, in riding upon the front platform of the defendant's car, and that in what he did he acted as an ordinarily prudent person would have acted, and was injured by the collision of the defendant's car, that then and in that case your verdict should be for the plaintiff and against the defendant.<sup>30</sup>

**§ 3989. Liability for Collision at Crossing with Train of Another Railroad.** And you are further instructed that if you should believe from the evidence before you that said locomotive and train of the Ft. W. & N. O. R. Co., as the same approached said crossing, was brought to a full stop before the locomotive reached the crossing, yet if you further believe from the evidence that when said locomotive and train went over said crossing, or attempted to cross the same, the circumstances were such as, in the exercise of proper care for the safety of passengers on said train, this should not have been done or attempted, and if you further believe from the evidence that a collision occurred on said crossing between the said train and a train of the M., K. & T. R. Co. of Texas, and that said collision would not have occurred if said train and locomotive of the Ft. W. & N. O. R. Co. had not gone, or attempted to go, over said crossing at said time, and if you further believe from the evidence that plaintiff's wife received the injuries complained of, you should find a verdict in favor of plaintiff against the Ft. W. & N. O. R. Co.<sup>31</sup>

30—Magrane v. St. Louis & S. W. Ry. Co., 133 Mo. 119, 81 S. W. 1158 (1160).

"The only adverse criticism to be passed on those instructions is that they submit to the jury the question of negligence of the defendant in the matter, without instructing the jury as to what constitutes negligence. Where, as in this case, there is no instruction defining negligence, the instruction submitted to the jury should be, not whether the act was done negligently, but whether, in doing it, the defendant observed the degree of care required; and that degree should be stated in the instruction. If, however, the term 'negligence' is defined in any of the instructions, the question of

whether the defendant did the act complained of negligently may be put in that form to the jury."

31—Ft. Worth & N. O. Ry. Co. v. Enos, Tex. Civ. App. —, 50 S. W. 595 (596).

"The rule of liability governing the attempt to make the crossing is not correctly stated in the charge. The charge, in effect, tells the jury that if the circumstances were such that, in the exercise of 'proper care' the attempt to run over the crossing should not have been made, the company would be liable. The charge had defined the 'highest degree of care,' and the jury were told that such degree of care was required in case of passengers; but they were not told what was meant

§ 3990. **Injury to Passenger by Falling of Transom or Ventilator Window of Car.** The jury are instructed that in order to entitle the plaintiff to recover in this suit, it is only necessary for him to prove that he was a passenger for pay in the defendant's train from S. to M. and that he was struck and injured by the falling of said transom or ventilator window of said car upon his head whilst it was in possession and control of the defendant's servants and while he was then and there in the exercise of ordinary care for his own safety as charged in the declaration.

The burden of proof is then cast upon the defendant to show in mitigation of damages or in bar of the action, that the falling of said ventilator and injury to plaintiff thereby, if any is shown by the evidence, was not on account of the fault or negligence of the defendant.<sup>32</sup>

### CONTRIBUTORY NEGLIGENCE.

§ 3991. **Contributory Negligence of Passenger.** (a) The defendant company is responsible to the plaintiff for an injury, such as here complained of, which his wife may have received, if its negligence,

by 'proper care,' as used by the court. The test was what very cautious, competent persons would have done under similar circumstances. If the circumstances were such that very cautious, competent persons would have apprehended danger, and by reason thereof would have refrained from the attempt to go over the crossing, the making of such attempt would be negligence. This charge left the jury to determine whether the circumstances showed that the attempt to make the crossing should not have been made, in the exercise of proper care; fixing their own standard of proper care. *Int'l & G. N. Ry. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *Int'l & G. N. R. R. Co. v. Halloren*, 53 Tex. 46. This part of the charge undertakes to apply the principles of law to the facts under the evidence, and the errors therein are therefore particularly calculated to be hurtful. It is also contended, under this assignment, that the rule of requiring of carriers of passengers the highest degree of care only applies to the construction of the railroad and its machinery, and the selection of its employes, and did not obtain in this case. *Thompson, in Carriers of Passengers* (page 209) says: "The rule imposing upon the carrier of passengers the highest degree of care has this limitation: It applies only to those means and measures of safety which the passenger, of necessity, must trust wholly to the carrier. It is, in general, applicable only to the period during which the carrier is, in a certain sense, the bailee of the person of the passenger." Under this statement of the law, the case of an injury to a passenger occurring by reason of the collision of trains would clearly require the application of the rule of the highest

degree of care. The statement of the law by Mr. Thompson, as above quoted, is approved in *Tex. & Pac. Ry. Co. v. Miller*, 79 Tex. 82 (83), 15 S. W. 264."

32—*Ill. Cent. R. R. Co. v. Becker*, 119 Ill. App. 221 (229, 230).

"The first paragraph of the third instruction tells the jury that in order to entitle plaintiff to recover it is only necessary for him to prove certain specified facts. And the second paragraph casts the burden upon appellee, not only of overthrowing appellee's *prima facie* case, and defeating his right to recover even nominal damages by showing that the falling of the said ventilator was not on account of the fault or negligence of appellant, which is proper; but it goes further and casts the burden upon appellant to mitigate appellee's claim of thirty thousand dollars damages, and allows him to do that in but one way, i. e., by showing that the falling of the said ventilator and injury to plaintiff thereby, was not on account of the fault or negligence of appellant. There is no element of punitive or exemplary damage involved in this case, and there is not in any true sense, any question of mitigation of damage involved. The law permits the recovery of only actual damages, under the facts of this case, and the burden was upon appellee to prove such damages by a preponderance of the evidence, and he had no right to recover any more than he did so prove. Appellant had the lawful right to contest the amount of appellee's damages, and to meet evidence with evidence as to the extent of appellee's injury, and the burden of proof in this respect was not cast upon him. The third instruction contains material error."

or the negligence of its agents or servants, to use the degree of care and caution above set forth, was the primary, direct, and proximate cause of the injury, although there may have been negligence also on the part of the plaintiff's wife, unless it appears that, under the circumstances of the case, she could, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendant or its agents, keeping in view the rule or standard hereinbefore laid down.<sup>33</sup>

(b) If the defendant was guilty of negligence to plaintiff's damage, and if plaintiff was guilty of negligence which contributed to the injury or damage, defendant would not be liable for such damage or injury, unless it had been shown that the negligence, if any, of defendant's servants, was the direct cause of the damage; nor would plaintiff be entitled to recover for injury or special damage on account of defendant's negligence (if any there was) if he or his wife could have avoided the consequences of such negligence by the exercise of ordinary care and prudence on their part; that is, such care and prudence as an ordinarily careful and prudent person would have used under the circumstances.<sup>34</sup>

§ 3992. **Voluntarily Riding in Exposed or Dangerous Place.** You are instructed that in case you find from the evidence that A. B. on the occasion in question, unnecessarily occupied a position of danger, he thereby assumed all the ordinary risks incident to railway travel; and, if you find that plaintiff fell from the car under such circumstances as stated, you will return a verdict for the defendant.<sup>35</sup>

§ 3993. **Getting Off a Moving Train.** (a) Alighting from a moving train is not an act of negligence unless the then conditions and circumstances make it so, of which you are to judge.<sup>36</sup>

33—Tex. & Pac. Ry. Co. v. Harrington, 93 S. W. 653, — Tex. Civ. App. —.

"The objections urged are that it assumes the injuries to have been proven, that it is confusing, meaningless, and unintelligible, and that it is erroneous, in that it instructs the jury that the plaintiff may recover notwithstanding the plaintiff's wife may have also been guilty of negligence.

"It is certainly true that the meaning of the court is not clearly expressed, and that the charge is easily susceptible of the construction that the plaintiff may recover notwithstanding the negligence of his wife. It was, perhaps, proper for the court, under the facts, to charge the jury that, though the plaintiff's wife may have been negligent, yet if her want of care did not contribute to her injuries she might still recover. But the charge is not so framed, and we think the assignment should be sustained."

34—St. Louis & S. W. Ry. Co. of Texas v. Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090.

"The charge is defective. In effect, it states that, if both the defendant and plaintiff were guilty of negligence, and the defendant's negligence was the proximate cause of the damage, plaintiff was entitled to recover. Under this charge the jury might well have inferred it should

find for plaintiff notwithstanding plaintiff's negligence contributed to the injury. As a proposition of law this is not correct. Whenever damages are sought to be recovered upon the ground of negligence, contributory negligence is a complete defense. If the charge had required the jury to find that the negligence of the plaintiff was not proximate, and therefore did not contribute to the injury, the principle of law announced would have been sound; but the form of the charge and the manner of announcing the principle would still have been objectionable under the facts of this case."

35—Gulf, C. & S. F. Ry. Co. v. Carter, — Tex. Civ. App. —, 71 S. W. 73 (75).

"This charge is an erroneous statement of the law, because it required a verdict for the defendant if A. B. unnecessarily occupied a position of danger, without reference to whether that fact contributed to bring about the accident. Even if A. B. was in a position of danger, he did not cease to be a passenger, and if he was injured by reason of the negligence of the railway company, and the fact that he was occupying a position of danger did not help to cause that result, he was entitled to recover."

36—Gulf, C. & S. F. Ry. Co. v. Booth, — Tex. Civ. App. —, 97 S. W. 128.



(b) You are further instructed that if you believe from the evidence that when the train approached H. the plaintiff was asleep, and as the train started out from H. and after the train was in motion, the plaintiff came out on the platform of the car to alight from the train, and he knew the train was in motion, and failed to exercise ordinary care in alighting from the train, and you find that the injury occurred by reason of plaintiff's want of ordinary care, and the injury was the direct and proximate cause of plaintiff's want of care, you will find for the defendant.<sup>37</sup>

**§ 3994. Age of Plaintiff to be Considered on Question of Negligence in Stepping from Moving Train.** You may take into consideration the age of the plaintiff in determining whether she was negligent in attempting to step from the train after the same was in motion at the time plaintiff stepped therefrom.<sup>38</sup>

**§ 3995. Effect of Direction of Carrier's Servant to Passenger to Get Off Moving Train.** If the jury believe from the evidence that the plaintiff attempted to get off the train at C. station while the train was moving, with or without a suggestion from defendant's employes for passengers to then alight at C. station, the jury will determine, from all the evidence as to the circumstances and conditions existing at the time, whether so alighting was an act which an ordinarily cautious and prudent person would or would not usually attempt under such or similar circumstances. The suggestion of defendant's employes, if any, for him to alight not alone justified him in alighting, but being a circumstance to be considered with all the other evidence to determine whether he was in the exercise of such care as above stated in attempting to alight from the train when he did. If upon the whole evidence you find that plaintiff in attempting to alight from the train when and in the manner that he attempted to alight, did not observe that degree of care which an ordinarily prudent and cautious person usually exercises under the same or similar circumstances to those then existing, and that such want of care either in the particulars alleged by the defendant or in any other particulars, as plaintiff pleads that the injuries occurred without negligence on his part, and that such want of care was the proximate

"While, standing alone, this charge might not have resulted in a reversal, it is not to be commended. Whether jumping from a moving train is negligence vel non is a question for the jury and a court should not declare that it is or is not negligence. *G. H. & S. A. Ry. Co. v. Smith*, 59 Tex. 406; *San A. & A. P. Ry. Co. v. Jackson*, — Tex. Civ. App. —, 85 S. W. 445. The jury might well have inferred from the charge that, as a matter of law, the general rule is that it is not negligence to get off a moving train, and that the circumstances must be produced to prove an exception. It tended to confuse, rather than guide, the jury to a correct verdict."

37—*Galveston, H. & S. A. Ry. Co. v. Hubbard*, — Tex. Civ. App. —, 70 S. W. 112.

"It has been held that in submitting contributory negligence in a

case of this nature it is error to charge that such negligence must have been the proximate cause of the injury. For this we need only cite *Gulf, C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Culpepper v. Railway Co.*, 90 Tex. 627, 40 S. W. 386. It was also objectionable, in our opinion, to have conditioned the finding of contributory negligence on the finding that plaintiff on a moving train knew that it was in motion."

38—*Hodges v. So. Pac. Co.*, 3 Cal. App. 307, 86 Pac. 620.

"This instruction, though perhaps not sufficient to reverse the case, is objectionable. The age of the plaintiff in the absence of any evidence as to her physical and mental condition, was hardly a circumstance tending to show negligence on her part; nor is there anything in the evidence to justify this instruction."

cause or contributed directly to the injury, if any, that he received, you will return a verdict for the defendant.<sup>39</sup>

§ 3996. **Jumping from a Moving Train When Suddenly Placed in a Perilous Position by Carrier.** (a) The court instructs the jury that a railroad company carrying passengers for hire is bound to use the utmost care and skill and if injuries are sustained by a passenger lawfully on the train, caused by the want of such care and skill, the company is liable in damages to such injured party.

(b) The court further instructs the jury that if they believe from the evidence that the train of defendant ran from the track as stated in the declaration, then such running off the track is *prima facie* evidence of negligence of the company, and the burden of disproving negligence is thrown upon the company.

(c) The court instructs the jury that the fact that the plaintiff jumped from the cars, while they were in motion, to the ground, and thus sustained injury complained of, will not deprive him of a right to recover against defendant, if the jury believe from the evidence that the accident alleged in the plaintiff's declaration had occurred, that the cars were running off the track, and that the plaintiff had reasonable ground to believe and did believe and had reason to believe that his life or limbs were in danger, and that it was necessary to leap from the cars in order to avoid the danger which threatened him.<sup>40</sup>

§ 3997. **Getting Off Train on Side Away from Station.** (a) If you find that the plaintiff was negligent in getting off on the side of the train away from the station, and that the proximate cause of the accident was such negligence on the part of the plaintiff in alighting upon the side of the train away from the station, then you should find for the defendant.

(b) If you believe from the evidence that the defendant had provided a safe landing place at B. station for the use of the passengers getting on or off the cars, it was the duty of any passenger knowing

39—Tex. & Pac. Ry. Co. v. Whiteley, — Tex. Civ. App. —, 96 S. W. 109.

"This charge was probably on the weight of the evidence in saying that the fact of such suggestion alone would not justify appellee in his course, when, as a matter of fact, the jury might have concluded that it would. The rule was properly stated in the latter half of the charge quoted, that 'upon the whole evidence' the jury would determine the question of appellee's contributory negligence. We find nothing in the charge which can be complained of."

40—Mobile & O. R. R. Co. v. Klein, 43 Ill. App. 63 (65, 66).

"These instructions assume to state the law which gives a right to the plaintiff to recover. It is held in Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695: 'While courts announcing the rule governing common carriers of persons have said that they must be held to the utmost degree of care, vigilance and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render its use impracticable, nor does it

require the utmost degree of care which the human mind is capable of inventing. \* \* \* But the rule does require that the highest degree of practicable care and diligence shall be adopted that is consistent with the mode of transportation used.' In Heazle v. T. B. & W. Ry. Co., 76 Ill. 501, an action brought by a passenger against the carrier, it is said: 'By special verdict the jury found that plaintiff was guilty of greater negligence than defendant. In what particular is not stated, but doubtless the jury believed the plaintiff, in the midst of the confusion of the sudden shock occasioned by the accident, left his seat, and on attempting to jump from the train, sustained injuries; just how the injury to plaintiff was produced no one can tell. He was found at the bottom of the culvert when the train was stopped, severely injured. How he got out of the car is one of the questions in the case. He must have gone out voluntarily either before or after the accident, or else he was thrown out by the violence of the motion of the cars. The latter theory is the one insisted upon by plaintiff, but this theory of the case seems almost incredible.'"

this, or who in the exercise of common prudence should know it, desiring to leave the train, to get off on such landing place; and if plaintiff disregarded this duty and attempted to get off on the other side of the train where there was no such landing place, and thereby cause or contributed to the injury, an action cannot be maintained, and you must find for the defendant. But whether or not the plaintiff was negligent in getting off the train on the side away from the depot is a question of fact, which you are to determine from all the evidence in the case.

(c) If you believe from the evidence that the trainmen were upon the side of the train next to the station for the purpose of ascertaining whether all passengers had alighted, and that plaintiff was aware of such fact, but disregarded the same and attempted to get off on the platform on the side where there were no trainmen, and thereby caused or contributed to the injury, you must find for the defendant.

(d) If you find that the plaintiff was acquainted with the location of the station, and the habits of the trainmen to get off on that side to ascertain by an examination of that side of the train whether the passengers had all alighted, and that the cause of the injury was the fact that the plaintiff alighted from the other side of the train, then you should find for the defendant.<sup>41</sup>

### TICKETS.

§ 3998. **Ticket as Contract.** The court instructs the jury that a ticket which a railroad company sells to a passenger is not a contract between the company and the purchaser, but is only a symbol thereof, and a piece of evidence showing what the real contract is.<sup>42</sup>

### EJECTION OF PASSENGERS.

§ 3999. **Carrier May Eject Person Refusing to Produce a Ticket or Pay Her Fare.** (a) Although you may believe from the evidence that defendant's conductor demanded plaintiff's ticket, and that when said demand was made plaintiff failed or refused to produce her ticket or pay her fare; yet if you further believe from the evidence that said conductor was insulting in manner, words, or tone towards her, or that he rudely and roughly grabbed her by the arm while she was sitting in her seat, or used more force than was necessary to put her from the train (if any force was necessary for that purpose), you should find for the plaintiff damages in any sum not exceeding \$3,000, the amount sued for.<sup>43</sup>

41—Hodges v. So. Pac. Co., 3 Cal. App. 307, 86 Pac. 620.

"These instructions are all erroneous. We are of opinion that, upon the circumstances shown by the evidence, the jury would have been justified in finding that the conductor was guilty of negligence in not observing the outer side of the train, and that it would have been hardly justified in finding the contrary. But here the question is taken from the jury who are instructed, in effect, that if they find in accordance with the defendant's theory they must find for the defendant."

42—Dixon v. New England R. R.

Co., 179 Mass. 242, 60 N. E. 581 (583).

"A railroad ticket may be more than a symbol, and it may not show what the real contract is."

43—Louisville & N. R. Co. v. Fowler, 29 Ky. L. 905, 96 S. W. 568 (570).

"This instruction was confusing and misleading. The jury should have been told that, under the proof, defendant had the right to eject plaintiff from its train, if she produced no ticket, or tendered no fare, and that in no event could she recover anything for being so ejected; but that her right of recovery, if



(b) The jury are instructed that, if the conductor refused to accept the ticket in question, and demanded a different ticket, or the payment of fare, and that, in consequence of his refusal to comply with this demand, the plaintiff was forcibly ejected from the cars of the defendant, such expulsion was unlawful, and entitled the plaintiff to recover, unless they shall further find that the plaintiff was guilty of such misconduct as to justify his expulsion from said cars.<sup>44</sup>

**§ 4000. Injuries to Passenger Brought on by Refusal to Leave Train When Ordered by Conductor.** If the jury believe from the evidence that, after being requested to pay additional fare from S. to P. or leave the car of defendant company, the plaintiff refused to do either, and thereupon invited a conflict, you are instructed that if the conductor thereupon did eject the plaintiff, using no more force than was necessary to eject him, the defendant Railway Company are not liable for any damages resulting from such ejection.<sup>45</sup>

**§ 4001. Ejection of Passenger from Train While in Motion.** The court instructs the jury that unless you find, by a fair preponderance

any, was based upon some injury received by her at the hands of the conductor while he was expelling her from the train, or because of some insult or indignity offered her by the conductor while being expelled from the train."

44—Baltimore, C. & A. Ry. Co. v. Kirby, 88 Md. 409, 41 Atl. 777 (778).

"Now, the plaintiff's prayer which was granted, is based entirely upon the plaintiff's evidence, and altogether ignores that of the defendant, except insofar as the general proviso referring to plaintiff's misconduct may be supposed to embrace it. But, assuming that the words constituting the proviso, viz., 'unless they (the jury) shall further find the plaintiff was guilty of such misconduct as to justify his expulsion,' etc., were intended to give the defendant the benefit of the facts offered in its defense, we think the jury should have been informed fully in the same instruction what those facts were. The defendant was entitled to more than such a proviso, and the jury should have been instructed that, although they should find that the conductor had refused the ticket in the front car, yet if he afterwards, and before ejecting the plaintiff, demanded the ticket, or the payment of the fare, and that the plaintiff refused both demands, and that thereupon he ejected the plaintiff because he would do nothing, there could be no recovery. It is true that by the first prayer of the defendant the jury were instructed to this effect. But we think the first instruction was calculated to mislead the jury. They might well conclude, under this instruction, that if the conductor had once refused to take the plaintiff's ticket, the plaintiff was thereafter justified in refusing to give it to the conductor, although the latter requested him so to do, or to pay the fare. But the granted prayer is defective, we think, not only because it entirely

ignores the defendant's proof. As has often been said, to sustain such a prayer, 'there must not only be proof to support its hypothesis, but the facts stated must of themselves, constitute a complete bar to the action, notwithstanding the truth of all the other facts in the case.' Merchant & M. Transportation Co. v. Story, 50 Md. 15; Caledonian Ins. Co. v. Traub, 80 Md. 223, 30 Atl. 904; 2 Poe, Pl. & Prac., §§ 301, 301a, etc. And finally, it was error to submit to the jury, as this prayer does, the question as to what, and how much, misconduct on the part of the plaintiff constituted a justification for his expulsion from the cars. It was the duty of the court to tell the jury what facts disclosed by the proof would constitute such a justification, and it was the province of the jury to determine whether such facts were established by the proof."

45—Peoria & P. Term. Ry. Co. v. Hoerr, 120 Ill. App. 65 (68).

"The court modified this instruction by adding the words, 'unless said plaintiff was ticketed from Western avenue to Pekin,' and gave it as so modified. The instruction was erroneous as offered and was also erroneous as modified and given. As offered it authorized the jury to find appellant not guilty even though appellee had a ticket from S. to P., and was, therefore, wrongfully ejected from the car. In such case appellee was entitled to recover damages for the indignity put upon him by being compelled to leave the car, and was also entitled to recover the amount of his fare from S. to P. As modified and given it was erroneous, because it was calculated to and probably did lead the jury, upon finding that appellee was ticketed from R. to P., to award him full damages for all injuries sustained, even though such injuries were the result of a conflict with the conductor, invited by appellee."

of evidence, and of all the evidence, in the case, that the plaintiff was shoved or pushed, or in some way forcibly ejected, from the train while it was in motion, as alleged in his declaration and claimed in his testimony, your verdict must be for the defendant.<sup>46</sup>

§ 4002. **Ejection of Passenger by Subordinate Employee.** The court instructs you that, if you believe, from the evidence, that the injury complained of was wantonly and willfully inflicted, as charged in the declaration, then the plaintiff will be entitled to recover, although you may believe from the evidence that plaintiff was guilty of some negligence.<sup>47</sup>

### SLEEPING CAR COMPANIES.

§ 4003. **Distinguishing Between Places of Safety in Berth for Deposit of Valuables.** (a) The court charges the jury that the plaintiff himself in taking the journey from M. to N. was bound to take such care and precaution for the safety of his property as an ordinary, reasonable man would take, and if they find from the evidence that plaintiff placed his pocket book in a place that was obviously more dangerous than some other place nearer his person, or in such a place that his companion on arising was liable to let the pocket book fall to the floor, or to any other still more dangerous and exposed places, and that such negligence contributed proximately to the loss complained of, they must find for the defendant.

(b) If the jury believe from the evidence that the plaintiff on retiring placed his pocket book in a place which was dangerous, and from which it was likely that the same would be lost, or stolen, when he could have placed it in a safer place, then he was guilty of contributory negligence, and cannot recover in this case.<sup>48</sup>

46—*Brassell v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 101 Mich. 5, 59 N. W. 426 (427).

"The jury should not, in a case of this character, be left, as they were under this instruction, to find that the plaintiff was 'in some way forcibly ejected from the train while it was in motion,' other than that shown by the evidence, and alleged in the declaration. He had stated how he was ejected, viz., by being pushed or shoved off while the train was in motion. The instruction should have limited the jury to the precise manner in which the act was committed."

47—III. Cent. R. R. Co. v. King, 179 Ill. 91 (95), 53 N. E. 552, 70 Am. St. 93.

"The law cannot assume, at least as to a subordinate employee on a train who is not entrusted with the general management and control of it, that he has control over passengers or persons attempting to ride, or that he is entrusted by his employer with authority in respect to them or to eject them, and it was necessary to make the proof. (3 Elliott on Railroads, § 1255; *Farber v. Mo. Pac. R. R. Co.*, 116 Mo. 181, 22 S. W. 631, 20 L. R. A. 350; *Corcoran v. Concord & M. R. R. Co.*, 6 C. C. A. 231, 56 Fed. 1014.) The requirement of such proof was omit-

ted from the statement of what would entitle the plaintiff to recover in the instruction."

48—*Pullman Palace-Car Co. v. Adams*, 120 Ala. 581, 24 So. 921 (924, 926), 74 Am. St. 53, 45 L. R. A. 767.

"The first charge seems to require that plaintiff should have placed his vest in the safest place in his berth and certainly distinguishes between places of safety in the berth, assuming that by depositing it in the hammock, it caused the pocket book to be liable to fall to the floor or to some other more dangerous and exposed place by the act of A., of which there is no proof; and makes the negligence of A. the negligence of plaintiff. If a charge as to such negligence could be considered at all, it should have postulated the loss as wholly attributable to A.'s negligence, and not to a mere liability of loss arising from his acts. Moreover, for the purposes of another trial, as the cause must be reversed, it is well to add, that the demurrer to the fourth plea was, in our judgment, improperly overruled, and that plaintiff was entitled to the exercise of reasonable care on the part of the company to prevent the theft of his pocket book, placed anywhere in his berth. The law draws no distinction as to places of safety in the berth, and as for this, the

(c) The court charges the jury that if under the evidence in this case the hammock in which plaintiff says he put his vest was not the safest place in which he could have put said vest, in said berth, and if they believe from the evidence that his loss occurred by reason of his not putting his vest in the safest place available, in the berth, plaintiff cannot recover.<sup>49</sup>

§ 4004. **Taking Ring Off Finger and Placing it in Pocket Book.** If they (the jury) find from the evidence that the ring could be worn in the usual manner, the defendant (plaintiff) was guilty of contributory negligence in not keeping it on his finger, and there can be no recovery for its loss.<sup>50</sup>

§ 4005. **Responsibility of Plaintiff for Negligence of Person Occupying Berth With Him.** (a) If the jury believe from the evidence that the loss of plaintiff's property was the result of negligence on the part of plaintiff or of A., who occupied the berth with plaintiff, then the plaintiff cannot recover in this case.

(b) If the jury believe from the evidence that the loss of the money and rings was occasioned by plaintiff's companion's (A.'s) negligence in allowing the pocket book to fall out into the aisle of the car, they must find for the defendant.

(c) If the jury believe from the evidence that the pocket book was lost or stolen by reason of A.'s negligence in taking the vest out of the hammock in such manner as to allow the pocket book to fall on the floor and thereby become exposed, they must find for the defendant.<sup>51</sup>

§ 4006. **Porter Going to Sleep—Third Person Walking Up and Down Aisle.** (a) There is no evidence in this case that the porter went to sleep after the train reached M., and, if the jury believe from the evidence that the pocketbook was not lost or stolen until after the train reached M., they must find for the defendant.<sup>52</sup>

hammock must be regarded as safe as any other place therein for the deposit of the valuables of the passenger while asleep.

"The second charge, without reference to any other fault, bases the instruction on the postulate that plaintiff was guilty of contributory negligence alone on the ground of his having placed his purse in a dangerous place, when he could have placed it in a safer one, and does not hypothesize that the pocket book was lost on account of such contributory negligence. We may add, however, as we have said in another connection, it was entitled to protection anywhere in the berth."

49—Pullman Palace-Car Co. v. Adams, *supra*.

"There was no error in refusing this charge for defendant. This charge was not within the plea numbered 4 on which plaintiff by the ruling of the court was forced to take issue. It may be difficult for a passenger to tell where is the safest place in his berth to place his valuables, to keep them from being stolen. The plea under which the charge was requested does not postulate that it was plaintiff's duty to put his purse in the safest place, nor could any such duty be properly required of him."

50—Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921 (927), 74 Am. St. 53, 45 L. R. A. 767.

"The proposition asserted is, if one wears a ring on a sleeper, which he had been accustomed to wearing on his finger, and he should take it off at night, and put it in his pocket book, and the book containing the ring should be stolen from his berth, that this would be contributory negligence on his part, disentitling him to recover, although the theft occurred from the negligence of the defendant—a proposition finding no support in law or reason."

51—Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921 (923, 926), 74 Am. St. 53, 45 L. R. A. 767.

"These charges were properly refused. They each contain the instruction for a verdict for defendant, if the loss of plaintiff's property was the result of the negligence of A., a third person, who happened to be traveling with and shared the berth of plaintiff. From the evidence, we fail to see in what A. was negligent, and if he was, the plaintiff certainly would not be responsible for it."

52—Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921 (923, 926), 74 Am. St. 53, 45 L. R. A. 767.



(b) Under the evidence in this case, A. was awake in the berth occupied by the plaintiff, and walking up and down the aisle, until the train reached M., and, therefore, the plaintiff's property could not have been stolen without A.'s knowledge before reaching M.<sup>53</sup>

### BURDEN OF PROOF.

§ 4007. **Burden of Proof as to Negligence.** (a) You are instructed that under the issues submitted herein the burden of proof is upon the plaintiff to show by a fair preponderance of the testimony the negligence of the defendants, and that she was injured as alleged. If this has been shown to your satisfaction by a fair preponderance of testimony, then the burden of proof shifts to the defendants, and they must show by the evidence to your satisfaction that the plaintiff was guilty of contributory negligence as herein-after given you in charge.<sup>54</sup>

(b) If the court sitting as a jury believes from the evidence that the deceased was killed whilst a passenger on a train on a leased road operated by the defendant, the fact of such injury is *prima facie* evidence of the negligence on the part of the defendant, throwing upon it the burden of rebutting the presumption by showing there was no negligence on its part, or that the accident could have been avoided by the exercise of ordinary care on the part of the deceased.<sup>55</sup>

"This is an improper instruction. The porter may not have gone to sleep after the train left Mobile, and it would not follow he may not have been guilty of other negligence, which the charge does not hypothesize.

53—Ibid. "Though A. may have been awake until the train reached Mobile, there is no evidence that he was on watch, or ought to have been, to protect plaintiff's property. Nor does it follow, because he walked the aisle until he reached Mobile, that plaintiff's purse could not have been stolen. In walking, his back was turned from plaintiff's berth, as much as it was toward it. The charge was properly refused."

54—Gulf, C. & S. F. Ry. Co. v. Condra, 36 Tex. Civ. App. 556, 82 S. W. 528 (529).

"This charge is clearly erroneous, in that it required of the defendant a higher degree of proof in the establishment of its defense of want of ordinary care on the part of plaintiff in the treatment of her injury than the law demands. Baines v. Ullmann, 71 Tex. 537, 9 S. W. 543; Emerson v. Mills, 83 Tex. 385, 18 S. W. 805; Bluntzer v. Dewees & Hinkle, 79 Tex. 272, 15 S. W. 29; Mo. K. & T. Ry. Co. v. Kemp, — Tex. Civ. App. —, 30 S. W. 1117; Reliance Lumber Co. v. White, — Tex. Civ. App. —, 38 S. W. 391.

"While it may be technically inaccurate to designate plaintiff's want of care in the treatment of her in-

jury as contributory negligence, both the pleading of defendant, and the charge of the court refer to it as such, and the jury must have understood the paragraph of the charge above quoted as applying to the issue of plaintiff's care in the treatment of her arm after it was injured. We think the evidence clearly raises the issue of whether the damages claimed by plaintiff for the permanent injury of her arm was not proximately due to her own want of care in failing to have the injury properly treated, and the charge of the court to the effect that this defense must be proved to the satisfaction of the jury before they would be authorized to find for the defendant is such affirmative error as requires a reversal of the judgment of the court below."

55—Western Md. R. Co. v. State, 95 Md. 637, 53 Atl. 969 (970, 974).

"In this instruction it was ruled that the fact that S. was killed while a passenger was *prima facie* evidence of negligence on the part of the defendant, which threw upon it the burden of rebutting the presumption by showing that there had been no negligence on its part. This was erroneous. The mere fact that he was killed while a passenger, without any reference as to how he was killed, furnished no ground for a presumption of negligence. The fact that he was a passenger, and the fact that he was killed while a passenger, justified no inference of any kind as to what caused his

§ 4008. **Burden of Proof Where Passenger is Injured by Flying Cinders.** If you believe from the evidence that sparks of fire and cinders escaped from the defendant's engine and got into and injured plaintiff's eyes, as alleged, then such facts constitute a *prima facie* case of negligence on the part of defendant, and in the absence of rebutting evidence sufficient to overcome such *prima facie* case of negligence will render the defendant liable for the injury occasioned thereby.<sup>56</sup>

## ELEVATORS.

§ 4009. **Injury to Passenger Through Fall of Elevator.** (a) The jury are instructed that, if you believe from the evidence that the plaintiff was injured by the falling of the elevator in question, in which he was a passenger, and was thereby injured without fault on

death, and therefore did not warrant the conclusion that his death had been due to the defendant's negligence. This is illustrated in Penn. R. R. Co. v. MacKinney, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. 601, where it is said: 'A passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies, also, that it was caused by a crash in collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises,—not, however, from the fact that the leg was broken, but from the circumstances attending the fact.' Benedick v. Potts, 88 Md. 56, 57, 40 Atl. 1067, 41 L. R. A. 478."

56—St. Louis S. W. Ry. Co. of Texas v. Parks, 97 Tex. 131, 76 S. W. 740 (741).

"In the case of the San Antonio & A. P. Ry. Co. v. Robinson, 73 Tex. 277, 11 S. W. 327, it was distinctly ruled that such charge was erroneous. There are expressions in the opinion in that case which do not meet our approval, yet we think the decision was correct. In this class of cases, where there is a plea of contributory negligence, or other plea which denies liability, although the defendant may have been negligent, when the primary negligence is proved, then the burden is upon the defendant to establish such special plea by a preponderance of evidence. But upon the primary question of the defendant's negligence in the absence of a statute which makes the act or omission complained of negligence per se, the burden never shifts but is upon the plaintiff throughout the case. This is but the application of a general rule. In the case of Clark v. Hills, 67 Tex. 141, 2 S. W. 356, Chief Justice Willie says: 'The general rule is that the burden of proof remains on a party offering a fact in support of his case, and does not change in any aspect of the cause; though the

weight of evidence may shift from side to side, according to the nature and strength of the proof offered in support or denial of the main fact to be established. (Citing Central Bridge Corporation v. Butler, 2 Gray 132; Blanchard v. Young, 11 Cush. 345; Spaulding v. Hood, 8 Cush. 605.) Thus in a suit upon a note, the burden of proving the consideration of the note was held to be on the plaintiff, and that he made a *prima facie* case by putting the note in evidence, which purported to have been given for value received; but it was further held that this did not shift the burden of proof as to consideration to the defendant, but the plaintiff retained it throughout the investigation of that fact. (Citing Burnham v. Allen, 1 Gray, 496; Delano v. Bartlett, 6 Cush. 364.) *Prima facie* evidence is given of the execution and delivery of a deed; contrary evidence is given on the other side, tending to negative the fact of such delivery. This latter is met by other evidence, and so on through a long inquiry. The burden of proof has not shifted, though the weight of evidence may have shifted frequently. It rests on the party who originally took it.' (Citing Powers v. Russell, 13 Pick. 77.)

"The principle has been applied in numerous decisions in this court. Tex. Cent. Ry. Co. v. Burnett, 80 Tex. 536, 16 S. W. 320; Costley v. Railway Co., 70 Tex. 112, 8 S. W. 114; Stooksbury v. Swan, 85 Tex. 572, 22 S. W. 963; Heldt v. Webster, 60 Tex. 207. In the case last cited Justice Slayton announces the principle in the following language: 'Any charge as to a presumption arising from a given state of facts, unless in those cases in which the law raises a conclusive presumption in the nature of things, is a charge upon the weight of evidence, and although other parts of the charge given may have been correct, such an error will require a reversal of the judgment; and the fact that this court might be of the opinion that the evidence in the case justified the verdict found would not change the

his part, he thereby makes out a *prima facie* case of negligence against such of the defendants as the jury may believe from the evidence were operating or in control of the elevator, and places upon them the burden of proving by a preponderance of the evidence that the accident resulted from a cause which could not have been foreseen or guarded against by the highest degree of human care, skill and foresight practicable.<sup>57</sup>

(b) The court further instructs the jury that the plaintiff has made out a *prima facie* case when he has proved, if the jury believe from the evidence that he has so proved, that at the time of the accident he was in the exercise of due and ordinary care and without any fault on his part was injured by the falling of the elevator cab in question; that is to say, if the jury believe from the evidence that the defendants were in possession of and operating the elevator in

rule. The defendant was entitled to have the case submitted to the jury without any intimation from the court as to the relative force of a given fact. (We use the word 'relative' as found in the recorded opinion instead of 'putative' as shown by the published official report.) Clearly, an injury to a passenger on a railroad resulting from a derailment of a train or the abnormal operation of the machinery gives rise to an inference of negligence on the part of the company which may authorize the jury to so find; and it may be that in such a case, where the defendant has offered no evidence to rebut the inference, the court would be warranted in instructing the jury to find for the plaintiff upon the issue. But where the defendant company has introduced evidence which tends to show that it has used all proper care to avoid such accident, a charge which instructs the jury that the fact of the injury is *prima facie* evidence of negligence, which the defendant is called upon to rebut by showing that it has used such care, gives a preponderating effect to the inference of negligence arising from the fact of the injury shifts the burden of proof, and is a charge upon the weight of the evidence. We are not unmindful that in many jurisdictions, and notably in the Supreme Court of the United States, similar charges have been upheld. *Stokes v. Saltonstall*, *supra*; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458. In the case last cited it was held error to refuse to give a like instruction. Presumably in most of the jurisdictions where it is so held there exists no statute which, like ours, declares that the trial judge in his instructions to the jury 'shall not charge or comment upon the weight of the evidence.' Rev. St. 1895, art. 1317. It is due to the learned judge who tried the case to say that in cases of the destruction of grass or other property along the line of a railroad by fire claimed to have been caused by sparks from a passing en-

gine of the company, charges in effect the same as that complained of here could have been held to be erroneous. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563, and other cases there cited. But in the opinion in the case we here cite these are recognized as exceptional cases, and we are not inclined to extend the rule beyond the letter of these decisions."

57—*Field v. French*, 80 Ill. App. 78 (86).

"This instruction for the plaintiff has the same element last referred to in the fourth, and besides requires the defendant to prove 'that the accident resulted from a cause which could not have been foreseen or guarded against by the highest degree of human care, skill and forethought practicable.' As we have seen, the rule is that the carrier must exercise the highest degree of human care, vigilance and foresight which is reasonable under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accident, etc. *Chi. & A. R. R. Co. v. Byrum*, 153 Ill. 135, 38 N. E. 578. To the same effect are *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40 (48), 43 N. E. 809; *Chi. & A. R. R. Co. v. Pillsbury*, 123 Ill. 9-21, 14 N. E. 22; *Chi. & A. R. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117, and cases cited; *Penn. Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713. In the *Kerr* case, a similar instruction, which omitted the modification of the phrase 'practical operation of its roads' by the word reasonably, was condemned, and the court say: 'A railroad company doing all that human care, vigilance and foresight can do consistently with the practical operation of its road in providing a safe road-bed, track, etc., could be required to make it of solid masonry with ties of iron or stone, but ordinarily it would be unreasonable to require it to do so.' We think this instruction should have been modified at least by the insertion of the word reasonably before the word practicable."



question as alleged in the declaration at the time of the accident, and that the plaintiff without any fault on his part entered said elevator cab, and that, while standing in said cab in the exercise of ordinary care for his own safety, the said cab when descending from one of the upper stories of said building precipitated or dropped to the bottom of the elevator shaft, striking the bottom thereof with such force as to injure the plaintiff in the manner described by the evidence, then the jury are instructed that the burden of proof is upon the said defendants to show, if they can, by a preponderance of the evidence that said accident was without any fault or negligence on their part.<sup>58</sup>

(c) The court further instructs the jury that, if they believe from the evidence that at the time of the accident in question the elevator was being used for the carriage of persons to and from the different floors in the said building occupied by the firm of M. & Co., then the law is that all persons operating or responsible for the operation of said elevator are liable to the same extent as any carriers of passengers, and, as such, it was their duty to do all that human care and vigilance and foresight could reasonably do under the circumstances and in view of the character and mode of conveyance adopted reasonably to guard against accidents and consequential injuries; that the law is that, while a carrier of passengers in elevators like the one in question is not an insurer of the absolute safety of such passengers, nevertheless a carrier of passengers does in legal contemplation undertake to exercise the highest degree of care to secure the safety of passengers, and as such is responsible for the slightest negligence resulting in injury to a passenger, if the passenger at the time of the injury is in the exercise of ordinary care for his own safety; and the jury are further instructed that the care that is required by law of all carriers of passengers applies to the safe and the proper construction and equipment of all of the machinery and appliances used in connection with the operation of the particular conveyance adopted.<sup>59</sup>

58—Field v. French, *supra*.

"This instruction in the first part states the rule as to the care to be exercised by the carrier properly, and, in the latter part of the instruction, the court tells the jury that the carrier undertakes to exercise 'the highest degree of care to secure the safety of passengers, and as such is responsible for the slightest negligence resulting in injury to the passenger.' This, we think, was contradictory, and calculated to mislead the jury. The highest degree of care without any qualification may be very different from the highest degree of care which is reasonable under the circumstances and in view of the character of the conveyance."

59—Field v. French, *supra*.

"This instruction for appellee is improper, because, while all the counts of the declaration allege specific grounds of negligence, this instruction says that, when the plaintiff has made a *prima facie* case, 'the burden of proof is upon the defendants to show, if they can, by a preponderance of the evidence, that said accident was without any fault or negligence on their part.'

The plaintiff's right to recover must be confined to the grounds stated in his declaration, but this instruction only requires plaintiff to make out a *prima facie* case, and then says in effect defendants must meet all possible cases which would entitle the plaintiff to recover, without reference to whether he alleged or proved them. This is not the law. *Chi. & A. R. R. Co. v. Rayburn*, 153 Ill. 290, 38 N. E. 558; *West Chi. St. R. R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140; *Chi. B. & Q. R. R. Co. v. Levy*, 160 Ill. 385, 43 N. E. 357, and cases cited. \* \* \* There is a question as to whether this instruction is erroneous because it requires the defendants, after the plaintiff has made out a *prima facie* case, to prove their defense by a preponderance of the evidence. It does not appear to have been directly decided in this state. In civil cases, unless the state of the pleadings require it, if the defendant has pleaded payment, release, set off, or justification, the defense only has to meet the plaintiff's case, not by a preponderance of evidence, but by evidence which will evenly balance the plaintiff's evidence. The general rule is

that, when the plaintiff makes affirmative allegations as in this case of negligence of the defendants, and the defendants plead the general issue, the burden is on the plaintiff all through the case to establish his case,—that is, prove the specific negligence alleged by a preponderance of the evidence, and he cannot recover if the defendants' evidence is such as to evenly balance that of the plaintiff. 1 Jones on Evidence, §§ 174-176, 181 & 182; 1 Wharton on Evidence, § 357; 5 Am. & Eng. Encyc. of Law, 22; Heinemann v. Heard, 62 N. Y. 455; Scott v. Wood, 81 Cal. 400, 22 Pac. 871. In speaking of the burden of proof being shifted when the plaintiff has made a prima facie case, Mr. Jones (1 Jones on Evidence, § 175) says: 'All that is meant by this is that there is a necessity of evidence to answer the prima facie case or it will prevail; the burden of maintaining the affirmative of the issue involved in an action is upon the party alleging

the fact which constitutes the issue; this burden remains throughout the trial.' In the Scott case, supra, the Supreme Court of California says: 'It is by no means safe to infer that because a party has the burden of meeting a prima facie case therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him.' And further says, in speaking of the burden of proof being shifted to the defendant and back again to the plaintiff: 'The two burdens are different things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is placed by the pleadings, that is to say, with the party who has the affirmative of the issue.' We are inclined to the view that the instruction would be a better statement of the law in this respect if the words 'a preponderance of' were omitted."

## CHAPTER CLII.

### NEGLIGENCE—RAILROADS.

See Approved Instructions, Chapter LXIX, Vol. II.

#### OPERATION AND MANAGEMENT OF TRAINS.

- § 4010. Backing train through populous part of town.
- § 4011. Engine following train at short distance.
- § 4012. Duty of railroad company to use reasonable care to avoid injuring person on track.
- § 4013. Care due by railroad companies at places other than public crossing or usual and customary crossings.
- § 4014. Degree of care due towards child on track.
- § 4015. Duty to helpless person on track.
- § 4016. When fact that engineer saw person on track may be inferred from surrounding circumstances.

#### TRESPASSERS.

- § 4017. Assuming one a trespasser.
- § 4018. Liability as to trespassers.
- § 4019. Wanton and willful injury to trespasser by brakeman.
- § 4020. Ejection of trespasser from moving train.
- § 4021. Injury to trespasser while getting off moving train.

#### LICENSEES.

- § 4022. Duty to maintain lookout for licensees on track.
- § 4023. Rights of licensees.

#### INJURIES AT HIGHWAY CROSSINGS.

- § 4024. Highway crossings must be put in safe condition.
- § 4025. Reasonable care required at highway crossings.
- § 4026. Necessity of greater caution when large number of persons are crossing daily.
- § 4027. Crossing made public by customary use.
- § 4028. When defendant guilty of negligence as "charged in the declaration."
- § 4029. Condition of crossing as enhancing danger of collisions and accidents.
- § 4030. Rights and liabilities of railroad companies and travelers are equal and mutual.

- § 4031. Duty of company's servant to keep lookout for party at crossings.
- § 4032. Obstructing view of track at crossing by line of box cars.
- § 4033. Liability of railroad for frightening horses.
- § 4034. Frightening horses through usual and ordinary noise.
- § 4035. Effect of observance of ordinances of municipalities.
- § 4036. Running train at greater speed than that allowed by ordinance or statute.
- § 4037. Speed of train when no ordinance exists.
- § 4038. Duty to ring bell.
- § 4039. When failure to ring bell is excused.
- § 4040. Whistle need not be blown, nor bell rung at same time.
- § 4041. Whistle need not be blown nor bell rung, continuously.
- § 4042. When suit based on failure to give signals, recovery must be for such omission.
- § 4043. Consideration of evidence as to sounding of whistle or ringing of bell.
- § 4044. Lulling plaintiff into feeling of security by failure to give signals.
- § 4045. Obstruction of view by bushes and grass at private crossing.
- § 4046. When flagman reasonably necessary for safety at crossing.
- § 4047. Sufficiency of watchman standing at crossing as warning not to cross.
- § 4048. Effect of flagman's signal to cross.
- § 4049. Effect of flagman's signal not to cross.
- § 4050. Making "flying switch" at crossing.
- § 4051. Failure of defendant's servants to avoid threatened injury when possible.
- § 4052. Care required of travelers.
- § 4053. Driving across track with baby in arms.
- § 4054. Plaintiff's knowledge of dangerous character of crossing.



- § 4055. Duty of person crossing tracks to stop, look and listen.
  - § 4056. Failure of person at crossing to stop, look, and listen.
  - § 4057. When duty to stop, look, and listen is excused.
  - § 4058. Attempting to cross although view is obstructed.
  - § 4059. Approaching railroad crossing at a trot.
  - § 4060. Failure to hear noise of approaching train.
  - § 4061. Right of railroad company's servants to assume that driver of vehicle will remain at a safe distance.
  - § 4062. When negligence of driver of plaintiff's vehicle in crossing track will prevent recovery.
  - § 4063. Plaintiff must exercise ordinary care for his own safety although another person is driving.
  - § 4064. When no eye witness to killing of person by railroad train presumption of due care by deceased usually exists.
  - § 4065. Liability of railroad company for failure to restore highway to its former condition.
- CONTRIBUTORY NEGLIGENCE (SEE ALSO INJURIES AT HIGHWAY CROSSINGS).
- § 4066. Plaintiff must exercise ordinary care.
  - § 4067. Plaintiff must exercise reasonable care and prudence.
  - § 4068. Rashness in rescue of child.
  - § 4069. Contributory negligence of person injured at crossing.
  - § 4070. Standing on track—Duty to look and listen.
  - § 4071. Contributory negligence — Failure of plaintiff to discover approaching train.
  - § 4072. Driving across track in a reckless manner.
  - § 4073. Contributory negligence of plaintiff no defense if defendant could have avoided injury after discovering plaintiff's peril.
  - § 4074. Turning back toward track on sudden approach of train.
  - § 4075. Intoxication as contributory negligence.
  - § 4076. Effect of plaintiff's deafness —Vigilance in approaching crossing.
  - § 4077. Wanton and reckless conduct of plaintiff does not give right to kill him.
  - § 4078. Rule that burden of proof as to contributory negligence is on defendant.

- § 4079. Imputed negligence—Parent and child.
- § 4080. Comparative negligence.

FENCING TRACK.

- § 4081. Failure to comply with law negligence per se.
- § 4082. Obligation of railroad company to fence right of way.
- § 4083. Burden of proof on railroad to observe "all statutory precautions.
- § 4084. Stock entering at point where railroad not required to fence.
- § 4085. Examination of defective gate by jury—Duty of plaintiff to look gate.
- § 4086. Cattle guards.

ACTIONS FOR KILLING LIVE STOCK—  
CARE DUE IN OPERATION OF TRAINS.

- § 4087. Actions for killing live stock —Care due in operation of trains.
- § 4088. Failure of engineer to see animals on track when he should, under the circumstances.
- § 4089. Duty to avoid injury after discovering position of live stock.
- § 4090. Injury to stock at crossing.
- § 4091. Injury to mule at public crossing.
- § 4092. Animals coming on track so suddenly that accident cannot be prevented.
- § 4093. Rate of speed.
- § 4094. Injury to live stock through unsuitable cattle-guards.
- § 4095. Burden of proof to show negligence in killing live stock on plaintiff.

INJURIES BY FIRE.

- § 4096. Elements constituting negligence in injuries by fire.
- § 4097. No recovery against railroads when origin of fire left to guess or conjecture.
- § 4098. Rule in Texas as to instruction of juries in actions for injuries by fire.
- § 4099. Must provide most improved apparatus to prevent escape of fire.
- § 4100. Effect of using proper spark arrester.
- § 4101. Production of screen for inspection of jury.
- § 4102. Injury to cotton by fire—Engine running at excessive speed.
- § 4103. Dry weeds or grass.
- § 4104. Precautions to be taken by railroad company in especially dry or windy weather.

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| <p>§ 4105. Sparks of unusual size and number carried an unusual distance.</p> <p>§ 4106. Duty in unusual and extraordinary weather.</p> <p>§ 4107. Reasonable care and diligence only required by the company.</p> <p>§ 4108. Power of railway company to foresee consequences of fire.</p> <p>§ 4109. Burden of proof.</p> <p>§ 4110. Degree of care required of landowner.</p> <p>§ 4111. Contributory negligence of landowner.</p> | <p>§ 4112. Right of adjoining landowner to stack straw near right of way.</p> <p>§ 4113. Dedications of lands for use of railroads.</p> <p style="text-align: center;">SWITCHES AND FARM CROSSINGS.</p> <p>§ 4114. Defective bridge at farm crossing.</p> <p style="text-align: center;">INJURIES TO ADJACENT LAND AND PROPERTIES.</p> <p>§ 4115. Injury to abutting property by construction of railroads.</p> <p>§ 4116. Injury to adjoining land by noise, confusion and maintenance by unsightly structures.</p> |
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### OPERATION AND MANAGEMENT OF TRAIN.

§ 4010. **Backing Train Through Populous Part of Town.** A railroad company which runs a train of cars backward along its track, on a dark night, through a populous part of the town, and where its said track has been for a long time used by the public, with its knowledge and acquiescence, as a walking place, is under a duty to use due care and take due precaution to prevent injuries to persons who may be on its side track either by ringing the bell or sounding the whistle, or displaying rear-end lights, or giving due notice or warning in some other reasonable or proper manner of the approach of said train.<sup>1</sup>

§ 4011. **Engine Following Train at Short Distance.** It is for you to determine, under all the circumstances surrounding and conditions as they existed at and near the crossing, the building and other obstructions that you may find existed, the fact that the P. M. R. R. was in close proximity, under all the facts in the case, whether the defendant railroad was exercising such ordinary and reasonable care and caution as ordinary prudence would dictate in running its engine and tender, backing the same in close proximity to the freight train that had just passed B. street, going in the same direction and on the same track. If you find that the defendant railroad was not exercising such ordinary and reasonable care and caution in its conduct as ordinary prudence would dictate, then I charge you that the defendant railroad

1—Jones v. Charleston & W. C. Ry. Co., 61 S. C. 556, 39 S. E. 758 (760).

"It is objected that this charge was (1) a charge on the facts, in violation of the constitution; and (2) that it undertook to instruct the jury what acts a railroad should do under the conditions in order to exercise due care. It was disputed by the defendant company that the place of the accident was in a populous part of the city of Anderson, where its track had been used by the public, with its knowledge and acquiescence. Therefore to state such fact other than in a hypothetical way as a basis for declaring its legal effect was an improper reference to the testimony, as it was

likely to convey to the mind of the jury that the court assumed as true what the defendant disputed. Norris v. Clinkscales, 47 S. C. 523, 25 S. E. 797. Furthermore, as shown in China v. City of Sumter, 51 S. C. 460, 29 S. E. 206, negligence is a mixed question of law and fact, and while the court may define negligence, it is for the jury to say whether the facts proved are sufficient to show negligence; hence it is improper for the court, and especially when the facts are in dispute, to charge the jury that certain facts show negligence. For the same reason, it would be improper for the court to state to the jury that certain facts in evidence would negative negligence."

would be guilty of negligence, and the plaintiff would be entitled to a judgment, if you find that such negligence of the railroad was the proximate cause of injury, provided that you further find that Mr. N. was exercising such ordinary and reasonable care and caution as an ordinarily prudent man would exercise under the same circumstances, surroundings and conditions as you will find they appeared to him at the time. The court instructs the jury that the defendant was not required to have a flagman stationed on B. Street where the accident happened, and the plaintiff cannot recover in this case for failure to have a flagman stationed there. The court instructs the jury, from the evidence in this case, they must find that the speed of the train at the time of the accident did not exceed six miles an hour. In speaking of the train, that refers to the engine and tender. And the court further instructs the jury that six miles an hour was not an excessive rate of speed, and did not, as an isolated circumstance, constitute negligence on the part of the defendant.<sup>2</sup>

**§ 4012. Duty of Railroad Company to Use Reasonable Care to Avoid Injuring Person on Track.** The defendant, as a railroad company, had a right to run their trains upon the track, and are not responsible for injury done to persons on the same that could not be avoided by the use of ordinary and reasonable care and diligence. This, however, would not excuse the running over of a person on the track. It was the duty of the servants and agents of the defendant in charge of a running train on its tracks at all times, and especially in passing through towns or villages, and in approaching crossing places on its track where people were accustomed to pass, to keep a lookout. It was also the duty of said servants and agents, in running a train into and through a town or village, to operate same at a rate of speed as a person of ordinary prudence would have done under similar circumstances.<sup>3</sup>

2—*Barnum v. Grand Trunk W. Ry. Co.*, 137 Mich. 580, 100 N. W. 1022 (1924).

"This was in effect allowing the jury to find that it was negligent for the defendant to permit its locomotive to follow its train at so short a distance and time. We have held in the case of *Breckenfelder v. Railroad Co.*, 79 Mich. 563, 44 N. W. 957, that we could not say as a matter of law that one going upon a track immediately after a portion of a train had passed, without looking to see if it was closely followed by another car or cars, was guilty of contributory negligence; but it was for the jury to determine whether one injured under such circumstances, could be said to have used ordinary care, and to be, therefore, free from contributory negligence. We are of the opinion that the same rule should be applied here; but it does not follow that the defendant was guilty of negligence from the mere fact of sending its engine immediately after its train. If it may use a locomotive to push its trains over the grade, it must either couple it to the train before it starts, or have the right to follow

at a constantly diminishing distance until it overtakes the train. If we were to say it should couple only to a stationary train, the engine must follow the train at a short interval, unless we are to require delay, after the train stops; and if he were to say that, it would not help the matter, for few persons would expect an engine or train to run up close to a stationary train. Safe railroading is often a matter of minutes, sometimes seconds, and it is not for juries or courts to determine what good or bad railroading requires from their own notions, or from the fact that an accident has happened under certain conditions. It was not proper to say that the jury might find negligence from the mere fact that the engine followed the train."

3—*Int'l & G. N. R. Co. v. Lehman*, 30 Tex. Civ. App. 3, 66 S. W. 214 (215).

"The objection urged to this charge is that it instructed the jury that the use of ordinary and reasonable care would not excuse the running over of a person on the track. This criticism is well founded. The second sentence in this charge must have been understood by the jury



§ 4013. **Care Due by Railroad Companies at Places Other than Public Crossings or Usual and Customary Crossings.** You are charged, as a matter of law, that those operating railroad trains are not bound to keep a lookout for persons and property upon their tracks except at public crossings and in public streets, and at such places as the public frequently use, and where they may reasonably expect persons and property to be exposed to danger by being upon such tracks; and in this case, if you believe from the evidence that plaintiff's property was upon defendant's track at a place where there was no public crossing or street, and where it was not usual or customary for people and property to be exposed to the danger of passing trains, then, as matter of law, there was no duty upon defendant to keep a lookout for plaintiff's property under the circumstances; and if you so believe, unless you further believe that the persons operating defendant's train actually knew and discovered the peril to plaintiff's property in time, so that by the exercise of the means and agencies at hand they could have stopped said train in time to avoid injury to plaintiff's property, and failed to do so, your verdict must be for the defendant.<sup>4</sup>

§ 4014. **Degree of Care Due Towards Child on Track.** (a) The court instructs the jury, as a matter of law, that if you believe from the evidence that the deceased J. G. came to his death by reason of being run over by one of the cars of the defendant company while the same was being managed, controlled and operated by defendant's employes, and that such car was grossly and negligently managed, controlled and operated by the employes of said company, and that said negligence and carelessness were the proximate cause of his injury and death, then you should find the defendant guilty, provided the jury believe, from the evidence, that the child himself was in the exercise of reasonable care for himself at and before the accident, and provided also the father and the mother exercised reasonable care in watching over and caring for the boy at and before the accident.<sup>5</sup>

(because it cannot properly be construed otherwise) as placing a limitation upon the right referred to, and the doctrine of nonliability announced in the preceding sentence."

4—Houston & T. C. R. Co. v. Ripetoe, — Tex. Civ. App. —, 64 S. W. 1016 (1017).

"We do not think the court erred in refusing this charge, because it restricts appellee's right to go upon appellant's track to public crossings and streets, and such other places as the public frequently use, ignoring the issue raised by the evidence as to whether appellant had not acquiesced in the use by appellee of its tracks in the manner and under the circumstances they were being used at the time of the accident."

5—Union Stock Y. & T. Co. v. Goodman, 91 Ill. App. 426 (428).

"It will be noticed that this instruction omits all reference to the question as to whether the boy was injured upon the private property of appellant or upon a public street. If he was upon the private property of appellant at the time he was in-

jured, then that instruction is erroneous. That instruction states the rule which would apply in case the injury was inflicted while the boy was upon a public street. But, under that instruction, it was the duty of the jury in case they should find that the employes of appellant were negligent and careless to find the appellant guilty, even though the intestate was injured upon the private property of appellant. That is not the law, as we have shown. In that case, a recovery cannot be sustained, unless the injury was the result of wanton and willful misconduct, or of negligence so gross that willfulness will be inferred. (See Union Stock Yards Co. v. Karlik, 170 Ill. 405, 48 N. E. 1008; Wabash R. Co. v. Jones, 163 Ill. 172, 45 N. E. 50; Ill. Cent. R. R. Co. v. Godfrey, 71 Ill. 500-508, 22 Am. Rep. 112; Ill. Cent. R. R. Co. v. King, 179 Ill. 93, 53 N. E. 552, 70 Am. St. 93; Ill. Cent. R. R. Co. v. Hetherington, 83 Ill. 516; Roden v. Chi. & G. T. Ry. Co., 133 Ill. 73, 24 N. E. 425.) The decisions of the Supreme Court in this State are in accord with the general

(b) Although the jury may find from the evidence in this case that at the time when and place where C. was killed the defendant's engine was moving at a rate of speed in excess of six miles per hour, yet if they further find from said evidence that after the dangerous situation of said C. was discovered upon the track, or could have been discovered by the exercise of ordinary care, and that said engine was then running not to exceed six miles an hour, and that it was then and there impossible for said engineer to stop said engine in time to avoid striking and killing said C., then they are instructed that the plaintiff is not entitled to recover in this action, and your verdict must be for defendant.

(c) Although the jury may believe from the evidence that plaintiff's child got upon defendant's track from 2 to 15 feet in front of defendant's moving engine, and that defendant's engineer saw it, or by the exercise of ordinary care might have seen it, still if the jury believe from the evidence defendant's engineer had, just a few yards south of the depot, discovered the apparent peril of others upon the track, and had used his best efforts to stop the train, and applied the emergency air brake to avert a collision with them, and was then unable to stop his train, still moving, in time to save the child, then the verdict must be for the defendant, if they believe from the evidence the child got upon the track after the speed of the train was reduced to six miles an hour, and then too late for the engineer to stop the train by the exercise of ordinary care.

(d) Although the jury may find from the evidence in this case that the engineer in charge of the locomotive then attached to the defendant's train at the time and place in question did not see the child before the train struck and killed her, and that, if said engineer had looked, he could have seen the child before striking her with the engine, and that, after first applying the emergency brake on the engine in order to avoid striking or injuring the witness D. and others before reaching the place where said child was struck and killed, that said engineer had not exhausted all the air upon his engine in the effort to avoid injuring said men, and, if he had seen said child, there still remained at his disposal 55 pounds of air on said engine, to be used in stopping the speed of said train, and that said 55 pounds of air was not used by said defendant's engineer in order to avert the injury and death of the child, yet if they further find from the evidence that, after making the first application of air to said engine, a period of time from 10 to 20 seconds would have elapsed before said engineer could have applied said air again, even if he had seen the said child and observed its danger, and that before said additional air could have been used the speed of the said train then and there slackened thereby said train, running at the speed it was then going, would still run upon and injure the child, even though said child was from two to fifteen feet from the engine when it came upon defendant's track, then you are instructed that plaintiff cannot recover, and your verdict must be for the defendant.

current of decisions in other States.  
\* \* \* The error in appellee's instruction quoted above is not merely technical, it is substantial and reaches the merits of the case. Un-

der that instruction, it is immaterial whether the injury was inflicted upon public or private grounds, and it was unnecessary for the jury to pass upon that question. That is not the law."

(e) If the jury believe from the evidence that defendant's train was approaching the station at M., and when near the same saw one or more parties upon or in dangerous proximity to the track, and the engineer in charge thereof sounded the danger signals and applied his emergency air brakes, and as he passed the aforesaid parties he spoke to and admonished them, and looked to see that they all had escaped danger, and while his said engine was still in motion, and while the said engineer was still impressed by the apparent danger that the aforesaid men had placed themselves in, and his attention attracted thereby, the child of plaintiff's escaped from the custody of its elder brother, or from a place of safety where he had left it, and ran along or near the center of the platform 15 or 18 feet wide, almost paralleling the tracks of defendant, when it suddenly started across the track directly in front of the moving engine, and within two to four feet thereof, and was caught and killed, then the verdict must be for the defendant.

(f) The mere seeing, or capacity of seeing, a person walking or running along at or near the center of a platform 15 to 18 feet wide, almost paralleling a railroad track, will not of itself demand in law of an engineer in charge of a train that he stop to inquire the intention of such person; nor will the law hold a railroad company responsible for the sudden impulse of any spectator, who, from fright or panic, rushes suddenly and unexpectedly within two to four feet and in front of a moving train; and, if the evidence shows that such facts are true of plaintiff's child, then the verdict must be for the defendant.

(g) There is no presumption of law or fact that upon a crowded depot platform any of its occupants will suddenly leave the crowd, and rush immediately in front of a moving train.

(h) If the jury find from the evidence in this case that at the time and place here in question the plaintiffs' daughter, a child between three and four years of age, suddenly stepped upon defendant's track, and was simultaneously thereafter struck and killed by one of defendant's engines then and there attached to a train then and there moving on said track, then you are instructed that plaintiffs cannot recover in this action, and your verdict must be for the defendant.

(i) In passing upon the question of negligence, the jury should consider all the facts and circumstances proven in evidence, as well as the apparent danger of the witness D. upon the track, the natural effect it had upon the engineer, if any, and the crowded condition of the platform, if proven.

(j) If, from all the facts and circumstances proven, the jury believe the killing of plaintiffs' child was one of those unforeseen and unavoidable accidents, then the verdict must be for the defendant, no matter how sad and mournful the result proved to be.

(k) By the term "ordinary care," as used in the foregoing instructions, the jury are instructed that such precaution or care is meant as would be exercised by a prudent man under like circumstances, and situated as defendant's engineer then was prior to the striking and killing of C., as shown by the evidence in this case.

(l) If the jury find from the evidence in this case that the mother of the child whose death is here sued for negligently permitted said child and its little brother, both of tender years, to wander unat-



tended upon the platform, track and depot grounds of defendant at M. at the time in question, whereby said child was afterwards struck and killed by one of defendant's moving engines, then they are instructed that the plaintiffs cannot recover in this action, and your verdict must be for the defendant, even though you should further find from said evidence that defendant's engineer then and there in charge of its engine failed to discover the dangerous situation of said child before it was struck and killed by said engine, and that said engine was then and there running at a rate of speed in excess of six miles per hour, unless the jury find from the evidence the engineer saw the danger of the child in time to have prevented it, or by the exercise of reasonable care might have seen it.

(m) The jury are instructed that the mere fact, if it be a fact, that at the time and place in question the plaintiff's child was running along the depot platform in a northwest direction to, parallel to, and approaching defendant's railroad track, did not require defendant's engineer to stop his engine or check its speed, or to observe the movements of said child upon said platform, as said engineer had a right to presume that said child would stop on said platform in a place of safety before reaching or attempting to cross said track; nor is the defendant liable in this case because the engineer either failed to observe the movements of said child on said platform or check the speed or stop his engine because of said movements of said child.

(n) The court instructs the jury that the burden of the proof in this case is on the plaintiffs, and it devolves upon the plaintiffs, before they can recover, to establish their case by a preponderance of the evidence to the reasonable satisfaction of the jury.<sup>6</sup>

6—Livingston v. Wabash R. R. Co., 170 Mo. 452, 71 S. W. 136 (140).

"From the instructions given at the request of the defendant, \* \* it is clear that the case was given to the jury on the theory that the defendant was not liable for the failure of the engineer to observe the child before it got on the railroad track. In the first instruction (b) for defendant the jury are told, if, at the time the engineer discovered, or by the exercise of ordinary care could have discovered, the child on the track, it was impossible to stop the train in time to save the child's life, the verdict must be for the defendant. That instruction was in accordance with the view of the law the learned counsel for the defendant urged during the introduction of the evidence when he said, 'The child was in no danger at all until it got upon our track.' The child was running into danger, as all who saw it realized before it reached the track. More than one of the defendant's expert witnesses—locomotive engineers—said, in effect, that if they had seen the child running in a northwesterly direction in a manner to indicate that it was going upon the track, they would, if in charge of the engine, have made every effort to stop the train. But that a child running as some of the

witnesses said this child was, was running into peril, is the observation of common sense, and requires no expert testimony. All the defendant's instructions ignore the duty of defendant's engineer to have observed the movements of the child before it actually got on the track, and in this they were erroneous. The fourth instruction (e) for defendant gives to the conduct of the engineer in looking at and speaking to the young men in question as he passed them the character of duty to see that they had escaped danger. But the evidence of the engineer himself was that he saw the young men move away from the place of danger readily on the sounding of the alarm signals when he was down by the water tank, so that by the time he reached them he was under no duty to give them any further attention. The defendant's fifth instruction (f) lays down an abstract principle applicable to persons of discretion walking or running on a platform paralleling a railroad track, but it has no application to a child three and one-half years old. Nor does the evidence justify the hypothesis of a sudden and unexpected rush of a spectator in front of a moving train. This child ran 50 feet diagonally across the platform towards the track, and her manner and

§ 4015. **Lookout for Human Beings on Track.** (a) I charge you that the brakeman on the car that ran over plaintiff was only required to keep such a lookout as a reasonably prudent man would have kept in performing the duties of a brakeman, and he was not required to keep a special lookout for persons lying on the track.

(b) I charge you that it was not the duty of the brakeman on the car that ran over plaintiff to keep a lookout for human beings on the track in front of his car.<sup>7</sup>

§ 4016. **When Fact that Engineer Saw Person on Track May be Inferred From Surrounding Circumstances.** The jury are not authorized to infer that the engineer saw B. on the trestle merely from the facts that the track was straight for a long distance, and the view of the track unobstructed, and the engineer was in his seat, looking ahead on the track, and that there was nothing to prevent the engineer from seeing a person on the track.<sup>8</sup>

### TRESPASSERS.

§ 4017. **Assuming Plaintiff a Trespasser.** No damages can be recovered by reason of plaintiff's walking to his destination along and over the track and trestle of defendant's railroad; such act being purely voluntary, and being further, an act of trespass on defendant's property. The jury may in their sound judgment and guided by the

course indicated that she was aiming to reach the trunk platform on the other side of the track. The sixth (g) and seventh (h) instructions are liable to the same criticism. We see no valid objection to defendant's eleventh (l) instruction. Whilst there was no express evidence that the mother permitted the child to be at the depot unattended, yet the fact that the child was there unattended is a circumstance which the jury might consider with any other evidence that might be in the case bearing on the question of whether the mother had so permitted. Defendant's twelfth (m) instruction goes to the length of telling the jury that the defendant's engineer was not bound to observe the child while running on the platform in a north-west direction approaching the track, nor to check the speed of the engine, as he had a right to presume the child would stop on the platform before reaching or attempting to cross the track. That would be a proper declaration of law applicable to the person of mature years, but it is wholly inapplicable to a child of three and one-half years. 7 Am. & Eng. Encyc. Law (2d Ed.) 405."

7—Louisville & N. R. R. Co. v. Thornton, 117 Ala. 274, 23 So. 778 (780).

The above charges asked by defendant were properly refused. "This brakeman was, for the time, so to speak, the engineer of the descending car. He and no other person had control over it, and that was his duty. It had been held, that engineers or persons in control of an en-

gine or car 'should always be on the lookout for obstructions (whether of persons or things), and when discovered, no matter when or where, should use all the means within their power to escape the impending danger, or to avert the threatened injury; and less care than this is not due diligence.' Railroad Co. v. Williams, 65 Ala. 78. The rule of the company required 'each employe \* \* \* to look out after, and be responsible for his own safety as well as to exercise the utmost caution to avoid injury to his fellow servants, especially in the switching of cars, and in all movements of trains.' The injury to plaintiff occurred in the night time, in the switching yard of defendant in the city of Birmingham, which was interlaced with switch tracks. If true, as the charges postulate, that the brakeman was under no duty to keep a special lookout for persons on the track, yet, if a proper lookout for obstructions of any kind, which he was bound to keep, would have revealed a person on it, in a perilous condition, the duty would have arisen to save him if practicable. The charges were calculated to confuse and mislead the jury. The question of negligence or not, as averred in the complaint, was, under all the surrounding circumstances, one proper for the determination of the jury, under proper instructions."

8—So. Ry. Co. v. Bush, 122 Ala. 470, 26 So. 168 (173).

"While wantonness on the part of the engineer cannot be predicated on the mere fact that he ought to have

evidence in this case, if they should conclude to find for the plaintiff, assess only nominal damages, such as one cent or one dollar.<sup>9</sup>

§ 4018. **Liability as to Trespassers.** You are also instructed that, although a person may be improperly or unlawfully upon a railroad track, that fact alone will not discharge the company or its employes from the observance of reasonable care; and if such a person is run over by the train, and killed or injured, the company will be responsible if its employes were guilty of gross or reckless negligence, and could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness.<sup>10</sup>

§ 4019. **Wanton and Willful Injury to Trespasser by Brakeman.** The court instructs you that, if you believe, from the evidence, that the injury complained of was wantonly and willfully inflicted, as charged in the declaration, then the plaintiff will be entitled to recover, although you may believe, from the evidence, that plaintiff was guilty of some negligence.<sup>11</sup>

seen deceased on the trestle, or on anything short of actual knowledge. yet this actual knowledge need not be positively and directly shown, but like any other fact may be proved by showing circumstances from which the fact of actual knowledge is a legitimate inference. Otherwise in cases of this character, this fact could never be proved except by the testimony of the engineer himself. Certainly the facts that the road was straight for a long distance, the view of the track unobstructed, and the engineer was in his seat, looking ahead along the track, and there was nothing to prevent him from seeing a person on the track a few hundred feet ahead, are relevant and admissible for the purpose of proving that he did see such person, and may properly be submitted to the jury on this issue; and while no presumption arises from these facts that the engineer did see the person on the track, yet this may be inferred from these facts by the jury, whose province alone it is to decide the weight to be given to facts legally in evidence, and their effect on an issue which they are admitted to prove. A contrary conclusion was apparently reached in *Ga. Pac. Ry. Co. v. Ross*, 100 Ala. 490, 14 So. 282, solely upon the authority of the previous case of *Nave v. Railroad Co.*, 96 Ala. 264, 11 So. 391. An examination of the latter case, however, does not sustain this conclusion, since the evidence in that case did not show that the engineer was looking ahead along the track, and all that was there decided was that, inasmuch as it was not the duty of the engineer to keep a lookout for a person on the track, the fact that he could have seen him if he had looked did not authorize the inference that he did look and see him. We are of opinion that this charge was properly refused. *Birmingham Ry. & El. Co. v. Smith*, 121 Ala. 352, 26 So. 768."

9—*So. Ry. Co. v. Lynn*, 128 Ala. 297, 29 So. 573 (575).

The first charge requested by the defendant, which assumed that the plaintiff was a trespasser, was properly refused. The second charge was misleading in its tendencies and no error resulted in its refusal by the court.

10—*Chicago & E. I. R. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801 (804).

"This instruction was clearly erroneous. If a person be unlawfully upon a railroad track, the railroad company, in moving its trains upon the track, does not owe him any duty except to not purposely or willfully injure him. If he be willfully injured, his contributory negligence will not prevent his recovery; but if he, by his own fault, contribute proximately to his own injury, he cannot recover for the negligence of the company. Properly speaking, there are no degrees of negligence. The degree of care devolving on one as a duty depends upon a variety of circumstances, and negligence is a failure to perform such duty; but there can be no responsibility for injury caused by such breach of duty to one whose own fault contributed proximately to his injury."

\* \* \* The railroad company would not be liable for the negligent injury of a person in the situation supposed of the plaintiff in the instruction above quoted, and that instruction would be erroneous under any issue. *Cincinnati, etc., R. Co. v. Eaton*, 53 Ind. 307; *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301."

11—*Chi. & W. I. R. R. Co. v. Ketchum*, 99 Ill. App. 660 (662).

The above instruction was given in an action for injuries received while plaintiff, a trespasser, was being removed from a train by a brakeman. The court says: "Whatever may be the law in other States,



**§ 4020. Ejection of Trespasser From Moving Train.** You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all the material allegations of his petition not admitted in its answer; that is to say, that while defendant's train was running at a dangerously high rate of speed the defendant, through its agent, violently and forcibly ejected or put the plaintiff off its train, whereby he was thrown to the ground and hurt, and that the injury, if any, was caused in that way. That is, that he must show by the more convincing and greater weight of evidence that the trainmen put him off the train by force. And if the evidence on this point is evenly balanced or is more convincing that he was not put off by force, or if he got off of his own motion in some other way, then the railroad company is not liable, and your verdict should be for the defendant. The plaintiff would also be required to show by a preponderance of the evidence that he sustained damages alleged in his petition as a result of such act of the defendant, and the amount of the same. On the other hand, when the plaintiff has so established such facts he would be entitled to a verdict, unless the defendant shall prove by a preponderance of the evidence the material allegations of its defense alleged in its answer. That is to say, if the evidence produced on the part of the plaintiff does not show carelessness or fault or misconduct on the part of plaintiff contributing to the injury he received as a proximate cause thereof, then the burden is upon the defendant to prove that the plaintiff's injuries resulted from his own carelessness, fault, or misconduct as alleged in its answer.<sup>12</sup>

**§ 4021. Injury to Trespasser While Getting Off Moving Train.** The jury will find for the defendant, unless they believe from the evidence that those in charge of defendant's train saw, or had reasonable grounds to believe, that plaintiff was about to jump off the

we think it conclusively settled in this State that authority cannot be presumed to be possessed by a brakeman, and, in the absence of proof, it cannot be inferred or implied from the nature of his employment. Ill. Cent. R. R. Co. v. King, 179 Ill. 91, 53 N. E. 552; Chi. Rock I. & P. Ry. Co. v. Brackman, 78 Ill. App. 141; 3 Elliott on Railroads, § 1255; Farber v. Mo. Pac. R. R. Co., 116 Mo. 81, 22 S. W. 631; Corcoran v. Concord & M. R. R. Co., 6 C. C. A. 231, 56 Fed. 1014."

12—Chicago, B. & Q. R. Co. v. White, 73 Neb. 870, 103 N. W. 661.

"It is the contention of the defendant that this instruction is wrong as applied to the facts testified to by the plaintiff himself, because it ignores the rule in that class of cases where the jury might reasonably infer from the testimony of the injured party himself that his injury was due to his own negligence and carelessness. That question, however, seems to have been fairly submitted to the jury in the instruction complained of. It is also contended that the instruction is erroneous because of the qualifying language used by the court in that

portion of the instruction intended to inform the jury of what material facts the burden was upon the plaintiff to establish.

"The instruction is faulty in that it omits from the statement of facts which the plaintiff was required to prove 'by more convincing and a greater weight of evidence' the question of the dangerous rate of speed at which the train was moving. The question of the rate of speed was one controverted both by the pleadings and the evidence, and the plaintiff was as much required to prove that the train was moving at a dangerous rate of speed as he was required to prove that he was ejected from the train by force. He was a trespasser and the defendant had a right to eject him by force under proper circumstances. Whether such circumstances existed in this case was a question of fact to be determined by the jury, and the court having, in an attempt to define the burden of proof, singled out a single fact which the plaintiff was required to establish within the rule, left the jury to infer that the same weight of evidence was not required of the plaintiff to establish another important fact."

moving train, in time to have prevented the accident to him, in which event they will find for the plaintiff.<sup>13</sup>

### LICENSEES.

§ 4022. **Duty to Maintain Lookout for Licensees on Track.** If the jury find from the evidence that the said X. was injured by the train on the railroad track other than at a public crossing, or a crossing which the public was accustomed to use to cross the track, she was a mere trespasser, and the plaintiff would not be entitled to recover in this action, unless the jury further find from the evidence that the injury was the result of wanton and willful misconduct of the defendant in running its train at the time. Except at crossings, the railroad company has the right to the exclusive use of its track, and is entitled to assume that it is clear. It is not bound to anticipate that persons will be upon it, or to make provision for the safety of such persons.<sup>14</sup>

§ 4023. **Rights of Licensee.** If the plaintiff is a wrongdoer or trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was willfully inflicted, or that it was caused by negligence so gross, as to authorize an inference of willfulness. If you find from the evidence that the plaintiff, at the time he received the injury complained of, was in a position where he had a right to be, and the defendant was in a position where it had a right to be, to entitle the plaintiff to recover, he is only bound to show that the injury was occasioned by the negli-

13—*Louisville & N. R. Co. v. Thornton*, 22 Ky. L. 778, 58 S. W. 796 (797).

"We are of the opinion that the instruction given supra is erroneous. There can be no negligence in failing to do, unless there was a duty to do. Appellee, a boy 17 years of age and of reasonable intelligence, as shown by his testimony, is on a freight train by invitation of the fireman. He is not a passenger. The train is not engaged in carrying passengers. Under these circumstances, it is clear that appellee was a mere licensee, if not a trespasser, and appellant owed him no duty, unless his danger was discovered in time to have prevented an injury, by some agent or appellant. *Dalton's Adm'r v. L. & N. R. Co.*, 22 Ky. L. 97, 56 S. W. 657, decided May 2, 1900, and cases cited. We do not think that because appellee was on the train by invitation of the fireman, who was not in charge of the train, that appellant owed him any duty to stop the train to permit him to get off. When he boarded the train and rode without paying his fare, he accepted the advantage with the disadvantage that he would ride to the next regular stop. Appellant owed him

no duty to prevent (which implies force) appellee from jumping off the moving train. Indeed, there is proof in the case that if he had been prevented from jumping, and had remained where he was when noticed by the fireman, he would certainly have been killed by contact with a bridge, railing a short distance ahead."

14—*Jones v. Charleston & W. C. Ry. Co.*, 61 S. C. 556, 39 S. E. 758 (760).

"The defendant was not entitled to have the court charge the request without qualification, for it assumed that the plaintiff was a trespasser if the injury happened at other than a public crossing, and that, therefore, the defendant was not liable unless the injury was the result of defendant's wanton and willful misconduct; whereas, plaintiff's complaint and evidence in support thereof was directed to show that plaintiff was not such a trespasser, but rather a licensee, using the track with the knowledge and acquiescence of the defendant, and in a populous part of the city of — where people were accustomed to travel, which circumstance would call for greater care on the part of defendant than in the case of a bald trespasser."

gence of the defendant, and that he exercised ordinary care to avoid it.<sup>15</sup>

### INJURIES AT HIGHWAY CROSSINGS.

§ 4024. **Highway Crossings Must be Put in Safe Condition.** The court instructs the jury that even if you should believe from the evidence that S. Car Line was guilty of negligence with respect to the maintenance of its crossing, still the jury should not find a verdict against it, if you believe from the evidence that by the exercise of ordinary care it could not have foreseen that some injury might result from such alleged negligence.<sup>16</sup>

§ 4025. **Reasonable Care Required at Highway Crossings.** (a) The court instructs the jury that if you believe from the evidence in this case that the ——— street crossing mentioned in the evidence as such was a public crossing on the ——— day of ———, that the care required of the defendant at such crossing should have been commensurate with the danger that naturally would be probable to exist there at the time and place in question, and that, if you further believe, from the evidence, that the deceased, H. S., was killed in the manner and form as set forth in the plaintiff's declaration herein, by and through the negligence of the defendant, while she was exercising ordinary care for her own safety, you should find the defendant guilty

15—Chicago, I. & L. Ry. Co. v. Thrasher, — Ind. App. —, 73 N. E. 829.

"This instruction was adapted to mislead or to confuse the jury. There was no issue involving the question of the infliction of injury wilfully. The only issue was one involving negligence alone. No matter how gross the negligence shown in evidence, it could not, in this case, be treated as establishing a cause of action against the appellant for a wilful injury, or authorize, for the purposes of this case, an inference of wilfulness. It is true the court employed the words 'averring and proving,' etc., and that there was no averment of wilfulness in the complaint; but the court, after adverting to facts, the proof of which would prevent any recovery by the plaintiff, instead of plainly so informing the jury, told the jury that he could not maintain any action without averring and proving that the injury was wilfully inflicted, or that it was caused by negligence so gross as to authorize any inference of wilfulness. By 'averring and proving' that the injury was caused by negligence, the appellee could not have recovered under the circumstances predicated in the instruction; and the jury was authorized to infer that, if such predicated facts were proved to be true, the plaintiff might recover if the pleading and the evidence showed facts constituting negligence so gross as to authorize the inference of wilfulness. The complaint showed that some object by which the appellee

was struck protruded from the side of the engine a number of feet. If the jury found that this was literally true, and regarded it, under the circumstances pleaded and proved, as negligence so gross as to authorize an inference of wilfulness, they possibly might have supposed themselves warranted, by this instruction, in finding for the plaintiff, though he were a wrongdoer or a trespasser, etc. At least, there was no occasion for presenting the subject of a wilful injury to the jury, and to do so in the involved manner of the instruction was adapted to divert the attention of the jury from the real issue, and to entangle their ideas. In the subsequent portion of the instruction, as above quoted, the court told the jury that under the facts there predicated, to entitle the plaintiff to recover, he was 'only bound to show that the injury was occasioned by the negligence of the defendant,' without expressly limiting the negligence to that averred in the complaint. The statement was inaccurate."

16—Brecher v. Chicago Junc. R. Co., 119 Ill. App. 554 (565).

"Instruction should not have been given. The crossing is in the track of the St. Car Line. It could only have been guilty of negligence in not maintaining the crossing in a reasonably safe condition; and if it was thus negligent, it was not admissible for it to speculate as to whether injury might result from its negligence. We do not think the doctrine as to reasonable anticipation applicable in case of such negligence."



and assess the plaintiff's damages at such sum as you may believe from the evidence it has sustained, if any.<sup>17</sup>

(b) The court instructs you that it was the duty of the defendant, on the occasion in question, in approaching the crossing where the decedent, C., was killed, to slacken the speed of its train, keep a lookout for persons upon or crossing its track, give reasonable signal or warning of the train's approach by sounding the bell or whistle, and exercise the highest degree of care to avoid injury to persons at said crossing which was consistent with a prudent management of defendant's road and trains. If the location of said crossing, the amount of public travel thereon, and the existence and proximity of permanent buildings obstructed the view of the railroad and the view and hearing of approaching trains, rendered the crossing unusually dangerous to a large number of the traveling public, then it was the duty of defendant to keep a watchman, or adopt or use some other reasonably safe mode of warning travelers of approaching trains; and if the jury believe from the evidence that on the occasion under investigation the defendant, its agents or servants operating trains, failed to use ordinary care to warn the decedent, C., of the approach of its train, and that by the negligence of the defendant, or its agents or servants, the said C. was struck and killed by defendant's engine or cars, then the jury should find for plaintiff such compensatory damages, if any, as he sustained as the direct and natural result of said negligence and killing, not exceeding \$—, the amount claimed, unless they should further believe from the evidence that in receiving the injury C. was himself guilty of negligence to such an extent that, but for his own negligence, the accident would not have happened.<sup>18</sup>

17—Ill. Cent. R. R. Co. v. Chicago T. & T. Co., 79 Ill. App. 623 (631).

"Whether there was a public highway as claimed by appellee is a mixed question of fact and law, and it was error to submit that question to the jury without instructing them as to how a public highway may be constituted. *Harding v. Town of Hale*, 83 Ill. 501; *Baltimore & O. S. W. Ry. Co. v. Faith*, 175 Ill. 58-60, 51 N. E. 807. The instruction informs the jury that, if they find the defendant guilty, they may assess the damages at such sum as they may believe, from the evidence, that plaintiff has sustained. While the plaintiff may have been entitled on sufficient proof to recover damages, it did not in fact sustain any. The pecuniary loss, if any, was that of the surviving husband and next of kin of the deceased, and the statute limits the damage to their pecuniary loss, not exceeding \$—."

18—*Louisville & N. R. Co. v. Cummins' Adm'r*, 111 Ky. 333, 23 Ky. L. 631, 63 S. W. 594.

"In *Southern R. Co. v. Barbour*, 21 Ky. L. 226, 51 S. W. 159; *Ches. & O. Ry. Co. v. Gunter*, 108 Ky. 362, 56 S. W. 527, this court considered fully the law applicable to railroad crossings, and under the principles announced in these cases, the foregoing instructions did not prop-

erly present to the jury the law governing the rights of the parties. They go too far. They are also defective in not informing the jury that the duty of both parties as to care was reciprocal, and imposing a different degree of care on the appellant from that imposed on the deceased. In using the railroad and the street crossing, both parties were required to exercise the same degree of care. It was incumbent on appellant to give such notice of the approach of the train to the crossing, to run the train at such speed, keep such lookout, and use such care to avoid injury to persons thereon, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. It was incumbent on the intestate to use such care as might usually be expected of an ordinarily prudent person, situated as he was, to learn of the approach of the train, and keep out of its way. If the crossing was especially dangerous, it was incumbent on both parties to exercise increased care commensurate with the danger. 8 Am. & Eng. Encyc. Law (2d Ed.), 386-388. Also, see cases above referred to, and authorities there cited. If appellant's servants operating the train failed to use proper care, and by reason of such failure the intestate was struck and killed while

§ 4026. **Necessity of Greater Caution When Large Number of Persons Use Crossing Daily.** (a) If you believe from the evidence that Mrs. M. was struck by defendant's train, while she was crossing the track at the public road crossing in the town of Madison, where the people were wont to cross frequently and in numbers, or that said public road was a crowded thoroughfare, or in a populous district, and that the engineer of said train knew the nature of said crossing or had been running past said crossing on defendant's road for a sufficient length of time to be chargeable with knowledge thereof, and if you further believe from the evidence that the train that struck Mrs. M. was running at a high and dangerous and reckless rate of speed, and that the trainmen failed to give notice of the train's approach to said crossing, by blowing a whistle or ringing the bell at intervals while they were approaching the said crossing, then you would be authorized to find the defendant's employes were guilty of wantonness or recklessness, notwithstanding you may also believe from the evidence that there was negligence on Mrs. M.'s part and no fault on the part of defendant's employes after they discovered her peril.

(b) If the jury believe from all the evidence that Mrs. M. was crossing the railroad track at a public crossing in the incorporated town of Madison, and they further believe from all the evidence that people were wont to cross and recross this public crossing in numbers and with frequency, and she was struck, run over, and injured, from which injury she died, by an engine and train of cars on defendant's track, which was being propelled and rushed by defendant's employes and servants at a dangerous, reckless, intentional, and wanton rate of speed, without signals of approach, then the defendant railroad company would be liable for the injuries she received, notwithstanding the jury may believe that there was negligence on Mrs. M.'s part.<sup>19</sup>

(c) I charge you that in this case, even though you find from the evidence that the defendant was negligent in the operation of the engine which caused the injury, and you further find that the parents or either of them, of the deceased child, were also guilty of negligence in permitting it to go unattended upon the railroad track, and that such negligence on the part of the parents, or either of them contributed to bringing about the injury complained of, the plaintiff can-

exercising proper care, appellant is liable. But, if the intestate failed to exercise such care as was required of him, and but for this the injury would not have occurred, appellant is not liable, although there was also a want of proper care on its part. If the intestate was intoxicated at the time, this would not affect the rights of the parties, unless, by reason of his intoxication, he failed to exercise such care for his safety as might be ordinarily expected of a sober person of ordinary prudence, situated as he was, and, but for such failure, would not have been injured; in which event appellee cannot recover. 7 Am. & Eng. Encyc. Law. (2d Ed.) 441."

19--*Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 23 So. 231 (234).

"This court has never held that the mere crossing of the track of a railroad at a public crossing, by peo-

ple frequently and in numbers, was sufficient to impute knowledge to those in charge of the engine and train 'that likely or probably' some person at the time was on the track. 'Frequently' and 'in numbers' are terms too indefinite to justify the legal conclusion deduced therefrom by the court. The rule is that, if the jury should find from the evidence that people crossed so frequently and in such numbers (facts known to those in charge of that train) that it was likely or probable that at the time some person would be on the track, then the jury would be authorized to find that the conduct of the defendant's servants was wanton and with reckless indifference to consequences. The oral charge of the court (a) and charge (b) given at plaintiff's request failed to draw the distinction here pointed out."

not recover, and your verdict should be for the defendant, unless you further find from the evidence that notwithstanding such negligence of the parents or either of them, the defendant's servants, by exercise of ordinary care might have avoided the accident after in fact discovering the child's peril.<sup>20</sup>

§ 4027. **Crossing Made Public by Customary Use.** If the jury believe from the preponderance of the evidence the defendant company held forth invitation, inducement or allurements to the public generally, to cross and re-cross its right of way at the point where the accident is alleged to have occurred, and it was so used by the public generally, and that the company knew this, then and in that event, a person so crossing at said point, would not be a trespasser on the defendant's right of way.<sup>21</sup>

§ 4028. **When Defendant Guilty of Negligence as "Charged in the Declaration."** (a) The court instructs the jury that if you believe from the evidence that the defendant is guilty of the negligence charged in the declaration, and that the plaintiff, while in the exercise of ordinary care for his personal safety, was injured as alleged in the declaration, then you should find the defendant guilty, and assess plaintiff's damages at whatever you may believe from the evidence the plaintiff has sustained.

(b) The court instructs the jury that if you believe from the evidence that the defendant is guilty of the negligence alleged in the declaration, and that the plaintiff was injured as in the declaration alleged, and that the plaintiff, at the time of the injury, was in the exercise of ordinary care for his own personal safety, then you should find for the plaintiff.<sup>22</sup>

20—Corbett v. Ore. S. L. R. Co., 25 Utah 449, 71 Pac. 1065 (1066).

"With an unfenced track bordered by habitations on each side, and used quite generally as a highway for both grown people and children, surely some diligence was required by defendant other than 'after in fact discovering the child's peril.' In the case of Young v. Clark, 16 Utah 42, 50 Pac. 832, this court held: 'Where the public in considerable numbers become accustomed for a considerable length of time to use a bridge or railroad track as a footpath in populous cities or thickly settled communities, without molestation or objection from the company, and by reason of such general custom the presence of people upon the track or bridge is probable, or might reasonably be expected, those in control of passing trains are bound to use reasonable diligence and precaution to prevent injury to those who might be thereon, even though they are trespassers.' The instruction asked by defendant ignored entirely the question whether the use of the track for foot passengers was not such as to render it probable or reasonably to be expected, that people would be upon the track at this point. In addition to the authorities cited in the above mentioned case, the following may be referred to: Gunn v. Ohio River Ry. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; Felton v. Au-

brey, 20 C. C. A. 436, 74 Fed. 350; Garner v. Trumbull, 36 C. C. A. 361, 94 Fed. 321."

21—Ill. Cent. R. R. Co. v. Beard, 49 Ill. App. 232 (238, 244).

"The fact that many persons use a track, either in passing along or across it, with the knowledge of the railroad company, without legal right, may have an important bearing on the question as to the character of the act of a railroad company in the operation of its trains resulting in an injury in this, that such an act might be mere negligence without such knowledge, for which there could be no recovery, but with such knowledge the same act might be so grossly negligent as to evince wantonness, indicating an utter disregard for life. Care and negligence are relative terms, dependent largely as to degree upon known conditions. To run a train at a high rate of speed where it was known persons were so using the track, although without legal right, might be wanton, for which wantonness, resulting in an injury, there could be a recovery: Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. 218, while if run at the same rate of speed, without such conditions being known, and an accident to a person occurred, there would be no liability."

22—Wabash R. R. Co. v. Kingsley, 177 Ill. 558 (560), 52 N. E. 931, rev'g 78 Ill. App. 236.



§ 4029. **Condition of Crossing as Enhancing Danger of Collisions and Accidents.** The jury are instructed that if they believe from the evidence that the crossing in controversy was of such a character as to enhance the danger of collision and accidents at said crossing that it was the duty of the servants, agents, and employes of defendant in managing or running said locomotive and train of cars to exercise a degree of care in the operation of said train commensurate with the danger of collision reasonably to be apprehended at that location. And if the jury further believe from the evidence that the agents, servants, and employes of defendant failed to exercise such commensurate degree of care in the movement of such locomotive and train of cars as it approached and passes over said crossing, either by not keeping the bell on such locomotive ringing from a point 80 rods before said train reached said crossing or sounding the whistle on said locomotive at said point 80 rods before reaching said crossing and continuing to sound the same at intervals until said locomotive passes said crossing, such failure in any of said particulars constituted negligence on the part of said defendant. And in passing upon the question as to whether the agents, servants, and employes of the defendant were or were not negligent in running or managing said locomotive and train any of the particulars aforesaid, you should take into consideration all the facts and circumstances which you may find from the evidence existing at the time when and at the place where the injury occurred. And if you further believe from the evidence that in consequence of such negligence in any one or more of the respects hereinbefore mentioned the said P. received the injuries from which he died, you will find the verdict for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which directly contributed to his death. And the burden of proving contributory negligence on the part of P. rests on the defendant, and unless the defendant has proven such contributory negligence by a preponderance of the evidence, or unless such contributory negligence is shown by the plaintiff's evidence, you cannot find for the defendant on that ground.<sup>23</sup>

"It will be seen by the examination of the above instructions that they authorize a verdict for the plaintiff if the jury believe, from the evidence, that defendant is guilty of the negligence charged in the declaration. The declaration did not contain a charge of negligence. The act charged upon which a recovery was asked was 'wilful and wanton,' and under the rule laid down in *Chi. B. & Q. R. R. Co. v. Dickson*, 88 Ill. 431, no recovery could be had under the declaration for mere negligence. The instructions are erroneous."

23—*Porter v. Mo. P. Ry. Co.*, 199 Mo. 82, 97 S. W. 880.

"This instruction is erroneous and vicious. Its first sentence directs the attention of the jury to the dangerous condition of the crossing, and tells them that if the crossing was of such a character as to enhance the danger of collisions and accidents at such crossing, it was the duty of the servants, agents, and employes of the defendant, in man-

aging or running said locomotive and train of cars, to exercise a degree of care commensurate with the danger of collision reasonably to be apprehended at that location, when in fact the evidence does not show that the existence of the hole or condition of the crossing had anything whatever to do with the collision. The wagon was not loaded, and its passage over the crossing was not impeded, though it might have been slightly delayed by reason of the necessity of driving around the hole. In order to have entitled the plaintiff to recover on account of the condition of the crossing, it devolved upon her to show that its condition directly caused or contributed to the death of her husband, which the evidence in no way shows. There was, therefore, nothing upon which to bottom this part of the instruction, and the mere fact that the crossing might have been of such a character as to enhance the danger of collisions and accidents is not a

§ 4030. **Rights and Liabilities of Railroad Companies and Travelers Are Equal and Mutual.** (a) The jury are instructed that, if a railroad crosses any road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require reasonable care and caution of those traveling on the other road to avoid a collision; but while a passing train from its force and momentum will have the preference in crossing first, yet those in charge of it are bound to give reasonable warning, so that a person about to cross with a team and wagon may stop and allow the train to pass—and such warning must be reasonable and timely so far as the circumstances will reasonably admit.<sup>24</sup>

(b) The jury are instructed that the defendant railroad company had, at the time of the collision complained of, the same right to use that portion of the public highway over which its track passed at the point of collision that the public had. Its rights and those of the plaintiff were mutual and reciprocal, and the railroad company and the plaintiff were bound to have due regard each for the safety of the other.<sup>25</sup>

(c) The defendant had the right to run its locomotive engine over its railroad at the time it did when it collided with the wagon of the plaintiff's decedent, and at any time, day or night, that it pleased, and this the plaintiff is held to know, and the plaintiff's decedent to have known at the time of the collision.<sup>26</sup>

§ 4031. **Duty of Company's Servants to Keep Lookout for Parties at Crossings.** It was the duty of defendant's servants in charge of its train to keep a lookout for parties while approaching a public crossing, and a failure to do so would be negligence.<sup>27</sup>

sufficient ground of negligence to entitle plaintiff in this case to recover."

24—Toledo, St. L. & K. C. Ry. Co. v. Cline, 135 Ill. 41 (44), 25 N. E. 846.

"This instruction was objectionable. The only negligence charged in the declaration in respect of the personal injuries received by plaintiff, and in regard to which the instruction would have application, was a failure to ring a bell or sound a whistle. If the action is to be regarded as based upon the statutory liability imposed, or the non-performance of one of the other of these acts, then the instruction, in requiring that a warning should have been given such as was reasonable and timely under the circumstances, declared a higher duty than the statute imposes. Peoria, P. & J. Ry. Co. v. Stiltman, 67 Ill. 72.

If, on the other hand, the action is regarded as based upon the common law duty to give reasonable warning of the approach of the train, then it would seem that the instruction was broader than the averments of the declaration justified, the pleader having stated therein the particular breaches of such duty upon which he relied, and having made no general averments of neglect of duty in that behalf."

25—New York, C. & St. L. R. Co.

v. Kistler, 66 Ohio 326, 64 N. E. 130 (132).

"This charge was too strongly in the plaintiff's favor. While in law she had the same right to use the crossing that the railroad company had, the different modes of such use constitute a difference in right; as she could stop with her team within a few feet and the train could not stop short of many rods, it follows of necessity that when both were approaching the crossing at the same time, the train had the right of way, and it was her duty to stop and let the train pass before attempting to cross. Thompson Neg. 1611; Continental Improvement Co. v. Stead, 95 U. S. 161-163, 24 L. Ed. 403.

Such would be the conduct of all men of ordinary care under such circumstances. To rush ahead and attempt to pass knowing the train to be close at hand is not the conduct of ordinarily prudent persons but is gross negligence."

26—Nichols v. B. & O. S. W. Ry. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

"The right of appellee to operate its trains was subject to the restrictions imposed by law and prudence. Upon the giving of signals, appellee had a right to operate its trains."

27—St. L. S. W. Ry. Co. of Texas v. Elledge, — Tex. Civ. App. —, 93 S. W. 499 (500).

§ 4032. **Obstructing View of Track at Crossing by Line of Box Cars.** You are instructed by this court that if you believe from the evidence in this case, that the injury to the deceased occurred on account of the defendant having permitted its cars on its side tracks to obstruct the view of its road, or on account of having no pilot on its engine, or on account of running its engine at too great speed over the crossing, or on account of starting the engine without ringing the bell or sounding the whistle a reasonable length of time before starting, and while the deceased was in the exercise of ordinary care under all circumstances in the case, then your verdict should be for the plaintiff.<sup>28</sup>

§ 4033. **Liability of Railroad for Frightening Horses.** (a) If you believe from a preponderance of the evidence that said servants of defendant negligently sounded the whistle at the crossing, when they knew, or by the use of ordinary care could have known, that so sounding the whistle would frighten plaintiff's horse, and thereby probably cause injury to plaintiff, and that blowing the whistle was the proximate cause of the injury, then, unless plaintiff was guilty of contributory negligence, he is entitled to recover.<sup>29</sup>

"It was the duty of the servants operating defendant's engine and train to keep a lookout for parties crossing, or about to cross, the track while the train was approaching the crossing; but, in the absence of a statute making its failure to perform such duty negligence, it was error for the court to tell the jury that a failure in this respect constituted negligence, as a matter of law. The court should have left it to the jury to say whether such failure, if there was a failure, under all the facts, constituted negligence which proximately caused the injury. The charge was error. *H. & T. C. Ry. Co. v. Wilson*, 60 Tex. 142; *Mo. Pac. Ry. Co. v. Lee*, 70 Tex. 496 (501), 7 S. W. 857; *Gulf, C. & S. F. Ry. Co. v. Anderson*, 76 Tex. 246 (249), 13 S. W. 196; *Intern'l & G. N. Ry. Co. v. Dyer*, 76 Tex. 156 (160), 13 S. W. 377."

28—*Chi. & E. I. R. R. Co. v. Johnson*, 61 Ill. App. 464 (469).

"It had been charged that these things had been negligently done, and by this instruction the court took that question from the jury and decided it, telling them that if either of them was done at all, they must find for the plaintiff. There was no statute requiring a pilot on an engine or fixing the rate of speed, from which the court could say that the want of a pilot or the rate of speed was negligent. There was evidence of cars standing along the side track beside the one projecting into the street, and they obstructed the view of the railroad somewhat from various points. A man was unloading coal from one of them, and so far as appears they were all there for proper purposes, and in proper places for the legitimate business of the defendant. It must leave cars

to be unloaded, and provide for the demands of the public, empty cars to be loaded. Side tracks are proper places for such cars and defendant could not be held for negligence in having them there, although they would necessarily obstruct the view of the railroad from some points. *Garland v. C. & N. W. Ry. Co.*, 8 Ill. App. 571; *Wabash, St. L. & P. Ry. Co. v. Hicks*, 13 Ill. App. 407; *Chi. & A. R. R. Co. v. Nelson*, 59 Ill. App. 308.

Aside from the car which projected into the street, no right of the public was in any way invaded by cars on the side track. The evidence as to such other cars was competent to show the situation as affecting the care and caution required of the respective parties, but their presence was not a ground of recovery. Yet the instruction made that fact the basis for a verdict. It was wrong, and as to the question of negligence it invaded the province of the jury."

29—*Houston & T. C. R. Co. v. Carruth*, — Tex. Civ. App. —, 50 S. W. 1036 (1037).

"We think, under the circumstances in this case, the expression, 'or by the exercise of ordinary care could have known,' contained in the paragraph of the charge complained of, was misleading, in that it was calculated to impress the jury that it was the duty of the employees to keep a lookout for teams near the track, to prevent the frightening of them and causing injury. We do not understand that it is the duty of the employees of the company to keep watch for teams near the track, and to so operate the train as to not frighten them. If, however, a team is near the track, and the employees see it, and know, or have reason to believe, that the



(b) Therefore if you believe from the evidence that the plaintiffs are the surviving husband and surviving children of E. B., deceased, and that on or about the ——— day of ———, the plaintiff, D. B., together with the said E. B., deceased, and their children were traveling along the public road in D. county, Texas, as set forth in plaintiff's petition, in a two-horse wagon, and coming towards the town of C., and that said public road was crossed by defendant's railroad; and if you further find that the said plaintiff, D. B., as he approached said crossing coming towards the said town of C., exercised ordinary care to discover the approach of trains at said time towards said crossing, and while in the exercise of said care continued to approach said crossing; and if you further believe from the evidence that when he had reached a point in about twenty yards of said crossing, he discovered a train approaching at a rapid rate of speed, and before the plaintiff, D. B., could check his team attached to said wagon he was within about thirty feet of the track of said railroad, and at such time said train passed over said crossing, scaring and frightening plaintiff's team which caused them to surge and jump, which greatly frightened and excited plaintiff's wife, the said E. B., if she was greatly frightened and excited, and that, in her efforts to save herself and child from the danger of being thrown from said wagon undertook to alight therefrom, if she did so undertake, and in so doing fell to the ground out of said wagon, if she did so fall, or if you believe from the evidence in her fright or excitement she was thrown from said wagon to the ground, by reason of the surging and jerking of said team and thereby was greatly frightened, excited and severely shocked; and if you believe from the evidence that she was enceinte, as alleged by plaintiffs, and that as a direct and proximate result of said fall, if she did fall, she suffered a miscarriage, which resulted in her death as alleged by plaintiffs, and her death was the direct and proximate result of the fright and shock caused by said fall; and if you further believe from the evidence agents and employees of the defendant company knew, or by the use of ordinary care could have known, the surroundings of said crossing, and of obstructions, if there were obstructions, cutting off the view to persons traveling along said public road of defendant's trains, as alleged by plaintiffs; and if you further believe from the evidence that the agents, servants and employes in charge of said train failed to blow the whistle and ring

noise of the train would frighten it, and cause injury, then they should use proper care to prevent injury. *Gulf, C. & S. F. Ry. Co. v. Box*, 81 Tex. 677, 17 S. W. 375; *Hargis v. Ry. Co.*, 75 Tex. 21, 12 S. W. 953. In the case last cited, Justice Gaines, in discussing this point, said: 'Upon this assignment it is impliedly assumed, under the propositions in appellant's brief, that the defendant was liable, although its employes did not know, and did not have reason to believe, that the noise would frighten the mules, and that it was the duty of the company's servants to watch for teams near the track, and so to operate the engine as not to frighten them. We do not understand that the company or its servants owed to persons in

charge of vehicles near its track any such duty. It is the duty of the company, in running its trains, to keep a lookout along its track, so as not to injure persons who may be found thereon, at least at public crossings, but further than this, in our opinion, the duty does not extend.' We do not understand that trains can be run over crossings in utter disregard of the rights of others, but the company has the right to operate its trains in a proper manner, and, when necessary for that purpose, the employes are not required to abstain from blowing the whistle at or near the crossing to prevent the frightening of teams, unless they know, or have reason to believe, such a result will follow."

the bell on its locomotive engine at a distance of at least eighty rods from the place where defendant's railroad crosses said public road, and failed to keep said bell ringing until said engine had crossed said public road or stopped; and if you further believe from the evidence that if said bell had been rung and said whistle blown before reaching said public crossing, that plaintiff could and would have heard the same, and could and would have had warning of the approach of said train before driving so near the track of said railroad, and by reason of the notice given him by said ringing of the bell and blowing the whistle would have avoided the scare and fright to his team drawing said wagon, and the consequent shock and fright to his said wife and her death; and if you further believe from the evidence that at said time when said team became frightened that plaintiff D. B. and his said wife Ella B. were exercising that degree of care for their own safety that a person of ordinary prudence would exercise under the same or similar circumstances—then you will find for the plaintiff, unless you find for the defendant under the instructions hereinafter given you.<sup>30</sup>

(c) If the engineer in charge of defendant's locomotive engine as he approached the crossing going at a high rate of speed usual to his train, and when two or three hundred feet from the crossing he saw A. B. and his son in a wagon drawn by two mules approaching the crossing, and saw that his team did not stop when at a safe distance from the crossing, the said engineer was justified in sounding the alarm signals of the locomotive, and it was his duty to do so in order if possible to prevent the team from going on to the crossing in front of the locomotive.<sup>31</sup>

(d) The jury are instructed that to entitle the plaintiff to recover, it is incumbent to cause the jury to believe, from a preponderance of the evidence, that the whistle was blown upon the engine needlessly and wilfully—that is to say, that the servant who caused the whistle to be blown upon said engine did so needlessly and knew at the time of the proximity of the plaintiff's team to the railway.<sup>32</sup>

30—Texas Midland R. Co. v. Booth, 35 Tex. Civ. App. 322, 80 S. W. 121 (122).

"The first paragraph of the charge above quoted fails to submit to the jury whether there was actual or reasonably apparent danger and authorizes the jury to find for the plaintiff without passing upon that issue; and the paragraph quoted is open to the objection that it assumes the existence of such danger."

31—Nichols v. Baltimore & O. S. W. R. Co., 33 Ind. App. 229, 70 N. E. 183 (185), 71 N. E. 170.

"Without qualifications, this instruction is too broad. It will not be contended that if the engineer discovered that the alarm signals were frightening or adding to the fright of the team and making them unmanageable, it would still be his duty as a matter of law to continue giving the signals. Whether the engineer is justified in sounding an alarm signal after discovering the team, is to be determined by the jury upon proper instructions, un-

der all the facts and circumstances proven."

32—Wabash R. R. Co. v. Speer, 156 Ill. 244 (253), 40 N. E. 835, rev'g, 39 Ill. App. 599.

"This instruction was erroneous and misleading. After stating that, to entitle the plaintiff to recover, it must appear that the whistle was needlessly and wilfully blown, it proceeds to define these terms as meaning merely that the whistle was needlessly blown, and that the servant who blew it knew of the proximity of the plaintiff's team to the railway. Mere knowledge on the part of the defendant's servant of the proximity of the plaintiff's team to the railway was thus made equivalent to, or conclusive evidence of, willfulness, provided the blowing of the whistle turned out to be needless. The defendant's engineer may have blown the whistle in perfect good faith and with an honest belief that in blowing it he was subserving a plaintiff's safety in the best possible way, still, according to the instruction, if it turned

(e) If you believe from the evidence that the plaintiff was holding the team while the goods of her husband were being unloaded on the platform of the defendant for shipment, and if the jury further believe from the evidence that the defendant, by its employes, unnecessarily, either by whistling or escape of steam, in close proximity to the team, frightened the team and caused it to run off and injure the plaintiff, then she is entitled to recover.<sup>33</sup>

**§ 4034. Frightening Horses Through Usual and Ordinary Noise.**

You are instructed that as to whether or not defendant blew off steam from its engine at said railroad crossing, and by reason thereof frightened the horse that the wife of plaintiff was driving, is a question of fact to be determined by the jury from the evidence before them; and if you find that the defendant company blew off steam from its engine at said crossing, and thereby frightened the horse then being driven on such crossing by plaintiff's wife, and the agents and employes of defendant knew of the presence of plaintiff's wife on said track, then you will further consider whether or not the blowing off of steam was negligence, and whether same frightened said horse, and that such blowing off of steam and the frightening of said horse on said crossing, if you so find, could have been prevented by the use of such care on the part of the agents or employes of the defendant as a man of ordinary prudence would use under similar circumstances to avoid injuring persons so using said crossing.<sup>34</sup>

out that the blowing was unnecessary, the act was to be deemed willful, wanton or malicious. It needs no argument to prove that such is not, and cannot be, the law."

33—Toledo, St. L. & K. C. R. R. Co. v. Crittenden, 42 Ill. App. 469 (474).

"Appellee and the team were in charge of her husband. Therefore as between herself and the railroad company, a want of ordinary care on his part, contributing to the injury, would have the same legal effect as if it were her own, and bar a recovery, unless the injury were willfully committed by the company. *Rock Island v. Vanland-schoot*, 78 Ill. 485. And whether there was such a want on his part was a question for the jury. Did he exercise ordinary care in leaving her alone in the wagon, as he did? Was she a fit person to hold the team, unhitched, under the circumstances? The evidence referred to fairly raised that question. But the court told the jury, as a matter of law, if she was 'holding the team,' it was enough on that point. Had she been a child of three years the case might have differed in degree but would not in kind."

34—San Antonio & A. P. Ry. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607 (608).

"The first objection to this section of the charge is that it assumes as a fact that the horse was just being driven upon the crossing when the steam escaped, etc.; the evidence being conflicting. This objection seems to us hypercritical.

The language complained of cannot be fairly held to be an expression of an opinion of the court as to the evidence upon that issue. However, even the appearance of such an evil can be avoided upon another trial.

The third objection is sound. It was shown that the engineer knew of the presence of the horse and buggy at or near the crossing, and that the occupants of the buggy knew of the approach or proximity of the engine. A certain amount of noise is necessarily incident to the handling of a locomotive engine, and the noisy and sudden escape of steam from the safety valve is a matter of common knowledge. Persons who drive in close proximity to a locomotive, on the assumption that it will remain quiet, cannot be heard to complain that the horse takes fright at noises necessarily and usually incident to its safe operation. The company has a right to run its engine along its tracks, and in so doing to create such noises as are reasonably incident to its proper management. Liability would no more grow out of fright created by such a cause than could liability be predicated upon fright proceeding from the ordinary appearance of a locomotive in the absence of noise. Independent of the other issues in the case, what then was necessary to be shown in order to render the company liable for injuries resulting from the fright of the horse caused by the noise of the engine, under the facts of this case? First, the presence of the horse should have been



§ 4035. **Effect of Observance of Ordinances of Municipalities.** The jury are instructed that if they believe from the evidence that if, as soon as the servants of the defendant, who were in charge of the engine in question, discovered that for some reason, plaintiff could not get out of the way in time, they made diligent use of all the means at their command, in order to stop the train and avoid the injury to the plaintiff, then in no event can the jury find that the injury was willfully or wantonly inflicted. And if the jury further believe from the evidence that, in addition to such efforts on the part of said servants, the bell of said engine was ringing, as required by law, and that the engine, at the time of the accident, was not running at a greater rate of speed than ten miles per hour, then in no event can the plaintiff recover, and the jury should so find. And the jury are instructed that the burden of proof is upon the plaintiff to show that the bell of the engine was not thus ringing, or that the engine was running at a greater rate of speed than ten miles an hour, and she must establish the same by a preponderance of the evidence.<sup>35</sup>

§ 4036. **Running Train at Greater Speed than that Allowed by Ordinance or Statute.** (a) The court instructs the jury for the plaintiff, that if from the evidence in this case the jury believe that the defendant company was running its train more than 10 miles an hour over ——— avenue crossing, and that said crossing is a public crossing within the city limits, such rate of speed would be negligence in and of itself.<sup>36</sup>

(b) You are instructed that the ordinance introduced in the evidence is a valid law of the Village of G., and if you believe from the evidence in this case that the defendant was, at the time of the injury complained of, running the train that killed N. J. within the corporate limits of such village of G., at the rate of speed in excess of ten miles per hour, then the law presumes that the defendant by so doing was guilty of negligence, and liable in damages for causing the death of said N. J.<sup>37</sup>

known to the operatives of the engine; second, the probability of causing fright to the horse, and consequent disaster, should have been apparent to a person of ordinary prudence, situated as the engineer then was; third the noise causing the fright should have been due to causes under the engineer's control, and such noises should have resulted from the failure on his part to exercise ordinary care to prevent them. If these facts concur, and the person injured was exercising ordinary care, the company is liable. The existence of the crossing and the presence of the horse thereon would not be a necessary element in the case, under such circumstances; for the engineer would owe a like duty to one in charge of a horse and near the engine, though not on the crossing or right of way. *Gulf, C. & S. F. Ry. Co. v. Box*, 81 Tex. 617, 17 S. W. 375; *Hargis v. Railway Co.*, 75 Tex. 21, 12 S. W. 953."

<sup>35</sup>—*Elgin, J. & E. Ry. Co. v. Raymond*, 148 Ill. 244 (247), 35 N. E. 729.

"This instruction, as will be seen

embodies several distinct propositions, some of which, if standing alone, might perhaps have been regarded as correct. But when taken together, the instruction is clearly erroneous, and was properly refused."

<sup>36</sup>—*Ill. Cent. R. R. Co. v. Ashline*, 171 Ill. 313 (319), aff'g 70 Ill. App. 613, 49 N. E. 521.

"The instruction goes somewhat further than the statute. Under the statute, negligence is presumed from the violation of its provisions. Under the instruction, the running of trains at a rate of speed in violation of the ordinance is of itself negligence. We think the instruction was erroneous."

<sup>37</sup>—*Chicago, B. & Q. R. R. Co. v. Appell*, 103 Ill. App. 185 (187, 188).

"This instruction did not state a correct principle of law. By it the jury were authorized to render a verdict in favor of the plaintiff in case they found the plaintiff was, at the time in question, running its trains within the corporate limits of the village at a greater rate of speed than ten miles per hour, re-

(c) If the jury find that the train at the time it reached the crossing in question was running at a greater speed than that prescribed by the town ordinance, and find that, if the said train had not been running at the time it reached the said crossing at a greater rate of speed than that prescribed by the town ordinance, that the injury would not have occurred—that is, find that but for such rate of speed the injury would not have happened—then the jury are instructed that this was negligence, and they will answer the first issue, "Yes."<sup>38</sup>

(d) The jury are instructed that the rate of speed at which the train was running would not be negligence, or evidence of negligence, unless the jury find that if the train had been running within the limits prescribed by the town ordinance, to wit, not more than ten miles an hour, the injury would not have occurred.<sup>39</sup>

(e) If the jury believe from the evidence in this case that the plaintiff's horse was killed and his harness and wagon was injured within the incorporated limits of the city of C. by a train running on the defendant's track, by its permission and authority, and that said train was being run at that place and time at a greater rate of speed than was then permitted by the ordinance of said city, read in evidence, then the injury thereby caused to the plaintiff's property, if

gardless of the question whether the excessive rate of speed contributed to bring about the death of \_\_\_\_\_, and also of the vital question whether \_\_\_\_\_ was, at the time, in the exercise of ordinary care for his own safety \* \* \* It told the jury plainly and positively that under a certain state of facts appellee was entitled to recover, when in truth such condition of the facts did not of itself, entitle to a recovery."

38—*Edwards v. Atl. Coast Line R. Co.*, 129 N. C. 73, 39 S. E. 730 (731).

"This charge is correct in so far as it correctly assumes the two requisites for an affirmative finding of the first issue, namely, that the defendant must be guilty of negligence, and that such negligence must have contributed to the injury. In another view it is not correct, because it restricts the consideration of the excessive speed to the actual point of the injury. The negligence consists in running at an unlawful rate of speed within the corporate limits. If a train were running within such limits at an unlawful rate of speed, and in consequence of such excessive speed could not be stopped in time to prevent injury at the crossing after coming within sight thereof, the company could not free itself from liability simply by showing that the train was running less than 10 miles an hour when it reached the crossing. The object in limiting the speed where accidents are liable to occur is to keep the train within the control of the engineer, so as to enable him to stop in time to

prevent such accidents after he discovers the danger."

39—*Edwards v. Atl. Coast Line R. Co.*, supra.

"This instruction is in conflict with those quoted above, and is clearly erroneous, as well as prejudicial to the plaintiff. If the excessive speed was not even evidence of negligence, it would make no difference if it did cause the death of the intestate. A train may, without negligence, kill a man simply because, owing to its high speed, the engineer was unable to stop in time after discovering the danger; and yet the company would not be liable unless such speed were negligent or unlawful. A rate of speed greater than that allowed by law is always at least evidence of negligence, and under certain circumstances may become negligence per se. *Norton v. Railroad Co.*, 122 N. C. 910 (912), 29 S. E. 886.

In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, the court says on page 418, 144 U. S., page 683, 12 S. Ct., and pages 489, 36 L. Ed.: 'Indeed it has been held in many cases that the running of railroad trains, within the limits of a city, at a rate of speed greater than is allowed by an ordinance of such city, is negligence per se. (Citing authorities.) But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence.'

any, is presumed to have been done by the negligence of the defendant.<sup>40</sup>

(f) The jury are further instructed that by the laws of this state, if a railroad company by its agents or servants runs an engine or train of cars in or through the limits of an incorporated city, town or village, at a greater rate of speed than is permitted by the ordinance of such city, town or village, then the company is liable for all damages done to the property of any person injured by such engine or train of cars, providing the person injured is exercising the care for his property at the time in question.<sup>41</sup>

§ 4037. **Speed of Train When No Ordinance Exists.** (a) The court instructs the jury, that it is the duty of a railroad company whose railroad runs through a city or village, to run its trains while in the city or village at such rate of speed as to have them under control, so as to be able to avoid injury to persons or property, though there is no ordinance of such city or village on the subject, and if it fails to do so, it will be guilty of negligence.<sup>42</sup>

40—Chi. & W. I. R. Co. v. Zerbe, 110 Ill. App. 171 (172-3).

"The presumption intended by the section is not a conclusive presumption, which can not be overcome by evidence. If it were, then if a person should lie down on the rail of the track, and the train should run over and break his legs, on mere proof of the damage and that the train was being run in the city at a greater rate of speed than that permitted by the ordinance, he would be entitled to recover. A construction involving such an absurdity must be rejected."

41—Chi. & E. I. R. Co. v. Cross, 113 Ill. App. 547 (555-56), aff'd, 214 Ill. 602, 73 N. E. 865.

"This instruction is justly subject to criticism, and unless cured by other instructions given would be likely to be misleading. It is substantially the language of the statute, omitting the clause that the injury will be presumed to have been done through the negligence of the railroad company. In Atchison, T. & S. F. R. R. Co. v. Feehan, 47 Ill. App. 66, opinion by Mr. Justice Cartwright, it was held, the fact being proven that the train was running at a prohibited rate of speed at the time of the injury, the presumption is created by virtue of the statute that the injury was committed by the negligence of the defendant; this presumption is not conclusive, but it devolves upon the defendant to rebut it. The judgment of the Appellate Court was affirmed in 149 Ill. 202, 36 N. E. 1036. This precise point was not discussed by the Supreme Court in its opinion, but is fair to assume that that court did not disagree with the Appellate Court as to the law of this question."

42—Toledo, St. L. & W. R. R. Co. v. Smart, 116 Ill. App. 523 (527).

"The true rule governing the speed at which a railroad company is permitted to operate its trains

within corporate limits, in the absence of a statute or ordinance, was laid down by the Supreme Court in the case of Partlow v. Ill. Cent. R. R. Co., 150 Ill. 321, 37 N. E. 663, as follows: In the absence of a statute or ordinance a railway company has the undoubted right to establish the speed of its trains; but, under rules of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers, and such persons as may travel on the highway crossing railroad tracks; and, in establishing the rates of speed that their trains may run, due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care, travelling on the highways over and across railroad tracks.

In *Overton v. Railroad Co.*, 181 Ill. 326, 54 N. E. 898, it was held that whether the speed of the train running over a public crossing is unreasonably fast and unsafe depends in a great degree upon the extent and frequency of the use of a crossing by the public; that a railroad company being charged with knowledge of the extent of the use of the street by the public, and the consequent danger of running its trains over the same at a high and unusual rate of speed, is bound to regulate such speed with due regard to the safety of those having occasion to use the same.

The instruction was erroneous for the reason that under the rule therein stated, a railroad company is made the insurer of the safety of a person upon its tracks, within the city or village limits, without reference to the degree of care exercised by such person or his right to be on such tracks. If this were the law it would be only necessary in the case at bar to prove that the deceased was struck by a train within the village limits."



(b) The jury are instructed that no duty existed by defendant to plaintiff either as to rate of speed or as to efforts to stop the train, so long as she was running from the track of defendant's railroad.<sup>43</sup>

(c) The evidence shows and it is admitted that W. avenue at the point where the accident occurred was not at the time of the accident within the limits of any city or village; and you are instructed as a matter of law that there was no restriction by law imposed upon the defendant as to the rate of speed at which it should run its train at that point, but that it was only bound to use due and reasonable care for the safety of its passengers in the running of its train, and to give warning of the approach of its train by ringing a bell upon its engine from a point of at least eighty rods to the east of said crossing up to the said crossing.<sup>44</sup>

§ 4038. **Duty to Ring Bell.** (a) The court instructs the jury that by the law of this state every railroad company is required to have a bell and steam whistle placed and kept on each locomotive engine, and cause the same to be rung or whistled at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and to keep the same ringing or whistling until such highway is reached. It is a question for you to determine from the evidence whether the law as above stated was complied with by the defendant, and that it is also for you to decide from the evidence whether A. B. the deceased was or was not in such condition and so situated that he could have heard the bell or whistle if the former was rung or the latter sounded.<sup>45</sup>

(b) If the jury find that defendant's train approached the crossing in question without sounding the whistle and without ringing the bell, and struck and killed the plaintiff's intestate, then the jury are instructed that defendant was guilty of negligence, and you will answer the first issue "Yes."<sup>46</sup>

43—*Louisville & N. R. Co. v. Robinson*, 141 Ala. 325, 37 So. 431 (433).  
"This charge is inaccurate and misleading in the use of the expression 'no duty existed by defendant to plaintiff.'"

44—*Landon v. Chi. & G. T. Ry. Co.*, 92 Ill. App. 216 (218).

"This instruction is erroneous because in effect it tells the jury that if appellee gave warning of the approach of its train to the crossing, there was no liability, however great the rate of speed at which the train was run, so that the peril to its passengers thereon was not increased."

45—*Wabash R. R. Co. v. Stewart*, 87 Ill. App. 446 (451).

"The instruction was well calculated to mislead the jury as to what the laws of this state require of railroad companies in regard to giving signals at public highway crossings for the benefit of persons using the same, and was well calculated to prejudice the defendant before the jury, and it was reversible error to give it."

In *Louisville, N. A. & C. R. R. Co. v. Patchen*, 167 Ill. 204, aff'g, 66 Ill. App. 206, 47 N. E. 368, the court criticises the form of the above in-

structions, but holds that it contains a correct rule of law and that it does not mislead the jury.

46—*Edwards v. Atl. Coast. Line R. Co.*, 129 N. C. 78, 39 S. E. 730 (731).

"This instruction was erroneous because, the killing being admitted, it made the answer to the first issue depend entirely upon the failure to sound the whistle or ring the bell. If the issue had been simply as to the negligence of the defendant, this instruction would have been correct, but such was not the issue. It was as follows: 'Was the plaintiff's intestate killed by the negligence of defendant?' This issue involved two propositions: First, the existence of such negligence; and, secondly, its relation to the injury. The negligence of the defendant, no matter how great, would not of itself have rendered it liable in damages unless it had contributed to the death of the plaintiff's intestate; while, on the other hand, the mere killing would not have been actionable unless caused by some unlawful act or the negligent or willful omission of some legal duty on the part of the defendant."

(c) If the jury find that the defendant's train approached the crossing in question without sounding the whistle and without ringing the bell, and struck and killed the plaintiff's intestate, then the jury are instructed that the defendant was guilty of negligence, and you will answer the first issue "Yes."<sup>47</sup>

**§ 4039. When Failure to Ring Bell is Excused.** If you believe from the evidence that the plaintiff at the time he sustained the injury was so attracted in a different direction that the noise of the bell or the whistle would not have attracted him, or that the wind was so strong that he would not likely have heard it in his then state of mind, then the failure to ring or whistle would not be such negligence as would enable plaintiff to recover for such failure.<sup>48</sup>

**§ 4040. Whistle Need Not be Blown, and Bell Rung, at Same Time.** The court instructs you that the defendant is not required to have a bell of at least eighty pounds weight ringing on its engines and at the same time sound its whistle. It is sufficient if the defendant did either at the time of the alleged accident.<sup>50</sup>

**§ 4041. Whistle Need not be Blown, nor Bell Rung, Continuously.** And if the jury further believe from the evidence in this case that as defendant's engine and cars approached and reached said highway crossing the bell on the engine was not being continuously rung, or that the whistle on the engine was not being continuously sounded, and that neither the bell nor whistle was sounded continuously for eighty rods from said crossing and until said crossing was reached by said engine.<sup>51</sup>

**§ 4042. When Suit Based on Failure to Give Signals, Recovery Must be for Such Omission.** The court instructs the jury that if they believe from the evidence that the place of the injury complained of was the crossing of the railroad over a public highway, and that upon the occasion of the injury of the plaintiff the bell was not rung or

47—Butts v. Atl. & N. C. R. R. Co., 133 N. C. 82, 45 S. E. 472 (473).

"This instruction was erroneous, because the killing being admitted, it made the answer to the first issue depend entirely upon the failure to sound the whistle or ring the bell. If the issue had been simply as to the negligence of the defendant, this instruction would have been correct, but such was not the issue. It was as follows: 'Was the plaintiff's intestate killed by the negligence of the defendant?' This issue involved two propositions: First, the existence of such negligence; and secondly its relation to the injury. The negligence of the defendant, no matter how great, would not of itself have rendered it liable in damages unless it had contributed to the death of the plaintiff's intestate; while on the other hand, the mere killing would not have been actionable unless caused by some unlawful act or the negligence or willful omission of some legal duty on the part of the defendant.' See, also, Curtis v. Railroad, 130 N. C. 437, 41 S. E. 929."

48—Toledo, St. L. & K. C. Ry. Co. v. Cline, 135 Ill. 41 (44), 25 N. E. 846.

"This instruction was properly refused. It was argumentative and invaded the province of the jury and would have set them afloat on a sea of surmise."

50—Suburban Ry. Co. v. Balkwill, 195 Ill. 535 (539), aff'g, 94 Ill. App. 454, 63 N. E. 389.

"The instruction would have told the jury that it was sufficient if appellant either rang its bell or sounded its whistle at the time of the alleged accident. The statute fixes the specified distance within which the bell must continuously ring or the whistle sound, and to ring the bell or blow the whistle just when the train was upon the crossing would be of no benefit to one about to cross the track."

51—St. L. P. & N. Ry. Co. v. Rawley, 90 Ill. App. 653 (658).

"This instruction is misleading. The statute does not require that the bell shall be continuously rung, or if not that the whistle shall be continuously sounded. If the bell is rung a part of the required time, and the whistle sounded for the remainder of the time, the statute is complied with."

the whistle sounded at a distance of 80 rods from the crossing, and kept ringing or whistling until the crossing was reached, and that the plaintiff was lulled into a feeling of security by reason of such negligence on the part of defendant, and that in attempting to cross the said railroad track he was struck and injured as charged in the declaration, then the plaintiff, even though he may have been somewhat careless in looking out for trains, may recover, provided the jury shall, upon a comparison, be of the opinion from the evidence that the negligence of defendant was gross and that plaintiff's negligence was only slight.<sup>52</sup>

§ 4043. **Consideration of Evidence as to Sounding Whistle or Ringing Bell.** In the consideration of the evidence, affirmative testimony, as that a bell was rung or a whistle was sounded, is entitled to more weight than negative testimony, as that a bell or whistle was not heard.<sup>53</sup>

§ 4044. **Lulling Plaintiff into a Feeling of Security by Failure to Give Signals.** The court instructs the jury that the giving of four or five blasts of the whistle or ringing of the bell for a less distance than 80 rods is not a compliance with the law, which requires the whistle or the bell to be sounded continuously for a distance of 80 rods before reaching the crossing; and if the jury believe from any omission to give the signal, the plaintiff was lulled into a feeling of security in attempting to cross the railroad, and that he was exercising such care and caution as would have been exercised by a reasonably prudent man, then the verdict should be for the plaintiff, and damages should be assessed at such sum as the jury think the plaintiff entitled to from the evidence.<sup>54</sup>

52—Toledo, St. L. & K. C. Ry. Co. v. Cline, 135 Ill. 41, 25 N. E. 846.

"This instruction was inaccurate. The statute imposes a liability upon railroad companies for all damages sustained by reason of a neglect to either ring a bell or sound a steam whistle when approaching places where their railroads cross a public highway. The instruction does not make the liability of defendant for damages depend upon the fact that they were occasioned by a failure to ring a bell or sound a whistle, but depended upon the fact that such violation lulled the plaintiff into a feeling of security. The plaintiff may have been lulled into a feeling of security by the neglect of defendant in that behalf, non constat, such neglect occasioned the injury. In the Peoria, P. & J. R. R. Co. v. Siltman, 67 Ill. 72, a similar instruction was condemned, and it was there said: 'This is an evasion of the statute, and was calculated to mislead the jury.' The requirement in the instruction that they should believe from the evidence that the plaintiff 'was struck and injured as charged in the declaration' did not sufficiently cure the defect therein, since the jury probably understood that language to refer to the charge in the declaration that the locomotive struck the wagon and broke it in pieces, and

thereby threw him to the ground, etc."

53—Pence v. Chicago R. I. & P. Ry. Co., 79 Ia. 389, 44 N. W. 686 (689).

"The instruction ignores the fact that, in weighing such testimony, the comparative credibility and means of knowledge of the witnesses should be considered."

54—St. L. A. & T. H. R. R. Co. v. Odum, 156 Ill. 78 (81), aff'g 52 Ill. App. 519, 40 N. E. 559.

"The expression 'if the jury believe from any omission to give the signal the plaintiff was lulled into a feeling of security in attempting to cross the railroad' was condemned by this court in Peoria, P. & J. R. R. Co. v. Siltman, 67 Ill. 72, and Toledo, St. L. & K. C. R. R. Co. v. Cline, 135 Ill. 41, 25 N. E. 846.

"In the last case cited, in discussing a similar instruction, it is said (p. 49): 'The first instruction for appellee was inaccurate. The statute imposes a liability on railroad companies for all damages sustained by reason of a neglect to either ring a bell or sound a steam whistle when approaching places where their railroads cross a public highway. The instruction does not make the liability of defendant for damages depend upon the fact that they were occasioned by a failure to ring a bell or sound a whistle.



§ 4045. **Obstruction of View by Bushes and Grass at Private Crossings.** The law does not require the railroad company to prevent bushes and grass from growing upon its right of way so as to obstruct the view of persons using a private crossing. The law expects persons using a private crossing to exercise a high degree of care and caution to avoid injury from approaching trains.<sup>55</sup>

§ 4046. **When Flagman Reasonably Necessary for Safety at Crossing.** (a) The court instructs the jury that the fact (if you so believe from the evidence) that the defendant did not have or keep a flagman at the crossing in question, is not evidence of negligence of the defendant under the issues in this suit, and the jury should entirely disregard the same in passing upon the question of whether or not the defendant was guilty of negligence as charged in the declaration in this case.<sup>56</sup>

(b) If you believe that W.'s crossing was an exceptionally dangerous crossing, it was the duty of the defendant to keep a watchman at such crossing, or to use some other effective means to warn travelers of the approach of its trains to said crossing, and the failure to do so was negligence on the part of the defendant.<sup>57</sup>

(c) If the jury believe from the evidence that the ringing of a bell or the sounding of a whistle or the keeping of a lookout for persons about to cross said tracks or the keeping of a flagman at said crossing were reasonable precautions to be exercised by the persons in charge of such engines with reference to the safety of such persons, then a failure to use such reasonable precautions would be negligence on the part of the persons so operating such engines.

but depended upon the fact that such failure lulled the plaintiff into a feeling of security. The plaintiff may have been lulled into a feeling of security by the neglect of defendant in that behalf, non constat, such neglect occasioned the injury."

55—Chicago & A. R. R. Co. v. Sanders, 154 Ill. 531 (538), 39 N. E. 481, aff'g 55 Ill. App. 87.

"The first clause of this instruction is an abstract statement, the correctness or incorrectness of which it is not necessary to decide. It was calculated to mislead the jury because the question here was, whether bushes or grass growing on the right of way constituted an obstruction to the view. If they did, then it was a fair question to be submitted to the jury whether the running of the train at a rapid rate without warning of its approach, when the view was not obstructed, showed negligence on the part of the railroad company. We do not think that the refusal of the instruction was error."

56—Chi. & I. R. R. Co. v. Lane, 130 Ill. 116 (123), 22 N. E. 513.

"The instructions the court gave sufficiently guarded the interests of appellant against any improper inference that might be deduced from the circumstances that there was no watchman, and the court very properly declined to tell the jury they should entirely disregard such

circumstance in passing upon the question whether or not appellant was guilty of the negligence charged in the declaration."

57—Chesapeake & O. Ry. Co. v. Gunter, 108 Ky. 362, 56 S. W. 527 (528).

"This was, we think, a peremptory instruction to find for plaintiff if the jury believe that crossing was exceptionally dangerous. It required the company to adopt means which should be actually effective to warn the traveling public of the approach of trains. The company was required only to use such means to give warning of the approach of trains as, considering the character of the crossing, were reasonably sufficient to warn travelers of the approach of trains; and the jury are the judges of the reasonable sufficiency of the means actually employed. Whether the means employed were reasonably sufficient, under the circumstances of this case, and considering the nature of the crossing, and the physical conformation of the country surrounding it (that is, whether they were such as an ordinary prudent person operating a railroad would have adopted under like circumstances), was a question for the jury to decide under proper instructions. It is not required by the law that the means adopted should prove effective."

(d) If the jury further believe from the evidence that at the time of receiving such injury the said A. B. was in the exercise of reasonable and ordinary care in respect to his own safety and that the persons in charge of and operating the said engine were guilty of negligence in manner and form as charged in the declaration and defined in these instructions, and that by reason of such negligence the said A. B. was struck and killed, then the plaintiff should recover.<sup>58</sup>

§ 4047. **Sufficiency of Watchman Standing at Crossing as Warning not to Cross.** If the jury believe from the evidence that Watchman L., with a lighted lantern in his hand, was standing near the middle of W. street within eight or ten feet of the defendant's main track when plaintiff passed over the latter and sustained the injuries complained of, then plaintiff is not entitled to recover, and your verdict must be for the defendant.<sup>59</sup>

§ 4048. **Effect of Flagman's Signal to Cross.** (a) You are instructed that if you find from the testimony in this case that the plaintiff intending to cross the track of the defendant railway company where the same crosses N. B. street in the city of T., stopped his horse and wagon at a reasonably safe and proper distance from

58—Peoria & P. Union Ry. Co. v. Herman, 39 Ill. App. 287 (293-295, 297).

"We think these instructions erroneous. The first instruction holds that if it was a reasonable precaution to be exercised by the persons in charge of the engine to keep a flagman at the crossing, then a failure to do so would be negligence. It will be observed that this instruction does not base the keeping of flagmen at the station as a necessary reasonable precaution to prevent injury to those crossings, which, we think, to make the instruction good it should have done. It might be a reasonable precaution and one very proper and appropriate to take and yet not be necessary. Very many things might be done repeatedly to prevent injury and yet not be necessary. When we read the first instruction in connection with the second, which tells the jury that if the person in charge of and operating said engine in the manner as charged in the declaration and defined in the instructions, the recovery would follow, we at once see how vicious and injurious the improper definition of what is negligence, as defined in the first instruction in regard to keeping the flagman, would be. The two instructions taken together in such form, we think, would be misleading. It could not properly be said, as supposed in the second instruction, that by reason of the negligence in not keeping a flagman when it was not necessary to protect the deceased, that the injury would or could result from such omissions. \* \* \* Another point is made on the second instruction and that is, that the deceased was only required to use reasonable and ordinary care in respect to his own

safety at the time of receiving the injury. This part of the instruction is claimed to be misleading in not requiring the deceased to use such care while he was approaching the crossing, as well as at the very moment of receiving the injury. This point is not a new one in this State. It has often been held by the Appellate Court as well as the Supreme Court, that such an instruction is erroneous, as the jury might understand that the deceased was not required to exercise any care for his own safety except at the moment of receiving the injury.

We cite the following cases which clearly support the claim: Chi. Mil. & St. P. R. R. Co. v. Halsey, 133 Ill. 248, 23 N. E. 1028; Chi. B. & Q. Ry. Co. v. Colwell, 3 Ill. App. 545; Chi. & N. W. v. Clark, 2 Ill. App. 116; Ill. Cent. R. v. Weldon, 52 Ill. 290.

If the writer hereof were deciding the case for the first time he would not feel disposed to construe the word 'time' as it appears in the instruction in so limited a sense as to mean the word 'moment,' but would rather be disposed to hold that it meant the entire occasion of the accident—as well as the approach to the crossing, as the very moment of the accident; but we felt the question is too well settled by the decisions to allow of a change."

59—Montgomery v. Mo. Pac. Ry. Co., 181 Mo. 508, 78 S. W. 930 (933, 936).

"This instruction was properly modified by the court. Moreover, as asked, it is not the law. It is not correct to say that the mere fact that a watchman is at a dangerous crossing is of itself a sufficient warning to travelers not to cross."

said crossing—that is, at such a place and distance from said crossing where plaintiff's horse would be reasonably safe from taking fright; and if you find that plaintiff in attempting to cross said track, and in driving near to the same, acted in such manner, and took such precautions, and exercised such care to avoid danger, as an ordinarily prudent person would act and do under similar circumstances; and that the flagman of the defendant company motioned or signaled to the plaintiff that the crossing was clear and to come ahead, when in fact an engine and cars were approaching said crossing near by; and that the flagman knew or could by the use of ordinary care and diligence have known or discovered that the same was so approaching; and that the plaintiff acted upon such signal, and started to drive across the track; and that, when he had approached near to the same, an engine and cars came along on defendant's side track, near to plaintiff's horse, and from the same the horse took fright, became unmanageable, and wheeled and overturned plaintiff's wagon, and threw the plaintiff out on the ground, and the plaintiff was thereby injured—then the plaintiff would be entitled to recover.

(b) But should you believe from the testimony that the flagman at the crossing in question did not flag or signal plaintiff to come on, and thereby cause plaintiff to endanger himself by driving his horse near the train of defendant company, and thus to be hurt as alleged, you will find for defendant.

(c) You are instructed, at request of plaintiff, that if the flagman signaled plaintiff to cross the track, believing that it was reasonably safe for plaintiff to so cross at that time, and not knowing that a train was then approaching said crossing, near by, so as to render it unsafe and dangerous for plaintiff to then cross said track, such train being then approaching and near said crossing, and if you believe that the flagman's mistake was on account of his "negligence" as that term has been defined, then you are instructed that such mistake of the flagman would not relieve the defendant company of liability, but it would be liable for such injuries as the plaintiff sustained and suffered as the direct result of such mistake of the flagman, on account of the flagman's want of ordinary care, if any.<sup>60</sup>

§ 4049. **Effect of Flagman's Signal not to Cross.** If the jury believe from the evidence that the flagman on the crossing did not flag the plaintiff to cross the tracks at all, and if the jury further believe from the evidence that he signalled the plaintiff not to cross, in time for the plaintiff by the exercise of reasonable care to have avoided the injury, then the jury are instructed, as a matter of law, that the plaintiff is not entitled to recover in this case, even if the jury should also find from the evidence that the gates were not lowered on the crossing, that no bell was run or whistle sounded, and that the train

60—St. L. & S. W. Ry. Co. of Texas v. Gill, — Tex. Civ. App. —, 55 S. W. 386 (387).

"There can be no question that these instructions are obnoxious to the well-established rule that it is against the statute prohibiting a charge upon the weight of the evidence for a court, in its charge to the jury, to group certain facts in the evidence and instruct the jury as a matter of law that such facts

constitute negligence, unless such facts show a violation of a statutory duty or show acts so contrary to the dictates of common prudence that no reasonable mind would hesitate to conclude that an ordinarily careful person would not have committed them. Tex. & Pac. Ry. Co. v. Murphy, 46 Tex. 356; Gulf, C. & S. F. Ry. Co. v. Gasscamp, 69 Tex. 546, 7 S. W. 227; Campbell v. Trimble, 75 Tex. 270, 12 S. W. 863."



was moving at a rate of speed in excess of that prescribed by the ordinances of the town of L.<sup>61</sup>

§ 4050. **Making "Flying Switch" at Crossing.** The court instructs the jury that the using of a flying or running switch without any precautionary signals is negligence in itself, and if the preponderance of the evidence in this case shows that the defendant made a running switch on the occasion of the killing of C. D., deceased, without giving any signals and without placing any brakeman upon their cars, or blowing any whistle or ringing any bell, carelessly managed its train of cars, and by reason thereof, so as to cause the death of said C. D., without any fault or negligence on his part, then the jury would be authorized in finding the defendant guilty and assessing damages at any sum they see fit, from the evidence, not exceeding \$5,000, the amount claimed in the declaration.<sup>62</sup>

§ 4051. **Failure of Defendant's Servants to Avoid Threatened Injury when Possible.** (a) The court instructs the jury, that if they believe from the evidence in this case that the engineer or person upon and in charge of the locomotive and tender which struck and killed deceased, if they believe from the evidence his death was so caused, could, by exercise of reasonable care and watchfulness, have seen deceased in time to have stopped said engine and avoided the injury without danger to themselves or train, then the railway company is liable for the want of such care and watchfulness, and the injury occasioned thereby, provided the jury also believe from the evidence that deceased was at the time exercising all reasonable care and caution for his personal safety.<sup>63</sup>

(b) If you believe from the evidence in this case that after the engineer in charge of defendant's engine became aware of the position of the plaintiff with reference to the tracks he failed to do all that he could reasonably do, considering the time within which he had to act and all the circumstances of the situation, to avoid striking plaintiff with the engine, and that by reason of such failure the plaintiff

61—Chi. R. I. & P. Ry. Co. v. Clough, 134 Ill. 586 (595), 25 N. E. 664, 29 N. E. 184.

This was manifestly improper. "If the gates were not lowered on the crossing and no bell was rung or whistle sounded, and the train was moving at a rate of speed in excess of that allowed by the ordinances of the town, then the mere fact that the flagman signalled the plaintiff not to cross the tracks would not free the appellant from culpable negligence, if the signal to stop was not given in time for the plaintiff, by the exercise of reasonable care, to have avoided the injury. The claim of appellant that 'any warning of the approach of the train would be sufficient to prevent a recovery' is wholly inadmissible. The very object of placing a watchman at a railroad crossing is that he may give timely warning and thereby prevent injury to persons or property."

62—Cleveland, C. C. & St. L. Ry. Co. v. Maxwell, 59 Ill. App. 673 (675, 677).

"This instruction not only invaded the province of the jury (Myers v. I. & St. L. Ry. Co., 113 Ill. 386, 1 N. E. 899; Village of Clayton v. Brooks, 150 Ill. 97, 37 N. E. 574), but was harmful for the reasons stated. The making of such a switch over a street or road crossing, where, by statute, signals must be given, would be *prima facie* negligence where a collision results in consequence. But that is not this case. Common law negligence is here averred and must be proved. It will not be presumed."

63—Lake Shore & M. S. Ry. Co. v. Clark, 41 Ill. App. 343 (344).

"The undisputed fact is that the place was not a highway. The instruction has in it no reference to the use of it as a crossing, if that would make any difference. It imposes upon railroads, if it is good law, the duty of constant watchfulness over any track upon which a locomotive is running, and if anybody is seen upon that track, to stop and wait for him or her to get off. Such a doctrine can not be defended."

was struck and injured, you will find for the plaintiff in damages. Unless you so believe, you will find for the defendant.<sup>64</sup>

(c) The court charges the jury that if the jury are satisfied reasonably from the evidence that the defendant's engineer blew the whistle and rang the bell as the train was approaching said T. street crossing, and that the train was run at a moderate rate of speed at or near said crossing at the time of the accident; that plaintiff's intestate suddenly and without warning ran on the track of the defendant, so near to the front of the train that it was impossible to stop the train in time to prevent the accident, by using all the applications known to skillful engineering, then the verdict must be for defendant.<sup>65</sup>

(d) If you believe from the evidence that when the engine which killed W. was approaching said crossing on M. avenue, the engineer operating the same saw said W. near its track at said crossing, and it reasonably appeared to said engineer, and he realized that said W. would not probably stop before he reached said track, or would not pass over said crossing in time to avoid a collision with said engine, and if you further believe from the evidence that said engineer then failed to exercise ordinary care, by the use of the means he had at hand, to stop said engine and to prevent such collision, you will find for plaintiffs, even though you may believe that said W. was guilty of contributory negligence in the manner in which he approached and went upon said crossing.<sup>66</sup>

64—*Gunn v. Felton*, 108 Ky. 561, 57 S. W. 15 (17).

"The instruction leaves out of view entirely any duty of the engineer to either keep a lookout for the purpose of seeing whether any person was in danger, and also, in effect, says that although the brakeman might have repeatedly attempted to notify the engineer of the danger of plaintiff, yet plaintiff could not recover, unless he in fact became aware of plaintiff's perilous position in time to have avoided the injury. It was clearly the duty of the engineer to use all reasonable diligence to see and receive and regard the signals, if any, of the brakeman, and, if the place of injury was in fact within the town of D., it was the duty of the defendant to use reasonable care to avoid injuring any person on the track, even though a technical trespasser."

65—*Louisville & N. R. Co. v. Robinson*, 141 Ala. 325, 37 So. 431 (432).

"It will be observed that this charge predicates the freedom of defendant from liability on the inability of the engineer to stop the train in time to prevent the accident, when and if the child suddenly and without warning ran on the track in front of the engine. Without reference to the much-mooted question by consul, if it was not the duty of the employees of the train to run it at such a speed on approaching the place, and to retain such control over it as to be able to bring it to a full stop before striking the child, and that it would

be negligence not to so operate it, it was open to the jury, under the evidence, to conclude that the speed of the train might have been diminished to such an extent, after the engineer discovered the child's peril, as to afford her opportunity to escape. This question was clearly within the issue, and the charge in question ignored it. *Cent. of Ga. R. R. Co. v. Foshee*, 125 Ala. 199 (221), 27 So. 1006; *Louisville & N. R. Co. v. Orr*, 121 Ala. 489 (502), 26 So. 35."

66—*Mo. K. & T. Ry. Co. of Texas v. Eyer*, — Tex. Civ. App. —, 69 S. W. 453 (454).

"The charge is error, for the reason that it does not instruct the jury that they must believe that the engineer, by the use of ordinary care, could have avoided the collision. The jury may have concluded, under the charge, that the engineer did not exercise ordinary care, by the use of the means at his command, to prevent the collision, and for this reason have found for plaintiff, and still been of the opinion that, had he exercised such care, he could not have avoided the collision. The reason for holding the company liable on the ground of discovered peril is that the engineer in charge of the train has at his command means for stopping the train and preventing injury, and it is his duty to make use of these means, and his failure to do so is negligence for which the company is chargeable. The appellee contends that, if there is error in the charge in this respect, it is one of omission, and appellant, not having

§ 4052. **Care Required of Travelers.** (a) You are instructed that the law requires that every railroad corporation shall cause a bell of at least thirty pounds weight and a steam whistle to be placed and kept on each of its locomotive engines, and that it shall cause the same to be rung at the distance of at least eighty rods from the place where the railroad crosses any public highway, and that the same shall be kept ringing or whistling until such highway is reached, and if you believe, from the evidence, that the train in question approached the crossing in question without ringing a bell or sounding a whistle as required by said law, and that by reason thereof and as a result of such failure to ring a bell or sound a whistle, plaintiff's intestate, while crossing the defendant's railroad and in the exercise of ordinary care for her own safety, was struck and killed by said train, then your verdict should be for the plaintiff for whatever pecuniary damages you may believe from the evidence the next of kin has sustained by reason thereof.<sup>67</sup>

(b) The ordinary rule is that a person about to cross a railroad track must both look and listen for approaching trains, and, if the circumstances be such as to reasonably require it, he must stop before venturing upon the track, and satisfy himself, as an ordinary prudent man, that the way is clear. But such rule is not universal, and if the situation of the crossing, and the circumstances surrounding the attempt to use it, be such that the traveler is justified, as a reasonable and prudent man, in believing he can use it with safety without precautions, then his omission is not negligence.<sup>68</sup>

requested a special charge, cannot be heard to complain. We are of opinion that the charge is affirmative error, which requires a reversal of the judgment. *Tex. & Pac. R. R. Co. v. Scrivener*, — *Tex. Civ. App.* —, 49 S. W. 649; *San Antonio & A. P. Ry. Co. v. Gray*, 95 *Tex.* 424, 67 S. W. 763."

67—*Ill. Cent. R. R. Co. v. Farrell*, 86 *Ill. App.* 436 (438).

"This instruction was calculated to give the jurors to understand that the court required them to find a verdict for the plaintiff, if they believed from the evidence that the defendant failed to do those things therein enumerated, and by reason thereof the plaintiff's intestate was killed while crossing the defendant's railroad, and that she was then in the exercise of ordinary care for her own safety, while under the evidence to warrant a verdict the jury should have been required to believe that plaintiff's intestate was in the exercise of ordinary care before attempting to cross defendant's railroad as well as while crossing it, for 'one who failing to observe due care, blindly walks into danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger but fails to make any effort for his own per-

sonal safety, and because thereof, is injured.' *Chi. Mil. & St. P. Ry. Co. v. Halsey, admr., etc.*, 133 *Ill.* 248, 23 N. E. 1028, and *Abend v. T. H. & I. R. R. Co.*, 111 *Ill.* 203, 53 *Am. Rep.* 616. Whether or not the deceased used ordinary care to avoid the collision is shown by the evidence to have been a vital question. \* \* \* therefore the instruction should have been clear and certain upon that point, and, being uncertain and calculated to mislead the jury, it was prejudicial error to give it."

68—*Defrieze v. Ill. Cent. R. R. Co.*, — *Ia.* —, 94 N. W. 505 (507).

"The last sentence of the instruction is manifestly erroneous. We cannot imagine a case where one about to cross a railway track is not required to take precautions. If this were the rule, the railway companies would practically become insurers against all accidents at crossings. The instruction, as it reads, holds to the rule that if one, as a reasonably prudent man, believes that he can cross a railway track with safety without taking any precautions, his omission to do so is not negligence. This entirely nullified the rule that railway crossings are known places of danger, and practically justified the jury in inferring that a reasonably prudent man may, under certain circumstances, use such a crossing without taking any precautions whatever."



(c) If you find from the evidence that plaintiff was seated in the buggy with the driver in such a position that she could see the engine, then you are instructed that it was her duty to use all care and diligence to prevent any injury to herself that a careful and prudent person would have used; that if she failed to do so, and such failure caused or directly contributed to the injury then she cannot recover.<sup>69</sup>

(d) The jury are instructed that the injuries to plaintiff's decedent of which he died, if you find he did die from injuries received by collision with defendant's engine at a highway and railroad crossing, were brought about by his own negligence.<sup>70</sup>

§ 4053. **Driving Across Track with Baby in Arms.** If you believe, from the evidence, that the plaintiff was guilty of an extremely imprudent act in driving the three-year-old filly, with a baby in her arms, and that her imprudence in driving over the railroad under the circumstances contributed to her injury, you should find the defendant not guilty.<sup>71</sup>

§ 4054. **Plaintiff's Knowledge of Dangerous Character of Crossing.** You are instructed by the court that if you find from all the evidence in this case that the plaintiff, knowing the dangerous character of the crossing in question, used all and every possible care and caution for his safety at the time in question, and that he received the injury complained of as alleged in the declaration, and without any fault or negligence on his part, then, upon the question of negligence in this case, the law is with the plaintiff, notwithstanding the fact that the dangerous condition of said crossing was known to the plaintiff.<sup>72</sup>

69—Chicago G. W. Ry. Co. v. Bailey, 66 Kas. 115, 71 Pac. 246 (247).

"That she was seated in the buggy, and that she could see the engine, there was no dispute; but these two facts without further predicate are not sufficient to connect her, in the absence of the exercise of care and diligence, with the cause of the injury so as to make her a contributor thereto. Contributory negligence implies two things: First, a want of ordinary care on the part of the person injured; second, approximate connection between this want of ordinary care and the injury complained of. 1 Thomp. Neg., § 163. Now the instruction in question practically ignores both these essentials."

70—Nichols v. Baltimore & O. S. W. Ry. Co., 33 Ind. App. 229, 70 N. E. 183 (184), 71 N. E. 170.

"We have set out the opening sentence of the instruction. It is not modified by anything that follows. This was error. The instruction, we think, is contrary to the spirit of recent legislation and decisions. Burns' Rev. St. 1901, § 359a (Horne's Rev. St. 1901, § 284a); Malcott v. Hawkins, 159 Ind. 127, 63 N. E. 308; So. Ind. Ry. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722; Tex. & Pac. Ry. Co. v. Gentry, 163 U. S. 353 (366), 16 S. Ct. 1104, 41 L. Ed. 186; Baltimore & P. R.

Co. v. Est. of Landrigan, 191 U. S. 461, 24 S. Ct. 137 (140), 48 L. Ed. —; Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 81, 84 Fed. 93 (98); Norton v. Railroad Co., 122 N. C. 910 (928), 29 S. E. 886. The presumption is that the decedent was without fault, his negligence being a matter of defense."

71—Ill. Cent. R. R. Co. v. Griffin, 184 Ill. 9 (16), aff'g, 84 Ill. App. 152, 56 N. E. 337.

"The instruction in effect informs the jury that the plaintiff was imprudent in driving over the railroad track, and for this reason, if for no other, it was properly refused. It was for the jury to determine from the evidence whether plaintiff was negligent or imprudent, and it was not within the province of the court to tell the jury whether a certain act was imprudent or negligent."

72—Ill. Cent. R. R. Co. v. Truesdell, 68 Ill. App. 324 (329, 330).

"The vice of this instruction is that it assumes that the character of the crossing in question was dangerous. The third instruction given for appellee was bad, because it told the jury that if they believed from the evidence that the railroad company permitted the post to remain near the center of the traveled portion of the highway within and where it crossed the right of way, so as to render it dangerous to persons wanting to pass over the

§ 4055. Duty of Person Crossing Tracks to Stop, Look and Listen.

(a) If the plaintiff could not see the train approach, and his wagon and team caused any noise that would interfere with or lessen his opportunity to determine the approach of the train by the exercise of his sense of hearing, then it was his duty, before going upon the track, to stop and listen to ascertain whether or not a train might be approaching.<sup>73</sup>

approach, etc., it would be liable. From the instruction the jury would understand that it was the duty of the railroad company to keep the traveled portion of the highway over the entire right of way safe and free from obstructions. As held by us, that would not be necessary unless the conditions were such as to require the approach to extend to the boundary limit of the right of way."

73—Peck v. Oregon Short Line R. Co., 25 Utah 21, 69 Pac. 153 (154).

"It must be conceded that this request was in harmony with the rule adopted in a few of the American states, notably in Pennsylvania, where the rule of 'stop, look, and listen,' before attempting to cross a steam railway track is so inflexible that a non-observance of it under any circumstances, it seems, is held to be negligence per se. If, therefore, in that jurisdiction, a person attempts to drive across a steam railroad track, without first stopping to look and listen, and is struck and injured by a train, he is deemed, as a matter of law, guilty of such negligence that he cannot recover, regardless of whether or not the railway company was also negligent. In Railroad Company v. Beale, 73 Pa. 504, 13 Am. Rep. 753, it was said: 'There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se, and a question for the court.' Omslaer v. Traction Co., 168 Pa. 519, 32 Atl. 50, 47 Am. St. 901.

"This rule has been applied to some other jurisdictions to cases where, in the vicinity of the crossings, the traveler's view of the railway track was obstructed. Thus the supreme court of Oregon in Blackburn v. Southern Pac. Co., 34 Ore. 215, 55 Pac. 225, where, from a city street the view of the traveler in the vicinity of the crossing was obstructed, and he, without stopping his vehicle to listen for approaching trains, attempted to drive across the railroad track, and was struck by a train and killed, held that the failure to stop and listen before making the attempt to cross was negligence per se, and the plaintiff was not permitted to recover, although the train was running at an unlawful rate of speed when the accident occurred. Among this class of cases are Smith v. Rail-

road Co., 87 Me. 339, 32 Atl. 695; Phil. W. & B. R. R. Co. v. Hoge-land, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; Central R. R. Co. v. Smalley, 61 N. J. 277, 39 Atl. 695; Houghton v. Ry. Co., 99 Mich. 308, 58 N. W. 314; and Henze v. Ry. Co., 71 Mo. 636.

"The doctrine of the above cases, however, has never been adopted in this jurisdiction. Nor has the rule to 'stop, look and listen' been accepted or adopted by a majority of the courts of the Union, or by the supreme court of the United States. The objection to its general acceptance appears to be that it singles out and places too much stress upon a single fact in evidence, whereas such fact, with all the other material facts in the case, should be considered together in determining the question whether or not the traveler was exercising that degree of care which an ordinarily prudent man would, under similar circumstances, have exercised. Under the strict application of the Pennsylvania rule the question of the contributory negligence of the injured is conclusively determined if it appears in evidence that he did not stop to look and listen before attempting to cross, and yet there are doubtless many cases where the facts and circumstances which surrounded the injured at the time of the occurrence, including the fact of the failure to stop before attempting to cross the track, are of such character that all reasonable men could not draw the same conclusion from them,—the test for withdrawing such a case from the jury. The enforcement, therefore, of such a rule, regardless of all the other facts in a case, would seem to be an invasion of the province of the jury. No doubt there are cases where the fact of a failure to stop should receive great weight in determining the right of recovery, but still it is within the province of the jury to pass upon that fact, and, looking at and weighing all the other facts and circumstances connected with the accident, to say whether the failure to stop was an omission of that care and prudence which an ordinarily careful and prudent person should have exercised under such circumstances. The fundamental rule as to the care to be exercised at a railroad crossing is that both the traveler and those operating a railway train must exercise such caution as a man of ordinary care and prudence

(b) The law also imposed upon the plaintiff, when crossing said crossing, to use ordinary care to ascertain the approach of such train by looking and listening for said train, and, unless she did so use ordinary care to ascertain the approach of said train, she was guilty of contributory negligence, and the verdict ought to be for the defendant.<sup>74</sup>

**§ 4056. Failure of Person at Crossing to Stop, Look and Listen.**

(a) The court instructs the jury that it is the duty of a person ap-

would exercise under like circumstances and surroundings. If the crossing is particularly dangerous, a degree of care commensurate with the danger is required of both parties. They have the mutual duty of keeping a sharp lookout for danger. The railroad company violates such duty by running its train at an unlawful rate of speed, or by failing to give proper warning of the approach of the train at the crossing, and the traveler violates it by failing to look and listen before attempting to cross; but his failure to stop before attempting to cross is not negligence per se within this jurisdiction, nor, it seems clear, within the majority of the jurisdiction in this country. In *Olsen v. Railway Co.*, 9 Utah 129, 33 Pac. 623, where the material facts were quite similar to those in this case, counsel for the defendant requested, same as in this case, the court to charge the jury that it was the plaintiff's duty 'to stop his team, and listen for approaching trains.' This the court refused to do, but instructed the jury that in determining the question whether either party was negligent they 'should take into consideration the circumstances and conditions with which they were surrounded' at the time of the accident, and that they had a right to take into consideration the fact, if they believed it from the evidence, 'that there were obstructions to the view of the track or train from the road on which the plaintiff was traveling, and whether the train was a special one and not a regular train, and whether there was a high wind or otherwise.' The court further charged that, if there were obstructions to the view, 'then it was the plaintiff's duty to urge greater efforts to see and hear any train that might be approaching.' The supreme court, passing upon the instructions and action of the court, held that the law of the case was fairly submitted to the jury, and in the course of its opinion said: 'It was for the jury to pass upon the weight of the testimony, and as to whether or not the respondent was guilty of contributory negligence, under the circumstances in proof. \* \* \* The plaintiff may have expected that if any train was passing it would blow its whistle or ring its bell, as provided by

statute; \* \* \* and that it would not be run at an unusual rate of speed, and without reasonable and timely warning of its approach; and, while expecting this, yet it was his duty, under the facts shown, to make careful and vigilant use of his eyes and ears to look and listen for trains before crossing, and use greater effort to see and hear any train that might be approaching than he would be expected to do, were it not for the obstructions that prevented his view.'

74—*Chesapeake & O. Ry. Co. v. Gunter*, 108 Ky. 362, 56 S. W. 527 (527).

"We are of the opinion that the court should have told the jury that it was plaintiff's duty to exercise such care as an ordinarily prudent person would exercise under similar circumstances to ascertain the approach of trains, and that it should not have limited the degree of care required by the words 'by looking and listening for said train.' These words, in effect, notified the jury that, under the circumstances in this case, it was not required that plaintiff should stop, in order to constitute ordinary care on her part. What constitutes ordinary care is, we think, a question for the jury, under the circumstances of the case on trial. The amount of care which an ordinarily prudent person would exercise is to be determined by the circumstances of the particular case. What would be ordinary care in one case might be gross negligence in another. At a crossing in a level stretch of country, where an uninterrupted view could be had for a long distance in either direction, it might not be necessary to stop or listen, in order to exercise ordinary care; but at an exceptionally dangerous crossing, such as the jury found this crossing to be, a much greater degree of care would be required, to constitute ordinary care, and the jury might be justified in concluding that ordinary care required the plaintiff to stop and look and listen. It seems to us, therefore, that it was error to instruct the jury that it was plaintiff's duty 'to use ordinary care to ascertain the approach of such train, by looking and listening,' because that instruction told them that it was her duty to look and listen, only, and not to stop. 2 Thomp. Neg. 1235, ¶ 10."



proaching the crossing of a railroad over a public highway to listen and to look both ways along the line of the track for the approach of the railroad train before going upon the railroad, and if he goes upon the track without taking such precautions to guard against an accident and sustains an injury in consequence of his failure to take such precautions, he cannot recover, and if the jury believe, from the evidence, that the said deceased went upon the crossing of defendant's railroad at St. C. avenue without looking or listening for the approach of the train, and received the injury from which he died, then the plaintiff cannot recover, and the verdict should be for the defendant.<sup>75</sup>

(b) The jury are instructed, as a matter of law, that if you believe, from all the evidence in this case, that if the deceased had looked and listened for approaching trains, he could by the exercise of either of these faculties have discovered the approaching engine in time to have avoided the accident, the presumption of law would be that he did not know of the approach of said engine. When a person can see they must see, and it will not avail them to say they did not.<sup>76</sup>

(c) If the jury find from the evidence that, at a point on F. street twenty-five feet from the track upon which the locomotive that caused the injury was coming, the decedent, seated in his wagon, could, by looking in the direction of the approaching locomotive, have seen it at a distance of one hundred and fifty feet or more from the crossing, and in time to avoid the collision, his failure to discover its approach was negligence on his part, and the plaintiff cannot recover.<sup>77</sup>

75—T. H. & I. R. R. Co. v. Voelker, 129 Ill. 540 (552), 22 N. E. 20.

"The proposition raised by this instruction, and upon which the Circuit Court ruled against the defendant, was that going upon a railroad track at a point where it crosses a highway or street, without looking or listening for approaching trains, constitutes such contributory negligence as will bar a recovery therefor. It has been the uniform doctrine of this court that negligence is ordinarily a question of fact for the jury. Doubtless there may be conduct so clearly and palpably negligent that all reasonable minds without hesitation or dissent, would so pronounce it. When that is so, the inference of negligence may properly be said to be a necessary one, and such conduct may be treated as negligence per se. But, as said in Cumberland Valley R. R. Co. v. Maugans, 61 Md. 53, 48 Am. Rep. 88, 'When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been determined by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon

which fair-minded men may well differ.' See also B. & O. R. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329."

76—Chicago & North Western Ry. Co. v. Dunleavy, 129 Ill. 133 (149), 22 N. E. 15.

"This instruction was clearly erroneous. There is no legal presumption by virtue of which the deceased, if he could have discovered the approach of the engine by either looking or listening, must be deemed to have actually known that the engine was approaching; nor is there any rule of law which, under the circumstances here supposed, would treat him as though he had actual knowledge of its approach. Failing to ascertain the approach of the engine when the means of doing so were within his reach would be mere negligence, but failing to get out of the way of the engine when he actually knew of its approach would be suicide."

77—Cleveland, C. C. & I. Ry. Co. v. Schneider, 45 Ohio 678, 17 N. E. 321 (327).

"It is said in the argument that this instruction is adopted from Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 678.

"The instructions requested and refused in that case were that if the plaintiff's daughter, who was killed, and her sister who was accompanying her, could by looking, have seen the train, and avoided the injury,

(d) After listening to the arguments yesterday, gentlemen, by counsel for plaintiff and for defendant, and after carefully reading over the charges which have been asked for by both sides, I have come to the conclusion that in this case the plaintiff was guilty of contributory negligence as matter of law, and I would charge you that under the counts of the complaint which claim damages for simple negligence, that for the failure to perform its duty, the plaintiff cannot recover because he himself was guilty of contributory negligence. The evidence in this case shows the manner in which he approached this railroad track. It shows the location of this train that injured him. There is no evidence showing that he did look or listen. The law requires that a person should do both, for the simple reason there may be times when he cannot hear on account of other noises, but he may be able to see. And the evidence shows conclusively in this case that there was no obstruction in the way to prevent his seeing the approach of this train that ran over him. It is true, there was a moving freight train and he was near that; he may not have been able to hear the ringing of the bell when it was rung, but there is nothing for the evidence to show—in fact the evidence shows conclusively that there was no obstruction in the way to prevent his seeing the approach of the train if he had looked. It may be said there is no evidence that he didn't look, but if he looked and saw it, and then didn't get out of the way, that was such contributory negligence as would disentitle him to recover under these counts. So I say that I have come to the conclusion, and will charge you that the plaintiff in this case cannot recover under the counts which charge simple negligence on account of his own acts in putting himself where he was injured without taking the precaution that the law requires. In other words, that he was guilty of contributory negligence and cannot recover under these counts.<sup>78</sup>

their attempt to cross without looking was negligence; or if they were standing on the track without looking to see if a train were approaching, if they could have seen the danger, and avoided the injury, by looking, that was negligence. This court in declining to reverse the judgment because of the refusal to give the instructions, said: 'While we think the court erred in refusing a new trial on the ground that the verdict is against the weight of the evidence, we see no error in its refusal to give the instructions asked. To give the instructions asked would have been, to a great extent, taking the case from the jury, by assuming the existence of material facts in the case. The court could not say to the jury that the failure of the girls to look in the direction of the gravel train when approaching, or standing upon the track, was carelessness such as should prevent a recovery, without assuming the existence of material facts in the case which it was for the jury to find. The instructions asked assume the agency of the elder sister, and assume the non-ex-

istence of any facts or circumstances rendering it prudent or proper for her to omit looking out. These were matters for the jury, and could not be found or assumed by the court, no matter how plainly they might be proven.' These observations apply aptly to the instruction now under discussion."

78—*Gaynor v. Louisville & N. R. Co.*, 136 Ala. 244, 33 So. 808 (810).

"The court may state to the jury the law of the case, and may also state the evidence when the same is disputed, but shall not charge upon the effect of the testimony unless required to do so by one of the parties. In this case the court violated the statute by charging upon the effect of the testimony without being required to do so by either of the parties. Any other ruling would emasculate the statute. *Mayer v. Thompson-Hutchison Building Co.*, 116 Ala. 634, 22 So. 859; *Gafford v. State*, 125 Ala. 1, 28 So. 406; *Gary v. Woodham*, 103 Ala. 421, 15 So. 840; *Postal Telegraph Co. v. Brantley*, 107 Ala. 683, 18 So. 321; *Crawford v. McLeod*, 64 Ala. 240; *Baker v. Russell*, 41 Ala. 279; *Moore v. Robinson*, 62 Ala. 537."

§ 4057. **When Duty to Stop, Look and Listen Is Excused.** If such obstruction so placed there by the railroad company would prevent a person traveling upon said highway from both seeing and hearing an approaching train, then it would be useless on his part to look and listen for an approaching train. The law would not require him to do that useless act, and therefore he would be excused for not doing so.<sup>79</sup>

§ 4058. **Attempting to Cross Although View Obstructed.** If there were obstructions to the decedent's line of vision in the direction from which the locomotive was coming, that fact made it the more necessary that he should use other means to discover danger; and, if he could not avoid danger otherwise than by stopping and listening, then it was his duty, before going upon the track, to stop and listen; and, if his failure to do so contributed to the injury, plaintiff cannot recover.<sup>80</sup>

§ 4059. **Approaching Railroad Crossing at a Trot.** It was the duty of the decedent to approach the crossing at such a rate of speed as would enable him to stop promptly, to avoid danger; and if the decedent approached the crossing at a trot, or at such rate of speed as prevented him from discovering the danger in time to avoid it, or prevented him from stopping promptly, or from turning his horses, or as induced him to hurry across, upon discovering the danger, rather

79—*Evansville & T. H. R. Co. v. Clements*, 32 Ind. App. 659, 70 N. E. 554 (555).

"The instruction concludes as above. It excuses appellee because of the obstruction named from exercising reasonable care for his own safety. Within sight if not within hearing of danger (for the crossing was itself warning of danger) the jury were told that appellee had no duty to perform, since to look and listen would be useless. The jury might fairly be misled into the belief that appellee failing, as he testified, to see or hear the approaching train at a distance of sixty feet from the crossing, \* \* \* might without further regard for his safety proceed upon his way. This was error."

80—*Cleveland, C. C. & I. Ry. Co. v. Schneider*, 45 Ohio 678, 17 N. E. 321 (328).

"As before remarked, persons approaching railroad crossings are bound to the reasonable use of their faculties in discovering and avoiding danger from passing trains, and to that end it is ordinarily their duty to listen, and, if necessary, stop, before attempting to cross; but, at crossings where gates are maintained, this may cease to be a duty, or be so only under peculiar circumstances, though the view of the track is obstructed. The placing of gates and gatemen at the crossing may have become but a prudent and proper precaution on the part of the railroad companies because of the obstructed view of the tracks, and the difficulty on the part of persons approaching in discovering danger from observation merely. At such crossings, it is the

duty of the gatemen to observe the tracks, and to know when, on account of approaching trains and engines, it becomes dangerous to cross, and, whenever it does, to close the gates, and prevent persons from attempting it; and it is as much their duty to observe and know when the tracks are clear, and persons may cross over in safety, and, when it is, to open the gates, and keep them open for that purpose so long as it continues to be safe to cross, and no longer. Persons approaching such crossings have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and govern themselves accordingly; and hence, when the gates are open, and the gatemen present, they are entitled to assume that the tracks are clear, and it is safe to cross; and their failure to stop and listen before passing onto the tracks through the open gate is not, in the absence of other circumstances, negligence which will in case of injury to them caused by a passing locomotive while so attempting to cross, defeat a recovery therefor. This conclusion is sustained by the case of *Baker v. Prendergast*, 32 Ohio St. 494, 30 Am. Rep. 620, where it is held that 'a person about to cross a street of a city in which there is an ordinance against fast driving, has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance, and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons.'"



than attempt to stop, then he was guilty of contributory negligence, and the plaintiff cannot recover even though defendant's negligence also contributed to the injury.<sup>81</sup>

§ 4060. **Failure to Hear Noise of Approaching Train.** If you find from the evidence that the whistle was not blown and the bell was not rung for said crossing or curve, but if you further find from the evidence that the motion of said train made sufficient noise and roared sufficient to be heard by plaintiff prior to said accident, and if you find from the evidence that plaintiff could, by the use of ordinary care, have heard such noise or roar of said train in time to have avoided his injury, you will find for defendant, even though you may find said whistle was not blown or bell not rung.<sup>82</sup>

§ 4061. **Right of Railroad Company's Servants to Assume that Driver of Vehicle Will Remain at a Safe Distance.** (a) You are further instructed that if you believe, from the evidence, that the engineer in question saw or might have seen the plaintiff approaching the crossing at some distance, yet the engineer would be justified in assuming that the plaintiff would keep a reasonable look-out and stop before going upon the crossing; and if you further believe, from the evidence, that when the engineer and fireman saw the plaintiff was not about to stop and was about to incur danger, they did all that they could to avoid injuring the plaintiff, and that it was then too late to do so, you will find for the defendant.<sup>83</sup>

81—*Cleveland, C. C. & I. Ry. Co. v. Schneider*, 45 Ohio 678, 17 N. E. 321 (323).

"Indeed, the effect of the charge requested is that it is negligence in law for a person driving a team to approach at a trot a railroad crossing under any circumstances. It is undoubtedly true that persons approaching railroad crossings are bound to the reasonable and prudent exercise of their faculties to discover danger, and to the use of proper care to avoid injury; and, if the omission of either contributes to their injury, they are generally without remedy. But whether they have so exercised their faculties, and used such care, must depend upon the particular circumstance."

82—*Mo. K. & T. Ry. Co. of Texas v. Taft*, 31 Tex. Civ. App. 657, 74 S. W. 89 (90).

"If by this charge appellant sought to have the jury instructed that the failure to blow the whistle and ring the bell would not warrant a recovery provided the noise of the train was loud enough to have been heard, it was properly refused, because appellant could not thus substitute this method of giving warning for that prescribed by statute and its own rules, without showing that appellee actually heard the noise of the train in time to avoid the injury, and that, therefore, the failure to blow the whistle was not the proximate cause of the injury. But if the purpose of this charge was to have the jury instructed upon the issue of contributory negligence involved in the failure of

appellee to use ordinary care to hear the noise of the train, it should have left it to the jury to determine whether or not appellee used such care. The case does not quite come within the rule so often announced in recent decisions, making it the duty of the trial court to give a special charge, when requested, pertinently applying the law of contributory negligence to particular acts or omissions of the person injured. This charge did not purport to submit to the jury whether appellee did or did not fail to use ordinary care in any respect whatever, but only whether or not, by the use of such care, he could have heard the roar of the train. That was merely hypothetical, and wholly immaterial, if, as found by the jury under the charges given, appellee did not fail 'to use ordinary care.'"

83—*Chicago & Alton Railroad Co. v. Sanders*, 154 Ill. 531 (537), aff'd 55 Ill. App. 87, 39 N. E. 481.

"We think that this instruction was erroneous for two reasons. First, it assumes that the plaintiff did not keep a 'reasonable look-out' when it was for the jury to determine whether he did or not. Second, it announced that the engineer would be justified in assuming a certain state of facts; and is further subject to the criticism passed upon a certain instruction in *I. C. R. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. 830, where there was under consideration an instruction informing the jury 'that an engineer has a right to presume that a team approaching a crossing will be

(b) The court instructs the jury that the servants in charge of the defendant's engine and train which struck the deceased had a right to assume that he was rational, and that he would exercise reasonable care and caution to keep himself out of danger; and if the jury believe, from the evidence, that when the persons in charge of the engine and train first came in sight of the deceased he was so far removed from the track as to be free from danger of collision, then they had a right to assume that he would remain at such safe distance.<sup>84</sup>

§ 4062. **When Negligence of Driver of Plaintiff's Vehicle in Crossing Track Will Prevent Recovery.** (a) If the jury shall find, from the evidence, that as the vehicle in which the plaintiff's intestate was riding approached the crossing in question, the defendant's track was in plain sight and there was nothing to obstruct the view or prevent the driver from seeing the defendant's train for a long distance as it approached said crossing, that said train was lighted both with headlight in front of the engine and with lights in its cars, and was a conspicuous object and could be readily seen from a distance, and that S., the driver, was in such a position on the seat of his wagon that he must have seen the train before he reached this track, and that when he tried to cross over said track in front of said train, he must have known that the train was approaching, and if the jury shall find, from the evidence, that his act in trying to cross in front of said train was the proximate cause of the accident, then their verdict must be for the defendant.<sup>85</sup>

(b) The sole purpose for which signals are required to be given upon a train as it approaches a public crossing is to give a warning

stopped,' etc., and we said of it: 'It was improper for the court to say as a matter of law that the engineer might presume anything. Presumptions had nothing to do with the question involved.'

84—L. N. A. & C. Ry. Co. v. Patchen, 167 Ill. 204 (212), aff'g 66 Ill. App. 206, 47 N. E. 368.

"An instruction somewhat similar was held to be a correct statement of law in Chicago, R. I. & P. R. R. Co. v. Austin, 69 Ill. 426, but in later cases the tendency of the decisions has been to the effect that the matters and things stated in the instructions which the servants of the railroad company might as a matter of law assume, were questions of fact for the determination of the jury."

85—Landon v. C. & G. T. Ry. Co., 92 Ill. App. 216 (218).

"This instruction is calculated to mislead the jury, in effect that, if the negligence of the driver of the bus was the proximate cause of the accident, it should be imputed to the deceased, and there could be no recovery. The negligence of the driver cannot be imputed to the deceased, and the court so charged in its first instruction for appellant. Chgo. City Ry. Co. v. Smith, 69 Ill. App. 71; W. St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364-374; C. & E. I. R. R. Co. v. Hines, 82 Ill. App. 488-491; W.

C. St. R. R. Co. v. Piper, 165 Ill. 325, 46 N. E. 186. \* \* \* It is sufficient if the combined negligence of the driver and appellee caused the accident, and that of the latter was an efficient cause without which the injury would not have resulted, deceased having been in the exercise of ordinary care. Pullman, etc., Co. v. Laack, 143 Ill. 243-261, 32 N. E. 285; C. & E. I. R. R. Co. v. Hines, 183 Ill. 482; No. Chgo. St. R. R. Co. v. Dudgeon, 83 Ill. App. 528, aff'd 184 Ill. 477-487; American Express Co. v. Risley, 179 Ill. 295-298, 53 N. E. 558.

"It is also erroneous for the reason that in effect it tells the jury that certain specified acts of the driver amounted to negligence. Whether or not these acts referred to by the instruction were negligent should have been left to the jury. Meyers v. Ry. Co., 113 Ill. 389; Ill. Cent. R. R. Co. v. Griffin, 184 Ill. 10-16, 56 N. E. 337; C. & A. R. R. Co. v. Smith, 180 Ill. 453-455, aff'g 77 Ill. App. 492, 54 N. E. 325; C. & A. R. R. Co. v. Scranton, 78 Ill. App. 230-233.

"In the Smith case, supra, the Supreme Court held that it was not negligence per se for a person to attempt to cross a railway track in front of a railway train twelve hundred feet away and in full view and going at 35 to 40 miles an hour."

to the public of the approach of said train to said crossing and to keep off of said crossing until such train shall have passed over it; and if they shall find, from the evidence, that the driver of this vehicle in fact knew that the train was coming and started up his horses as he approached near said crossing for the purpose of attempting to get over said tracks before the train would reach the said crossing, then they are instructed that it is immaterial in this case whether the bell was ringing upon said engine or not, and that the plaintiff cannot in any event recover.<sup>86</sup>

**§ 4063. Plaintiff Must Exercise Ordinary Care for His own Safety Although Another Person is Driving.** If the jury believe, from the evidence, that the defendant's agents or servants in charge of the engine and train in question omitted to ring a bell continuously for a distance of eighty rods before reaching the street crossing, such omission constitutes a *prima facie* case of negligence against the defendant; and if the jury further believe, from the evidence, that the wagon in which the plaintiff was riding was struck by said train, and the plaintiff thrown therefrom and injured at the railroad crossing in question, as charged in the declaration, in consequence of the omission to ring the bell, and that the person driving the wagon in which the plaintiff was, took reasonable and proper care to look out for the train while approaching the crossing, and to prevent coming in contact with it, then the defendant is liable to the plaintiff for the loss and damage sustained by him by reason of such injury, if any such loss or damage has been shown by the evidence in this case.<sup>87</sup>

**§ 4064. When no Eye Witness to Killing of Person by Railroad Train Presumption of Due Care by Deceased Usually Exists.** The law presumes that a person found dead and killed by the negligence of another exercised due care himself.<sup>88</sup>

<sup>86</sup>—Landon v. C. & G. T. Ry. Co., *supra*.

"In our opinion this instruction is erroneous in that it tells the jury that, if the driver knew that the train was coming and started up his horses for the purpose of getting over the tracks before the train reached the crossing, then it was immaterial whether the bell was ringing on the engine or not. The negligence of the driver cannot be imputed to appellee, and therefore it cannot be said that it was immaterial whether the bell was ringing or not. \* \* \* This instruction is also erroneous because it omitted the element of the negligence charged against appellant, and precludes the plaintiff's recovery if the driver was negligent, although the negligence of the railway company may have in equal measure contributed to the injury. Pullman, etc., Co. v. Laack, 143 Ill. 243-261, 32 N. E. 285; C. & E. I. R. R. Co. v. Hines, 183 Ill. 482, 56 N. E. 177; W. C. St. R. R. Co. v. Piper, 165 Ill. 325, 46 N. E. 186."

<sup>87</sup>—Chicago, Santa Fe & California Ry. Co. v. Bentz, 38 Ill. App. 485 (488, 489).

"This instruction is erroneous. It is conceded that appellee was not at the time of the injury 'driving the wagon;' Suess was driving the horse which was drawing the wagon in which appellee was riding at the time of the injury. This instruction released the appellee from the exercise of ordinary care, although it required its exercise by the 'driver of the wagon,' which was Suess. It informed the jury in effect that appellee could recover without personally exercising any care or caution whatever on his part. Rolling Mills Co. v. Morrissey, 11 Ill. 650.

"The fact that other instructions were given to the jury which did require the exercise of such care by the appellee does not cure this error. The rule is well established that in a case close in its facts, the instructions should all state the law accurately. The jury, not being judges of the law, are as likely to follow a bad instruction as a good one. Chicago & N. W. Ry. Co. v. Dimmick, 96 Ill. 47; Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683, and cases cited."

<sup>88</sup>—Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793 (795).



§ 4065. **Liability of Railroad Company for Failure to Restore Highway to Its Former Condition.** The law requires the railway company to restore any street or highway which its route may cross to its former condition, or to such condition as not to unnecessarily impair its usefulness, and to exercise reasonable care to keep its crossings in such reasonable repair as an ordinarily prudent person would use under similar circumstances. If you believe, from the evidence, that the defendant had its track or tracks across H. street, in the town of Y., and did not restore such street to its former state, or to such condition as not to unreasonably impair its usefulness, and that such failure to restore such street was a proximate cause of injury to plaintiff's wife, combining with other negligence of defendant or alone, you will find for plaintiff, etc.<sup>89</sup>

### CONTRIBUTORY NEGLIGENCE.

§ 4066. **Plaintiff Must Exercise Ordinary Care.** (a) The jury are instructed that the plaintiff is not required to produce direct and positive testimony showing just what the deceased was doing at the instant he received the injury causing his death; that the law requires only the highest proof of which the particular case is susceptible; and you may take into consideration, with other facts, the instinct and presumptions which naturally lead men to avoid injury and preserve their own lives.<sup>90</sup>

"The instruction was given as asked, but his honor added 'likewise the law presumes that a person such as an engineer does his duty,' to which the plaintiff excepted. His honor went on to say further: 'In fact, as a rule, the law does not presume negligence, and it requires a person who charges a breach of duty or negligence to prove it.' The plaintiff excepted to the latter clause of that sentence. The question raised by this last exception has been frequently held by this court against the plaintiff, and we see no error in the instruction of the judge which the first exception was directed."

89—San Antonio & A. P. Ry. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607 (609).

"We are of opinion that under the facts shown the company was chargeable with no higher duty than the exercise of ordinary care in making the repairs undertaken with reasonable dispatch, and conducting the work with ordinary care, looking to the safety of those using the crossing as such. Or, if it should be held that the crossing was not technically a street crossing, still, since the company had by its acts invited its use as such, it was the company's duty to exercise ordinary care to keep it in a reasonably safe condition for use by the public. Taylor, B. & H. Ry. Co. v. Warner, 88 Tex. 642, 32 S. W. 868; Dallas & G. Ry. Co. v. Able, 72 Tex. 150, 9 S. W. 871; Gulf, C. & S. F. Ry. Co. v.

Montgomery, 85 Tex. 64, 19 S. W. 1015.

"Having thus invited its use by the public, it also assumed the duty of acting towards it in all respects as if it were a lawful crossing, which involves the statutory duty of sounding the whistle or ringing the bell when approaching it. Mo. Pac. Ry. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Mo. Pac. Ry. Co. v. Bridges, 74 Tex. 520, 12 S. E. 210. But, the statute being complied with in this respect, the company is chargeable with the exercise of only ordinary care to prevent injury to persons crossing, even where the crossing is shown to be a public crossing, in the strictest sense of the term. The charge complained of imposed a higher degree of care than is imposed by law, and, under the facts of this case, such error must be held to have been harmful."

90—Ill. Cent. R. R. Co. v. Kief, 111 Ill. App. 354 (358).

"From this the jury might well understand that the material question was not, did deceased exercise due care when he went upon the track, but was he exercising due care when, at the instant he was struck, he made an effort to escape? 'One who, failing to observe due care, blindly walks into danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who, by the observance of due care, could extricate himself from danger, but fails to

(b) The court instructs the jury in this case that it was only ordinary care for the plaintiff as he approached the crossing upon which he received his injuries to keep a lookout both ways for the approach of trains, and it was his duty to exercise such ordinary care; and if you believe, from the evidence, in this case, that he failed to exercise such ordinary care, then he cannot recover in this case, if you believe, from the evidence, that by the exercise of such ordinary care he could have prevented the injury, unless you further believe, from the evidence, that the defendant was guilty of gross negligence.<sup>91</sup>

(c) The court instructs the jury, that if they believe, from the evidence in this case, under the instructions of the court, that the defendant is guilty of wrongful acts, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the injury of the plaintiff's property, as alleged in the said declaration, then the plaintiff is entitled to recover in this case such damages as the jury may deem from the evidence and instructions of the court, that the plaintiff has sustained, if any, but not to exceed the amount claimed in the declaration.<sup>92</sup>

(d) The court instructs the jury that even if the defendant was guilty of negligence in the backing of its train, and such negligence was a proximate cause of the injury, if the jury also believe that the said J. showed a want of ordinary care in walking down the track that night, under all the circumstances, and such carelessness was a proximate cause of the injury, she was guilty of contributory negligence, and the plaintiff would not be entitled to recover; if the deceased, J., was guilty of negligence in acting as you may find from the testimony that she acted, and if her conduct, her negligence, together with the negligence of the railroad company, contributed to her injury as the proximate cause, then the railroad company would not be responsible, unless the railroad company could have avoided injuring her notwithstanding her negligence.<sup>93</sup>

make any effort for his personal safety, and because thereof is injured." *C. M. & St. P. R. R. Co. v. Halsey*, 133 Ill. 248, 23 N. W. 1028; *Abenk v. T. H. & I. R. R. Co.*, 11 Ill. 203; *I. C. R. R. Co. v. Farrell*, 86 Ill. App. 436. \* \* \* Inasmuch as the instruction was uncertain and calculated to mislead the jury, the giving of the same was prejudicial error."

91—*T. St. L. & K. C. Ry. Co. v. Cline*, 135 Ill. 41 (44), 25 N. E. 846.

"This instruction told the jury that if they believed, from the evidence, that the plaintiff failed to exercise ordinary care, and if by the exercise of such ordinary care he could have prevented the injury, then he could not recover unless it was further believed, from the evidence, that the defendant was guilty of gross negligence. The necessary implication from this latter instruction was, that gross negligence on the part of the defendant would obviate the necessity of ordinary care on the part of the plaintiff. This instruction is palpably erroneous."

92—*L. S. & M. S. Ry. Co. v. Pauly*, 27 Ill. App. 203 (205).

"If the jury found for the plaintiff on either one or both of the first two counts, they would assess no damages for the value of the wagon injured. They could not find the defendant guilty of the negligence alleged in the first count, and assess the damages claimed in the third and not claimed in the first. Each count is a separate declaration. *U. S. Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474. This is not the only objection to this instruction. It authorizes a recovery by the plaintiff without submitting to the jury whether the driver of the plaintiff's team was in the exercise of ordinary care. It was not enough that defendant should be guilty of the wrongful acts, neglect or default charged in the declaration, but plaintiff's servant must also have been in the exercise of ordinary care."

93—*Jones v. Charleston & W. C. Ry. Co.*, 61 S. C. 556, 39 S. E. 758 (761).

"The error complained of is the error which was condemned in *Cooper v. Ry. Co.*, 56 S. C. 94, 34 S. E. 16.

**§ 4067. Plaintiff Must Exercise Reasonable Care and Prudence.**

Now, gentlemen, you will scrutinize carefully this question with regard to the care of plaintiff in driving across that track, and determine whether on his part it was a foolhardy act or not to drive that horse at the time and in the manner he did, and under the circumstances across the track.<sup>94</sup>

**§ 4068. Rashness in Rescue of Child.** (a) If the jury believe, from the evidence, that plaintiff's intestate was endeavoring to rescue a child from being run over by an approaching railroad train under such circumstances as to constitute rashness, in the judgment of a prudent person, and was in such endeavor struck and killed by the train, this would constitute contributory negligence, and the plaintiff could not recover.

(b) If the jury believe, from the evidence, that plaintiff's intestate knew of the approaching train, and undertook to rescue a child on the track from danger, if they further believe that such an attempt was rash or reckless, her actions would amount to contributory negligence, and would defeat a recovery in this case.

(c) If the jury believe, from the evidence, that plaintiff's intestate knew of the approaching train and undertook to rescue a child on the track from danger, if they further believe that such attempt was rash or reckless, her actions would amount to contributory negligence and defeat a recovery in this case, unless you further believe that the defendant was guilty of willful and wanton negligence.

(d) Although it was not negligence on the part of H. O. to attempt to rescue the child from in front of the approaching train, yet if you believe, from the evidence, that she saw or could have seen the approaching train by the exercise of her senses, before she and the child got on the track of the railroad, then I charge you, as a matter of law, that it was negligence on her part to permit said

"The law in this state is settled that contributory negligence, as defined in Cooper's case, supra, to any extent, will always defeat plaintiff's recovery, unless the injury is wantonly or willfully inflicted; for the law cannot measure how much of the injury is due to the plaintiff's own fault, and will not recompense one for injury resulting to himself from his own misconduct. The objection to the charge is that it instructed the jury that, although plaintiff's negligence contributed to her injury as a proximate cause, she could recover if the defendant, by ordinary care, could have avoided the injury. Is it not manifest that such a rule would abolish contributory negligence as a defense? The qualifying terms, 'unless the railroad company could have avoided injuring her notwithstanding her negligence,' would necessarily mislead a jury; for they would at once say the railroad company could have avoided the injury by not being negligent in the manner alleged in the complaint, by having suitable rear-end lights, by a reasonable lookout,

by loud warning of the train's approach, by running at such slow speed as to enable any one warned to get off the track, and they utterly ignore the defendant's plea and evidence of contributory negligence, because of the instruction that plaintiff, notwithstanding her negligence, which proximately caused the injury, could still recover if the defendant could have avoided the injury. The jury ought to have been instructed without qualification that, if plaintiff was negligent, and that negligence contributed as a proximate cause to her injury, she could not recover, unless the injury was wantonly or willfully inflicted."

94—Hinchman v. Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277 (280), 65 L. R. A. 553.

"The jury would naturally infer from this language, that though plaintiff was negligent, and that negligence contributed to his injury, if his act was anything less than foolhardy he might recover. We need cite no authority to prove that this is wrong."



child to get from her control and upon the track; and if you believe, this from the evidence, your verdict should be for the defendant.<sup>95</sup>

§ 4069. **Contributory Negligence of Person Injured at Crossing.** If you find that the plaintiff was struck and injured at a point in H. avenue, or within its limits where it is crossed by the railroad tracks, whilst he was using said highway in a proper manner for the purpose of crossing the tracks, plaintiff would not in such case be a trespasser. If such place was a much frequented crossing used by many persons and teams in crossing and recrossing the tracks in a populous neighborhood, and near defendant's depot and yards, where it might reasonably be expected that persons would or might be crossing the tracks, then the defendant was under the duty of exercising care to discover the possible danger to pedestrians and teams making use of the crossing. In such case a railroad company would be liable to any one injured by reason of its failure to use ordinary care under all the circumstances, and if, by the use of such ordinary care at such point, it might have discovered a person on the crossing in a dangerous position, in time to have avoided the accident and if it failed to use such ordinary care to discover the exposed situation of the person receiving the injury, it would be liable to damages to such person so injured, notwithstanding he might have been guilty of negligence in thus exposing himself in the first instance. Although the rule is that, even if the defendant is shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of negligence contributing to his injury, yet this negligence on his part would not exonerate the defendant and prevent recovery by the plaintiff, if it be shown that, by reason of the publicity of the crossing, and the number of persons in and about and crossing over said crossing, the defendant's employes would or should, in the exercise of reasonable care, have had knowledge of such danger, and that they might in the exercise of reasonable care have discovered the plaintiff's danger in time to have avoided the accident, but failed to exercise such care, and thus failed to discover his exposed and dangerous situation in time to avoid the injury to him; and if you so find, and find that the defendant was negligent in not thus discovering the plaintiff, you should find for the plaintiff.<sup>96</sup>

95—Louisville & N. R. Co. v. Orr, 121 Ala. 489, 26 So. 35 (43).

"The first two charges have each two vices: (1) They require a verdict on contributory negligence, even though the defendant was guilty of wantonness and the like; and (2) they inject into the case an issue which was not made by the pleadings, namely, whether deceased's effort to rescue the child was rash or reckless in such degree that a prudent person would not have made it under the circumstances. The replication, as we have seen, did not aver that the attempted rescue was not rash or reckless. It may be that it should have so averred. If so, its failure to so aver should have been pointed out by the demurrer. The demurrer did not specify this as a defect, nor indeed, any defect, but was bad for

generality. If it was not necessary for this fact to appear on the replication the defendant should have brought it into the case by a rejoinder. This it did not do, but instead, in effect, took issue on the replication. On this state of the pleading the plaintiff was entitled to recover, so far as the alleged contributory negligence of the deceased is concerned, whether her effort to save the child was rash and reckless or not. This second vice of the first four charges infects also the third charge, and the first defect in these charges is common to the last charge."

96—Oliver v. Iowa Cent. Ry. Co., 122 Ia. 217, 97 N. W. 1072 (1073).

"The instruction told the jury in substance that no matter how negligent the plaintiff had been in exposing himself to the peril incident

§ 4070. **Standing on Track—Duty to Look and Listen.** The court instructs the jury, as a matter of law, that every person is bound to know that a railroad track is a dangerous place, and that, even if the jury believe, from the evidence, that the plaintiff was struck

to standing on a railroad track, the defendant would nevertheless be liable if its employees were negligent in not discovering the plaintiff in time to have avoided the accident. There can be no doubt that greater precautions should be taken for the protection of those in the rightful use of a public street across which a railroad is operated than the law would require under many other conditions. And we have held that the exercise of reasonable care under certain circumstances might require the railroad company to keep a lookout for those rightfully on the track. *McMarshall v. Chicago R. I. & P. Ry. Co.*, 80 Ia. 757, 45 N. W. 1065, 20 Am. St. 445; *Thomas v. C. M. & St. P. R. R. Co.*, 103 Ia. 649, 72 N. W. 783, 39 L. R. A. 399. And this rule we believe to be humane and bottomed upon just principles, for it would be little less than outrageous to say that those operating trains on public streets need pay no attention to the public also entitled to their use. We think this rule also supported by the great weight of authority, but even in cases where it should be said as a matter of law that the failure to keep a lookout was negligence, it does not necessarily follow that a person injured by reason of such negligence can recover regardless of his own negligence. A person may be in a position of danger without negligence on his part; for instance, if he be overcome by some physical force which he could not avoid, and be left in a place of danger, as upon a railroad track, he would most clearly not be guilty of negligence in being there. But if a person *sui juris* voluntarily and unnecessarily places himself in a position of known peril, it would be most unjust to say that he should be entirely relieved from the consequences of his own act, and that another no more negligent than he should fully compensate him for the injury he received. Moreover such a rule would entirely demolish the doctrine of contributory negligence, and if adopted in this case would require the overruling of a long line of cases holding exactly the reverse principle. Beginning with the early cases we have consistently held that there can be no recovery where there was contributory negligence, no matter how negligent the defendant might have been. It is unnecessary to review these cases or to cite all of them. Some of them involve the question of the respective rights of the public and the defendants to the use of streets, and in all the holding has been the same on the question of contributory negligence. *Tierney v.*

*C. & N. W. R. R. Co.*, 84 Ia. 641, 51 N. W. 175; *Sala v. C. R. I. & P. R. Co.*, 85 Ia. 678, 52 N. W. 664; *Banning v. C. R. I. & P. R. R. Co.*, 89 Ia. 74, 56 N. W. 277; *Moore v. K. & W. Ry. Co.*, 89 Ia. 223, 56 N. W. 430; *Bryson v. C. B. & Q. Ry. Co.*, 89 Ia. 677, 57 N. W. 430; *Crawford v. C. G. W. Ry. Co.*, 109 Ia. 433, 80 N. W. 519; *Barry v. Burlington Ry. & Light Co.*, 119 Ia. 62, 93 N. W. 68. Of our own cases relied upon by the plaintiff *Clampit v. C. St. P. & K. C. Ry. Co.*, 84 Ia. 71, 50 N. W. 673, was a case where the plaintiff was rightfully on the track and it was held that he was not negligent. In *Donaldson v. M. & M. Ry. Co.*, 18 Ia. 280, 87 Am. Dec. 391, the question now before us was not involved or determined. In *McMarshall v. Chicago R. I. & P. Ry. Co.*, 80 Ia. 757, 45 N. W. 1065, 20 Am. St. 445, there was no concurring negligence. Nor was such issue presented or determined in *Goodrich v. B. C. R. & N. Ry. Co.*, 103 Ia. 412, 72 N. W. 653. In the latter case the defendant's employees saw the plaintiff before he was struck, and it was held that whether there was negligence in not sooner stopping the cars was a question for the jury. In *Thomas v. C. M. & St. P. Ry. Co.*, 103 Ia. 649, 72 N. W. 783, 39 L. R. A. 399, it was held that the defendant was bound to keep a lookout for persons rightfully on the track, but owing to the age of the child injured, there was no question of contributory negligence in the case.

"Because of our own decisions on the precise question, we have not thought it necessary to review the cases from other jurisdictions which are relied upon by the appellant. However, we will refer briefly to two cases decided by the Supreme Court of the United States, to which the appellant makes frequent reference in support of his contention. *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, was a case where the officers of the boat saw the position of the injured party and might have stopped the boat before the accident, and the decision is simply an application of the doctrine of 'last clear chance.' The question in *Grand Trunk Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, was whether the defendant was negligent in not keeping a proper lookout and in not providing a flagman for the crossing. The precise question here was not discussed in that case, but the rule we have announced was recognized and approved. The trial court instructed that if the plaintiff was himself negligent there could be no recovery and this was said to be the correct rule."

while standing on the track, still the burden is on the plaintiff to prove that he looked or listened or took some reasonable measures for the avoidance of danger, and that, unless he proves by a preponderance of the evidence that he did take such measures, the verdict must be for defendant.<sup>97</sup>

§ 4071. **Contributory Negligence—Failure of Plaintiff to Discover Approaching Train.** If the jury find that the plaintiff was walking along the railroad track of the defendant, that he knew it was about train time, and could have seen the train approaching by the exercise of ordinary diligence, and that he did not look for its approach, but remained upon the track until the train approached and struck him, then his own negligence contributed to the injury which he received, and he cannot recover unless the injury was produced by the gross negligence of those managing the train; that is, unless it was willfully, wantonly and recklessly done.<sup>98</sup>

§ 4072. **Driving Across Track in a Reckless Manner.** Inability to stop, after seeing his danger, because the train was running faster than was permitted by a city ordinance, would not clear A. B. from the consequences of his own contributory negligence in recklessly driving in front of the train.<sup>99</sup>

§ 4073. **Contributory Negligence of Plaintiff no Defense if Defendant Could Have Avoided Injury After Discovering Plaintiff's Peril.** (a) A person who attempts to cross a railroad track in front of an approaching train, without looking up or down the track is guilty of such negligence as bars a recovery of damages by his administrator for injuries causing his death, unless the defense of contributory negligence is overcome by proof of such gross negligence on the part of the persons in charge of the train as amounts to recklessness, wantonness, or intentional wrong; and the failure of the engineer on approaching a public-road crossing, or a crossing at public street, at which the accident occurred, to blow the whistle, ring the bell, or check the speed of the train, does not show that degree of negligence.<sup>100</sup>

(b) Before you can find defendant guilty of wanton or reckless negligence, the evidence must reasonably satisfy your minds that de-

97—C. B. & Q. R. R. Co. v. Murowski, 179 Ill. 77 (80), 53 N. E. 572.

"An instruction of this character was condemned in Partlow v. I. C. R. R. Co., 150 Ill. 321, 37 N. E. 663, and for the reason there stated the instruction was properly refused."

98—The Terre Haute & I. R. R. Co. v. Graham, 95 Ind. 286 (298), 48 Am. Rep. 719.

"This instruction, we think, does not state the law correctly. The jury are told that the company is liable if the injury was willfully, wantonly or recklessly inflicted, notwithstanding appellee may have been guilty of contributory negligence. This instruction seems to have been based upon the theory that there is a middle ground of liability between ordinary negligence and willfulness, upon which appellee might recover, notwithstanding his negligence, and so the jury doubtless understood it."

99—Schweinfurth v. Cleveland C. C. & St. L. Ry. Co., 60 Ohio 215, 54 N. E. 89 (90).

"The above instruction refused is objectionable for the further reason that it assumes that the deceased recklessly drove in front of the defendant's rapidly moving train, while whether he was negligent in that respect was one of the questions of fact for the determination of the jury upon the evidence."

100—Louisville & N. R. R. Co. v. Orr, 121 Ala. 489, 26 So. 35 (43).

"We have already said that wantonness and willfulness of deceased in exposing herself to this danger would be no defense to the charge that defendant's employes wantonly and willfully ran over and killed her. The several charges requested by the defendant on this subject were well refused."



fendant's employes in charge of the train knew of the peril of the child in time to avoid injuring it, or injuring plaintiff's intestate in an effort to rescue the child from danger.

(c) Before you can find defendant guilty of wanton, reckless negligence, the evidence must reasonably satisfy your minds that defendant's employes in charge of the train knew of the peril of the child in time to have avoided injuring it, or injuring plaintiff's intestate in an effort to rescue the child from danger.

(d) Unless you believe, from the evidence, that those in charge of the train knew of the danger of injuring plaintiff's intestate, the defendant is not guilty of willfulness or wantonness.<sup>1</sup>

**§ 4074. Turning Back Toward Track on Sudden Approach of Train.** You are further charged in this case that if you should find, from the evidence, that plaintiff, in crossing the track of defendant company, had gotten across the track, and reached a place of safety, and if she had remained where she then was, that she would have escaped injury, and that she turned back suddenly toward the track upon the sudden approach of the train, and that the cause of her turning was the sudden approach of the train in close proximity to her, and that her act was such as an ordinarily prudent person might have been expected to do under like circumstances; and if you further find that the employes in charge of the train were guilty of negligence in operating the train, as the same has been defined to you—then I charge you that the fact that she may have stepped in the wrong direction, thereby suddenly placing herself in peril, would not defeat her recovery, if you find that her so doing was caused by the negligence of the defendant's employes.<sup>2</sup>

**§ 4075. Intoxication as Contributory Negligence.** If the jury find from the evidence that the plaintiff's intestate was drunk, and was in a helpless condition upon or near the track, and was unable to realize the dangerous position he was in, then the intestate would not

1—*Louisville & N. R. Co. v. Orr*, supra.

"To the imputation of reckless and wanton disregard of probable consequences to defendant's employes, it was not essential that they should have been aware of the peril of the deceased or of the child in time to have stopped the train, etc. It was sufficient, as we have seen, that it was likely or probable that some person or persons would be endangered by running the train at 40 miles an hour over that crossing, and that they were conscious of such danger—both questions for the jury."

2—*Texas & P. Ry. Co. v. Berry*, 32 Tex. Civ. App. 259, 72 S. W. 423 (424).

"The charge is subject to the criticism that it is upon the weight of the evidence in telling the jury that 'the fact that she may have stepped in the wrong direction, thereby suddenly placing herself in peril, would not defeat her recovery.' It assumes

that the appellee was placed in a perilous position by the negligence of the defendant, and that appellee was thereby induced to step in the wrong direction. If by the negligence of the railway company, appellee was, without her fault, placed in a position of peril, and as a result thereof in her effort to save her life, she started back across the track, the same would not necessarily amount to negligence on her part. *Int'l & G. N. Ry. Co. v. Neff*, 87 Tex. 303, 28 S. W. 283; *M. K. & T. Ry. Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956; *M. K. & T. Ry. Co. v. Oslin*, 63 S. W. 1039, 2 Tex. Ct. Rep. 1035.

"The issue as to whether under all the facts the plaintiff was guilty of negligence in failing to discover the approaching train, and if not whether she was placed in a position of peril by the negligence of the defendant, which proximately caused her injury, should have been clearly submitted to the jury in a proper charge."

be guilty of contributory negligence, and the jury should answer the second issue "NO."<sup>3</sup>

§ 4076. **Effect of Plaintiff's Deafness—Vigilance in Approaching Crossing.** (a) You are further instructed that, if you find and believe from the evidence that plaintiff was deaf or hard of hearing at the time the accident complained of, then, and in that event, you are instructed that such deafness, or partial deafness, would require greater vigilance of plaintiff in the exercise of his eyesight in approaching said crossing.<sup>4</sup>

(b) If you believe from the evidence that there were persons on the footboard of said engine, or elsewhere, who warned the plaintiff of the approaching train before he was struck, in time for him to have avoided injury by stepping aside; and you further believe he failed to hear such warning because of his impaired hearing; and you further believe that a man of ordinary prudence and caution, in the full possession of all of his physical and mental faculties, would have heard said warning, if any was given, and would have stepped aside in time to have avoided injury; and you further believe the failure to hear the same and avoid injury on the part of a person in possession of all his physical and mental faculties would have been negligence on his part,—then you are charged, as matter of law, that the same would have been negligence on the part of the plaintiff, because those operating the engine and train were authorized to presume that plaintiff was in full possession of his physical and mental faculties, and to act upon that presumption; and if you believe that such failure to so hear such warnings, if any were given, on his part, was due to his impaired hearing, and that he would otherwise have heard said warnings, if any, and, acting as an ordinarily prudent person would have acted under the same circumstances, would have avoided injury, then he is not entitled to recover, and your verdict must be for the defendant.<sup>5</sup>

3—*Stewart v. North Carolina R. Co.*, 136 N. C. 385, 48 S. E. 793 (1905).

"His honor properly refused to give that instruction. We cannot understand how it can be contended that a man who would drink spirituous liquor until he should become unconscious or take anything else until he should become insensible, and then lie down in that state upon a railroad track, is in the exercise of due care for his personal safety. Such a contention seems to us to be trifling with the law. In *Pickett v. Railroad Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. 611, where two negro boys lay down on a railroad track and went to sleep, it was held that they were guilty of contributory negligence; and so in *Lloyd v. Railroad*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. 764, where a man drunk and lying on the track was killed, it was held that he was negligent."

4—*Texas & P. Ry. Co. v. Durrett*, 26 Tex. Civ. App. 268, 63 S. W. 904 (1905).

"This charge, if given, would have been a discussion of, and comment upon, the evidence, and, in effect, a

charge upon the weight of the evidence; besides, it would have been confusing to the jury. It is all right to prove the fact of deafness or partial deafness in order that the jury may take such fact into consideration in determining whether the deaf man used such care as a man of ordinary prudence in his condition should have used, but it is quite another thing to charge on a particular fact and its relation to the other facts."

5—*Houston & T. C. R. Co. v. Harvin*, — Tex. Civ. App. —, 54 S. W. 629 (1902).

"This was correctly refused, because, although the defendant's servants, not having any knowledge of the plaintiff's infirmity, would after reasonable warning, be authorized to presume that he would leave the track, yet the fact that they are so authorized to presume would not render it, as a matter of law, negligence on the part of the plaintiff to be on the track if it would have been negligence on the part of a person in possession of his full sense of hearing under the same circumstances."

§ 4077. **Wanton and Reckless Conduct of Plaintiff Does Not Give Right to Kill Him.** I charge you that although you may find from the evidence that the servants of defendant were guilty of negligence contributing proximately to produce the injury to plaintiff, and although you may further find from the evidence that the agents and servants of defendant were guilty of wantonness in the management and running of said train, still if you find from the evidence that the plaintiff was himself guilty of wanton and reckless conduct in going on said crossing in front of said train, then your verdict must be for defendant.<sup>6</sup>

§ 4078. **Rule that Burden of Proof as to Contributory Negligence is on Defendant.** In order to prove that the failure to give signals contributed to the accident, the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, a preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant.<sup>7</sup>

6—Central of Georgia Ry. Co. v. Partridge, 136 Ala. 387, 34 So. 927 (928).

"There was no error in refusing the charge, that although the jury might find from the evidence that the servants of defendant were guilty of wantonness in the management of the train, which resulted in plaintiff's injury, yet if they further found, that plaintiff was himself guilty of wanton and reckless conduct, in going on said crossing in front of said train, then their verdict must be for defendant. A railroad company, even in case of a trespasser, has no right to kill him on that account, or fail to use all preventive means to avoid doing so, after discovering his peril. Even consent of the party injured could not give the right to kill. In the case of Stringer v. A. M. R. Co., 99 Ala. 410, 13 So. 75, in referring to wantonness and willfulness on the part of defendant, may be found the expression: 'Proof of the latter character of negligence, will authorize a recovery although the party injured may have been found guilty of contributory negligence, unless the contributory negligence on his part is of the same character as that of which defendant was guilty, in which event, he would not be entitled to a verdict.' This expression does not seem to have been necessary to the decision of the cause before the court, but, whether a dictum or not, the doctrine is unsound and clearly repudiated by later decisions of the court. L. & N. R. Co. v. Orr, 121 Ala. 499, 26 So. 35; Same v. Markee, 103 Ala. 160 (170), 15 So. 511, 49 Am. St. 21."

7—Nohrden v. Northeastern R. Co., 59 S. C. 87, 37 S. E. 228 (230, 236), 82 Am. St. 826.

"By the express terms of the request the burden of proof is placed

upon the plaintiff, for the language used is that 'the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision,' so that the practical inquiry is as to the burden of proof. We do not think that this burden is upon the plaintiff for two reasons: (1) Because it would be requiring the plaintiff, in violation of the general rule, to prove a negative. (2) Because the knowledge by the deceased of the approach of the train in time to avoid a collision is a matter of defense, to be proved by the defendant, and not to be disproved in advance by the plaintiff. The statute (Rev. St. § 1692) provides that if a person is injured at a crossing by a collision with the engine or cars of a railroad corporation, and it appears that the corporation 'neglected to give the signals required by this article (Rev. St. § 1865), and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision.

\* \* \* unless it is shown that, in addition to a mere want of ordinary care, the person injured \* \* \* was, at the time of the collision, guilty of gross or willful negligence or was acting in violation of the law, and that such gross or willful negligence, or unlawful act, contributed to the injury.' From this language it is apparent that if a person brings an action for damages sustained by reason of a collision with a railroad train at a point where the railroad track 'crosses any public highway or street or traveled place,' and makes it appear that the railroad corporation neglected to give the signals required by statute, and that such neglect contributed to the injury, he is entitled to recover. But if it is shown that such person was at that time guilty of gross or willful neg-



§ 4079. **Imputed Negligence—Parent and Child.** (a) The court further instructs the jury that if you believe from the evidence in this case that the deceased A. P. at the time of receiving the injury charged in the declaration was in the exercise of as high a degree of care and caution for her own safety, as an ordinarily prudent adult person would have used under all the facts, circumstances and surroundings shown by the evidence in this case, then it is not material in the determination of the issues in this case whether the parents were negligent concerning her safety or not.<sup>8</sup>

(b) It is the duty of a parent to take such care of his young child as will shield and protect it from danger, and keep it from dangerous places and out of harm's way. The care and diligence to be employed in the performance of this duty increase according to circumstances, and with reference to the perils the child may become exposed to, and the means employed to protect the child must be in proportion to dangers. More care is required of a parent in protecting a child of tender years than is necessary in reference to a child of such age and experience as to be able to take care of itself. And the court further charges you that if a parent trusts the care of his child to some other person, and such person fails to exercise the proper degree of care to protect the child from danger, and as a result of such carelessness the child is injured, the parent cannot recover, as the negligence of the custodian of the child would be imputed to the parent.<sup>9</sup>

ligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury, then he cannot recover. It is clear that the plaintiff in such a case is not bound to negative by testimony such conduct on his part as would defeat his recovery, but that the burden of proof is upon the defendant to show such conduct on the part of the plaintiff as would defeat his right to recover. The case of *Barber v. Railroad Co.*, 34 S. C. 444, 13 S. E. 630, cited by counsel for appellant, is not in point; for in that case there was no question as to the burden of proof, and could not have been, as it is stated at page 451, that, while there was evidence of negligence on the part of defendant in failing to give signals required by statute, yet it could not be said that the injury complained of was the result of such negligence, in face of the admitted fact, testified to by both the party injured and by his companion, that he knew not only that the train was approaching, but that it was near at hand, before he attempted to cross the track. Then follows the quotation from that case, incorporated in the exception, to the effect that the manifest object of the statute in requiring the signals to be given was to give notice of the approach of the train to persons crossing or desiring to cross the track, and, if the plaintiff knew of the approach of the train, then such notice was not necessary. For the reasons thus indicated, there was no error in refus-

ing the seventh request. There is, however, another reason why the request should have been refused, and that is the omission of the important addition made to the sixth request at the instance of counsel for plaintiff. It does not follow necessarily that the fact that the person injured knew of the approach of the train in time to avoid the collision would imply gross negligence on his part, and hence the above request could not, even if otherwise unobjectionable, have been granted without adding what was added to the sixth request."

8—*B. & O. S. W. Ry. Co. v. Pletz*, 61 Ill. App. 161 (164).

"As was held in the case of *C. C. Ry. v. Robinson Admx.*, 127 Ill. 9, 'where the conduct of an infant would not be negligence in an adult, the question of imputable negligence is immaterial;' but as we view the evidence in this record, it is a matter of substantial complaint that an instruction should assume there was sufficient proof that the deceased used such a degree of care. This assumption appears also in a modification of an instruction asked by appellant and elsewhere in the series.

The instruction also limits the consideration of the jury to 'the time of receiving the injury.'

The rights of the parties cannot be fairly treated without taking into account all the circumstances."

9—*Corbett v. Or.* S. L. R. Co., 25 Utah 449, 71 Pac. 1065 (1966).

"This request was rightly refused.

§ 4080. **Comparative Negligence.** (a) Ordinarily, when a person is injured by a passing railway train upon a public highway or street crossing, and such injury has been caused by his own negligence and carelessness, he is not entitled to recover damages by reason thereof; and the burden is upon the plaintiff to establish by a preponderance of the evidence, not only that the injury complained of was caused by the negligence of the defendant, its officers, agents, or employes, but also that the person injured was free from negligence contributing thereto, and in this case if you find from the evidence that the deceased's carelessness or neglect was the proximate cause of the accident causing the injury, then the plaintiff cannot recover on the ground of negligence alleged, to-wit, the failure to sound the whistle or ring the bell, as alleged in the petition; and in such case you should find for the defendant. By the term "proximate cause" is meant the cause which naturally led to and produced the result complained of, and without which the injury would not have occurred.<sup>10</sup>

(b) You are instructed that although you believe, from the evidence, that the negligence of the plaintiff contributed to the injury, that will not bar a recovery in this case, provided you further believe, from the evidence, that the plaintiff used and exercised ordinary care and caution, and that the defendant was guilty of negligence contributing to the injury, and of such degree that when compared with the negligence of the plaintiff the negligence of the defendant was gross, and the negligence of the plaintiff, when compared with that of the defendant, was slight.<sup>11</sup>

(c) The court instructs the jury, that the question as to whether the deceased, at the time he was killed, was using due care or was grossly negligent, is not a question of law, but one of fact, to be ascertained by the jury under all the evidence and attendant circumstances in the case, and if the jury believe from the evidence that the deceased was guilty of slight negligence, and if you believe from

It makes the parent the insurer of the safety of his child, although the law requires only the exercise of ordinary care to prevent injury. Again there is no evidence showing or tending to show how the child came upon the track, nor what care was bestowed upon the child by the person with whom it was intrusted. "The burden of showing contributory negligence is upon the defendant, unless the testimony of the plaintiff shows it." *Riley v. Rapid Transit Co.*, 10 Utah 437, 37 Pac. 681, citing *Reddon v. Railway Co.*, 5 Utah 344, 15 Pac. 262.

See also *Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554."

10—*Rietveld v. Wabash R. Co.*, 129 Ia. 249, 105 N. W. 515 (517).

"This was erroneous in the form in which it was given, in that it virtually announced the rule of comparative negligence which does not prevail in this state."

11—*The C. B. & Q. Rd. Co. v. Levy*, 160 Ill. 385 (386), 43 N. E. 373.

"This instruction was erroneous. It states that if the defendant was guilty of negligence contributory to

the injury, etc., then the plaintiff may recover. \* \* \*

Under the instruction as given, any negligence of the defendant, such as the willful and unnecessary sounding of a whistle or permitting the escape of steam, whereby plaintiff's injury might have occurred, would have authorized a recovery. The fact that such instruction tended to mislead the jury is evidenced by certain remarks of counsel for plaintiff in argument, which are assigned as error here, by which it was intimated to the jury that even though plaintiff's buggy was not struck, a recovery should be had for frightening his horse and throwing him out. The instruction also states the rule formerly existing, of comparative negligence, which has been held to be no longer the law of this state. (*City of Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938.) That part of the instruction is by a majority of this court held, adversely to the views of the writer of this opinion, not to be reversible error."

the evidence that the negligence of the defendant was gross, as compared with that of the deceased, then you may find for the plaintiff on this issue.<sup>12</sup>

(d) The court instructs the jury, that while a person is bound to use reasonable care to avoid injury, yet he is not held to the highest degree of care and prudence of which the human mind is capable, and to authorize a recovery for injury, he need not be wholly free from negligence, provided his negligence is but slight, and the other party be guilty of gross negligence, as defined in these instructions. And in this case, although the jury may believe from the evidence that the plaintiff was guilty of some slight negligence, yet if the jury further believe from the evidence that the plaintiff's negligence was but slight; and that the defendant's servants were guilty of gross negligence, as explained in these instructions, and that the injuries complained of were caused thereby, then the plaintiff is entitled to recover.<sup>13</sup>

### FENCING TRACK.

**§ 4081. Failure to Comply with Law Negligence per se.** If you believe from the evidence that the defendant at the time and place of the injury had on both sides of the railroad such a fence in existence as the law provides, the duty of the company ended with this compliance with the law, and it will, in that event, be your duty to find for the defendant. If, on the other hand, you find that at the time of this injury, and at the place mentioned in the testimony, the defendant did not have erected and in existence such a fence as I have mentioned, such omission is negligence as a matter of law; and if you so find it will be your duty thereupon further to inquire whether such absence of a fence such as is required by law was the proximate and real cause of the killing of plaintiff's horse. If you find that this was the case, and further find that plaintiff or her agent did not by their negligence contribute to such killing, it is your duty to find for the plaintiff.<sup>14</sup>

12—C. & St. L. Ry. Co. v. Maxwell, 59 Ill. App. 673 (676 & 677).

"The above instruction is erroneous, not because the stating of the rule of comparative negligence has become fatal error in this State (A., T. & S. F. R. Co. v. Feehan, 149 Ill. 202, 36 N. E. 1036), although it has become obsolete and should not be given, but because it leaves out the essential element, that the jury must believe from the evidence that the deceased at the time was in the exercise of ordinary care. C. I. & S. Co. v. Martin, 115 Ill. 358 (368), 3 N. E. 456; City of Beardstown v. Smith, 150 Ill. 169 (176), 37 N. E. 211; C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328 (334), 36 N. E. 965."

13—I. C. R. R. Co. v. Beard, 49 Ill. App. 232 (239, 248).

"Where a person voluntarily and unnecessarily places himself in a position well known to be a place of danger, and is injured, there can be no recovery for even gross negligence on the part of the defendant,

the act of the defendant not being willful or wanton."

14—Pecos Valley & N. W. Ry. Co. v. Cazier, — New Mex. —, 79 Pac. 714 (716).

"If it was the intention of the Legislature in enacting the above sections, to make the neglect of the railroad companies in failing to construct and maintain fences, as therein provided, in itself sufficient negligence to enable one whose stock is injured to recover damages, regardless of the careful operation and management of trains by the employees of such companies, then the instruction given by the learned judge was correct; otherwise there was reversible error. Numerous cases can be found that hold to the doctrine announced, but a careful examination of all the cases we have examined shows they depend upon the statutes requiring the railroads to build and maintain fences along their lines. It is well settled that states may in the exercise of the



§ 4082. **Obligation of Railroad Company to Fence Right of Way.**

The court instructs the jury that by the law of this state the defendant was required to erect and maintain a fence, suitable and amply sufficient to prevent cattle from getting onto the railroad track, at and along the right of way, where the cattle were killed and injured. If plaintiff satisfies you by a preponderance of the evidence that defendant failed to keep and maintain such a fence as herein described, and that the cattle were killed and injured because of such fact, then the defendant is liable, and your verdict will be for the plaintiff, unless you find for the defendant upon other instructions herein given.<sup>15</sup>

§ 4083. **Burden of Proof on Railroad to Observe "All Statutory Precautions."** If the jury should be of opinion that the track

police power, enact and enforce laws compelling railroads to construct and maintain such fences, and making such roads as neglect to comply with the statutory provisions responsible for all damages to stock by reason of non-compliance. Such statutes may be found in Missouri (section 52, c 39, p. 437, Rev. St. 1855), Illinois (chapter 114, par. 68, Starr & C. Ann. St. 1896, p. 3253), Wisconsin, Kansas, Nebraska and many other states, and in these jurisdictions the courts hold that proof of the ownership of the animal, its value, the fact that it was killed or injured by the railroad company's train at a point where the statute required the railroad to be fenced, and the nonexistence of such fence is sufficient to justify a recovery. But in California it was held under a statute somewhat similar to ours, that a neglect to fence was merely prima facie evidence of negligence.

McCoy v. C. P. R. Co., 40 Cal. 532, 6 Am. Rep. 623. A careful reading of our statute does not disclose an intention on the part of the Legislature to do more than to change a rule of evidence. Before the enactment of sections 241, 242 the burden of proof as to the negligence and careless operation of train cars and locomotives of the defendant company rested upon the plaintiff. A. T. & S. F. Ry. Co. v. Walton, 3 New Mex. (Gild.), 9 Pac. 931.

The plain provisions of the statutes cited merely shift the burden to the defendant company in cases where the company fails to build and maintain the fences required by the statute. Section 241 makes it the duty of every company to construct and maintain such fences, and if that section stood alone, it might be construed to mean that neglect to comply with its provisions would be such negligence as would be sufficient to maintain a recovery, although the rule is laid down by many authorities that the violation of the statute or ordinance is merely a circumstance to be considered by the jury on the question of negligence. 21 Am. & Eng. Ency. of Law

(2d Ed.) 481; Hayes v. Mich. Cent. Ry. Co., 111 U. S. 228, 4 S. Ct. 369, 28 L. Ed. 410; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; 12 S. Ct. 679, 36 L. Ed. 485.

But section 242 clearly points out that the violation of the preceding section is to shift the burden of proof to the defendant company, and the language used in the last clause of said section seems to conclusively establish that proof showing that the engines, cars and locomotives of the defendant railway company were properly and prudently managed with due care and precaution, and with a reasonable effort to avert the injury will be a complete defense to an action like the one at bar."

15—Brownfield v. Union Pac. Ry. Co., — Neb. —, 104 N. W. 876 (877).

"It is contended that this instruction is erroneous because of the words 'unless you find for the defendant upon other instructions herein given.' With this contention we agree. The plaintiff was entitled to an instruction advising the jury, that, if they were satisfied by a preponderance of the evidence that the defendant failed to keep and maintain a fence suitable and amply sufficient to prevent the cattle from getting on the railroad track, and that if by reason of that fact the plaintiff's cattle escaped upon the railroad track and were killed, the defendant was liable, and that their verdict should be for the plaintiff. He was entitled to that instruction without qualification. The qualifying words added can have but one meaning, and that is, that under a certain state of facts it was the duty of the jury to find for the plaintiff, unless they should find for the defendant. There is some evidence in the record tending to show that the fence in question was not suitable for the purpose required by the statute, and the evidence is undisputed that on the morning after the cattle were killed some of the wires were down in at least two places and for that reason the error in the instruction was prejudicial."

was properly fenced, and that the animals got into the enclosure and upon the track and were killed, then the railroad company would be responsible for running its engine upon them, unless it can show by a preponderance of evidence in the case that it used all the statutory precautions.<sup>16</sup>

§ 4084. **Stock Entering at Point Where Railroad Not Required to Fence.** In an action of this kind, it is the place where the animal goes upon the right of way that determines the liability of the railroad company, and not the place where the animal was killed. And in this action, if you find from the evidence that the plaintiff's mule colt entered upon the defendant's right of way at a point where the defendant was not required to fence, your verdict should find the defendant not guilty. The court instructs you that the defendant is not bound to fence its tracks where passengers and freight is received and discharged and where public convenience requires that there should be unobstructed access to the building or tracks; and in this case, if you believe from the evidence that the mule in question went upon the railroad track at a place where the same was not required by law to be fenced, as explained to you in the first part of this instruction, and from there wandered down the track or right of way and was killed, you should find the defendant not guilty.<sup>17</sup>

16—*Mobile & O. R. Co. v. Tiernan*, 102 Tenn. 704, 52 S. W. 179 (180).

"This instruction was erroneous, in that it imposed upon the company the burden of showing an observance of 'all statutory precautions' even though it might appear to the jury that the company at the time of the collision had its track inclosed by a lawful fence. That part of the charge relating to the observance of statutory precautions should have been omitted altogether, and the liability or nonliability of the company should have been made to turn upon the absence or presence of a lawful inclosure of the track. The fencing act (Acts 1891 c. 101) greatly modifies, and in a large measure supersedes, the previously existing law. *Ill. Cent. R. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618; *Cincinnati, N. O. & T. P. Ry. Co. v. Russell*, 92 Tenn. 108, 20 S. W. 784. The second section of that act makes railroad companies absolutely liable for injury caused to live stock by moving trains up on unfenced tracks, and the third section gives them complete exoneration from liability for such injury upon fenced tracks. The nonliability in the latter case is as complete as the liability in the former. *Cincinnati, N. O. & T. P. Ry. Co. v. Russell*, supra.

Since the passage of that act, proof with reference to the observance or non observance of the 'statutory precautions' referred to is irrelevant in actions like the present one. *Cincinnati, N. O. & T. P. Ry. Co. v. Russell*, supra; *Cincinnati, N. O. & T. P. Ry. Co. v. Stonecipher*, 95 Tenn. 313, 32 S. W. 208. The effect of the charge of the learned circuit

judge was to give the plaintiff the benefit of two independent remedies (one under the Code and the other under the act of 1891) in the same action and to allow the railroad company no escape whatever, except upon proof of full compliance with both laws at the same time. A result so unequal and partial was not contemplated by the legislature, and should not be approved by the courts. *Cincinnati, N. O. & T. P. Ry. Co. v. Russell*, supra.

17—*Toledo, St. L. & W. R. R. Co. v. Delliplane*, 119 Ill. App. 122 (124, 125).

"These instructions as asked did not state the law correctly. We do not understand the law to be as contended for by counsel that in a case like the one at bar, 'it is the place where the stock comes upon the right of way, and not the place where it was killed, which determines the railroad company's liability under the fencing act.'

The question here raised has been under consideration in both the Appellate and Supreme Courts of this state. In *Wabash R. R. Co. v. Pickrell*, 72 App. 601, the court held: 'It is sufficient for a plaintiff suing a railroad company for the value of stock alleged to have been killed on the account of a failure of the company to maintain proper fences and cattle-guards, to show that the stock was killed at a point where the company was required to fence; he need not show that such stock entered upon the right of way at a place where the company was required to erect and maintain fences and cattle-guards.' And in *Chi. & E. I. R. R. Co. v. Blair*, 75 Ill. App. 659, the court held: 'Where stock enters a

§ 4085. **Examination of Defective Gate by the Jury—Duty of Plaintiff to Lock Gate.** (a) You have been permitted by the court to go to the place where the accident in question is claimed to have occurred, for the purpose of examining the gate in controversy. You are instructed, gentlemen, that the only purpose of this examination, and the only purpose for which you can consider such examination, is to aid you in determining the issue, with the other evidence in the case, as to whether or not the material which went into said gate in its construction was defective, and whether or not the manner of its construction was defective; and in considering this you should take into consideration the length of time which has elapsed since the accident and the time of your examination.<sup>18</sup>

(b) The court instructs the jury, that if you find from the evidence that the stock escaped upon the track of the defendant through a gate erected by the company for the accommodation of the plaintiff, and the plaintiff at the time had failed to lock and secure the gate, and by reason of such failure on his part the stock went through such gate and upon the track, and were then killed, then the defendant is not liable to the plaintiff for the killing, unless you should further find that the killing or injury to such cattle was done through the negligence of the servants of defendant in operating their train.<sup>19</sup>

§ 4086. **Cattle Guards.** It is claimed by the defendant that the colts of the plaintiff ran upon the crossing at about the same time

railroad right of way at a place exempt from the operation of the statute in regard to fences and cattle-guards, and wanders along the track to a place not exempt, because of a failure to erect a suitable fence or cattle-guard, and is there killed by a train, the company is liable.' This view of the law is supported by the opinion of the Supreme Court in *Atchison, T. & S. F. R. R. Co. v. Elder*, 149 Ill. 173, 36 N. E. 565."

<sup>18</sup>—*Morrison v. Burlington C. R. & N. Ry. Co.*, 84 Ia. 663, 51 N. W. 75.

"When a view is permitted, the jury should not only be instructed as to the purpose, but cautioned not to consider their own observation as evidence. It is upon the evidence, as understood in the light of their view, that they must decide. If a party has failed to prove a material fact, the jury must take the evidence as it is, even though their view convinces them that the fact exists. To find the fact upon their own observation is not to find it upon evidence, while if it had been the subject of testimony the other party might show the finding to be wrong. In this instruction the jury were told that the only purpose of the examination, and the only purpose for which they could consider it, 'is to aid you in determining the issue, with the other evidence in the case.' They were not told that the only purpose was to enable them to better understand and apply the testimony, but it was to aid them in determining the issue, with the other testimony. From this language, the

jury must have understood that they were to give to their own observations as to the construction of the gate and the materials used the place and weight of evidence. We think the giving of this instruction was error prejudicial to appellant."

<sup>19</sup>—*Brownfield v. Union Pac. Ry. Co.*, — Neb. —, 104 N. W. 876 (877).

"The particular portion of this instruction complained of is that part reading as follows: 'And the plaintiff at the time had failed to lock and secure the gate, and by reason of such failure on his part the stock went through such gate and upon the track, and were killed, then the defendant was not liable.' It is doubtless true that the only obligation resting upon the plaintiff with reference to the gate, was to close and secure the same with the means provided for that purpose by the defendant. He was not required to lock the gate, which, according to the ordinary meaning of the word 'lock' would be to lock the gate with a key. No such obligation could be imposed upon the plaintiff, especially under the facts in this case, which disclose that such was not the means provided by the defendant for securing the gate. The giving of the latter instruction, however, might not be held to be prejudicial, because the undisputed evidence is that on the evening before the cattle were killed the gate was fastened in the manner provided by the company for that purpose, and that the means so provided were amply sufficient for the purpose intended."



that the engine arrived there, and that, in attempting to escape from the engine, they ran upon and crossed, or attempted to cross, the cattle guard, and were struck either while upon the guard or after having crossed the guard, in attempting to escape from the engine. If you find the evidence to sustain the contention of the defendant as above set forth, then your verdict will be for the defendant.<sup>20</sup>

### ACTIONS FOR KILLING LIVE STOCK.

**§ 4087. Actions for Killing Live Stock—Care Due in Operation of Trains.** If the jury believe, from the evidence, that the person or persons in charge of the engine in question by the exercise of ordinary care might have stopped the train in question in time to have avoided injuring the cows in question, and that the cows were injured by such failure to exercise ordinary care, and that they were the property of the plaintiff, then the jury should find the issues joined in favor of the plaintiff.<sup>21</sup>

**§ 4088. Failure of Engineer to See Animals on Track when he Should Under the Circumstances.** If you find from the evidence that the defendant's employes did not stop the said car which caused the accident as soon as they could do so after discovering that the cows were on the track \* \* \* then you will find for the plaintiff.<sup>22</sup>

**§ 4089. Duty to Avoid Injury After Discovering Position of Live Stock.** (a) The court instructs you that if you find from the evidence that the mare of the plaintiff was killed upon the track of the defendant, by the negligence of the defendant, or the engineer of the train on said road, in not using proper endeavor to stop said train, or frighten the animal away, if said mare was on the track of defendant, as was seen, or could have been seen by said engineer by the use of proper care and diligence in time to have avoided such injury, then

20—Paul v. Chicago, M. & St. P. Ry. Co., 120 Ia. 224, 94 N. W. 498 (500).

"This was more favorable to defendant than the law warranted for, as seen, if one colt attempted to cross when it would not have done so but for the defective condition of the guard the plaintiff was entitled to recover."

21—Chi. & N. W. Ry. Co. v. Bunker, 81 Ill. App. 616 (620).

"While the instruction substantially directs a verdict for appellee, it entirely ignored the question of due care on the part of plaintiff, or the person in charge of the cows, and in the absence of proof of willful and intentional killing, which certainly nowhere appears in the evidence, it was clearly erroneous. Then again, the instruction ignores the question as to whether appellant's servants by the exercise of due care could have stopped the train after discovering the danger in time to have avoided the injury. Whatever may have formerly been the rule in this state, it is not now the duty of railroad companies to anticipate the presence of cattle or

stock upon their tracks, and be on the constant watch to discover them, but the duty to avoid injury arises only after discovery of their presence. If after the servants of the company see animals upon the track they can, by the exercise of due and proper care, avoid doing them injury and fail to do so, the company will be liable. Ill. Cent. R. R. Co. v. Noble, 142 Ill. 578, 32 N. E. 684. The instruction under discussion was erroneous in failing to recognize this proposition."

22—Fullerton v. Cedar Rapids & M. C. Ry. Co., 101 Ia. 156, 70 N. W. 106 (107).

"The defendant complains of that portion of the charge on the ground that it submitted an issue not presented by the pleadings, and we are of the opinion that the objection is well founded. The petition does not aver, in substance or effect, that the defendant or its employes who were operating the car were negligent in failing to discover the cows, but charges that, with knowledge of their presence on the track, the employes negligently and willfully ran the car against them."

you should find for the plaintiff, unless you find that the plaintiff was guilty of such negligence as would preclude him from recovery.<sup>23</sup>

(b) The court instructs the jury that in determining the question of the liability of the railroad company in this case, you have a right to take into consideration the character and circumstances of the injury as shown by the evidence, and in weighing the testimony you should consider all the evidence together and give to the testimony of every witness whatever weight in your judgment it deserves; and if, from all the evidence, and from all the circumstances shown by the evidence, you believe that by the exercise of reasonable care and caution, the horses could have been seen by the employes of defendant in charge of said train after said horses were on the track of defendant's railroad in time to have stopped said train or to have reduced its speed so as not to have injured said horses, by the exercise of reasonable diligence, then it was the duty of said employes to have done so, and if they did not, then the defendant is liable for such negligence, and the plaintiff is entitled to recover whatever the jury may believe said horses were worth.

(c) Unless the plaintiff has proved by a preponderance of the evidence that after the horses were, or by the exercise of reasonable care could have been, seen approaching the track or on the track, the train men might, by the exercise of ordinary care, have prevented the train from striking the horses, you should find the defendant not guilty.<sup>24</sup>

§ 4090. **Injury to Stock at Crossing.** (a) It is claimed by the plaintiff that the defendant's agents and employes were negligent in failing to sound the necessary warning by whistle when approaching the crossing in question, and that by reason of such failure the cattle in suit were run upon and killed. This is the only particular wherein plaintiff claims that the defendant was negligent, and will be the only one considered by you in your determination of the case.

(b) It must appear from the evidence that the defendant in operating the train in question, was negligent in failing to sound the whistle as required by law in approaching said crossing. This is the matter wherein plaintiff claims defendant was negligent. The statutes of this state, among other things, provide: "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached," etc., "and the company shall

23—St. L., Alton & T. H. R. R. Co. v. Fullerton, 45 Ill. App. 618 (619).

"This instruction was erroneous. It was not the contributory negligence of plaintiff but his son's negligence, when he had the mare in charge, that was relied on by appellant to absolve it from liability for the death of the animal; hence the attention of the jury was by this instruction improperly withdrawn from the negligence that might be material and necessary for them to consider in determining appellant's liability, and was directed to the acts of plaintiff, which were not material to a proper determination of that question. The instruc-

tion was defective in other respects, and was calculated to mislead the jury. It was not error to refuse the instruction in the form as offered. It should have included the words 'in comparison with each other,' or their equivalent. C. B. & Q. R. R. Co. v. Harwood, 90 Ill. 425."

24—Ill. Cent. R. R. Co. v. Noble, 142 Ill. 578 (583), 32 N. E. 684.

"We are of the opinion that the instructions in this case, so far as they imposed upon the servants of the defendant in charge of its train the duty of care and caution to discover the presence of trespassing animals, of which they know nothing, upon the track, were erroneous (p. 589)."

be liable for all damages which shall be sustained by any person by reason of such neglect." If it appears from the evidence, by the greater weight thereof, that at the time of the accident in question, in which plaintiff's said cattle were killed, the employes of defendant in charge of the engine hauling said train failed to twice sharply sound the whistle on said engine at least sixty rods before reaching said crossing, such failure on the part of such employes would be sufficient to constitute negligence in the operation of said train on the approach of said crossing. But unless it appears from the evidence under the rules above given, that said employes of the defendant did fail to sharply sound said whistle twice at least sixty rods before reaching said crossing, then the plaintiff cannot recover. Whether said employes did sound said whistle at least sixty rods before approaching said crossing twice sharply, as above required, is a question of fact to be determined by you from all the testimony before you throwing light thereon. This is one of the main questions of fact to be decided by you, and should be the first one decided by you when you begin the consideration of the case.

(c) If you find from the evidence that plaintiff or said J. heard the approaching train when it was sixty rods or more north of said crossing, then the failure to sound the whistle, if any such there was, did not cause or contribute to such accident, and you should find for the defendant.

(d) There is some testimony before you showing that the plaintiff did not stop said cattle, or cause the same to be stopped, until he could ascertain whether or not a train was approaching. He is required to use ordinary care and caution, such care and caution as an ordinarily prudent man would use under like circumstances—and, if such care and caution would require that he stop said cattle to investigate, then a failure to do so would constitute negligence on his part and he cannot recover. But unless ordinary care and caution, under the facts of this case would require that he take such step, and stop said cattle for such purpose, he would not be negligent in failing to do so.<sup>25</sup>

25—Kinyon v. Chicago & N. W. Ry. Co., 118 Ia. 349, 96 Am. St. 382.

"The tenor and effect of the instructions given were to impress upon the jury the thought that, if the whistle of the engine was sounded 60 rods from the crossing, the defendant had discharged its whole duty. This idea was expressly or impliedly repeated in various forms throughout the charge. There are a few cases which tend to sustain the doctrine announced by the learned trial court in this respect (Beisiegel v. Railroad Co., 40 N. Y. 9, Grippin v. Railroad Co., 40 N. Y. 34), but as we shall endeavor to show it is not in accordance with the weight of authority. Even when there is no statutory regulation, a railway company may be chargeable with negligence for failing to give reasonable warning before running its train over a public crossing. Shear. & R. Neg. § 484; Artz v. Railroad Co., 34 Ia. 158; Grand Trunk

Ry. Co. v. Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485; Tolman v. Railroad Co., 98 N. Y. 198, 50 Am. Rep. 649; Loucks v. Railway Co., 31 Minn. 526, 18 N. W. 651; Guggenheim v. Railroad Co., 57 Mich. 488, 24 N. W. 827; Thompson v. Railroad Co., 110 N. Y. 636, 17 N. E. 690; Harty v. Railroad Co., 42 N. Y. 468.

And in such cases the place where and the distance at which reasonable care requires the warning to be given must of necessity depend upon circumstances. It is a matter of common observation that railway crossings are not all equally dangerous; varying as they do, from the intersection of straight tracks upon the open prairie, with unobstructed view for miles in every direction, to the crossing of sharply curved tracks in deep cuts, where an extended view is impossible. It is obvious that taking one extreme it is hardly possible for a traveler upon a highway to collide with a



§ 4091. **Injury to Mule at Public Crossing.** Our statute provides that the agents and employes of a railway company in charge of its moving engines and trains shall, upon approaching a public crossing, sound its whistle and ring its bell for a space of at least 80 rods before passing said public crossings. You are charged in this connection that, if you believe from the evidence that the defendant company, its agents, and employes in charge of said engine and train, failed to sound the whistle, or ring the bell continuously for a distance of at least 80 rods before passing a public crossing where the mule was injured, the defendant would be guilty of negligence *per se*. You are further instructed that, if you believe from the evidence in this case that the defendant company, its agents or employes in charge of said engine and train, was guilty of gross negligence as hereinafter defined in failing to blow the whistle or ring the bell, or in checking the speed of the said engine and train after discovering the danger or peril of said mule while upon its right of way and railway track, and that said gross negligence was the direct and approximate cause of the injury to said mule, you will find for the plaintiff such sum as you may believe from the evidence he is entitled to, not to exceed \$———. <sup>26</sup>

passing train without gross negligence upon his own part, while in the other case he may quite readily be run down and injured when in the exercise of all reasonable care for his own safety. The general common law rule that care to be reasonable must be proportioned to the danger to be avoided, applies here, as in other cases of alleged negligence; and that rule affects not only the traveler who ventures upon the crossing, but the railway company which operates its trains over the track. Turning to the statute, we find the provision to be that the whistle of the engine shall be sounded 'at least sixty rods before a crossing is reached.' The effect of this is to indicate the kind of warning which must be given, and the minimum limit within which the duty must be performed, but does not abrogate the common law obligation which would require a warning at a greater distance, if by reason of the speed of the train, or the peculiar dangers of the crossing, some earlier signal is dictated by reasonable caution. 1 Ror. R. R. 529; Atchison, T. & S. F. R. R. Co. v. Hague, 54 Kas. 284, 38 Pac. 257, 45 Am. St. 278; Richardson v. Railroad Co., 45 N. Y. 846; Eaton v. Railroad Co., 129 Mass. 364; Barry v. Railroad Co., 92 N. Y. 289, 44 Am. Rep. 377; Bradley v. Railroad Co., 2 Cush. 539; English v. So. Pac. Co., 13 Utah, 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. 772. In other words the warning must be timely, and timeliness depends upon the facts and circumstances of each case. Eskridge's Ex'rs v. Railway Co., 89 Ky. 367, 12 S. W. 530; Phil. W. & B. R. R.

Co. v. Stinger, 78 Pa. 219. In the case of Hart v. Railroad Co., 56 Ia. 170, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93, we said the doctrine that 'mere compliance with statutory requirements will not absolve the railroad corporations from any duties which they were under before, or excuse them from taking other reasonable precautionary measures when their trains are crossing, or about to cross a highway is well settled. In case of collision it is for the jury to say whether such measures have been adopted, and whether, under the circumstances of the case, the railroad company has used reasonable care to prevent it.' This precedent is authoritative and commends itself to our judgment as announcing a just and salutary rule of law in the light of which the restriction placed by the trial court upon the right of plaintiff to recover, must be regarded as error."

26—Mo. & K. T. Ry. Co. v. Scofield, — Tex. Civ. App. —, 98 S. W. 435.

"This charge, under previous decisions of this court, is objectionable, as applied to this and similar cases, because the same is upon the weight of the evidence and authorizes a finding by the jury that appellant's servants were guilty of gross negligence, if, in approaching the public road crossing, they failed to sound the whistle or ring the bell as prescribed by the statute to which we have heretofore referred. In the case of H. & T. C. Ry. Co. v. Jones (Tex. Civ. App.) 40 S. W. 745, it is held, 'that such a charge was erroneous; that, while ordinarily it is not error for the court to charge

§ 4092. **Animals Coming on Track so Suddenly that Accident Cannot be Prevented.** (a) If the jury believe from the evidence that the mule was seen by the engineer of the train a quarter of a mile from him, and that said mule was then grazing on the side of the embankment, and then started down it from the train, and when the mule was in about 100 yards of the train, and then jumped on the track in front of the engine, they must find for the defendant.

(b) If the jury believe, from the evidence, that the mule jumped in front of the engine when it was within 100 yards of the engine, and that prior thereto the mule had been away from said track, and the engineer was on the lookout, they must find for the defendant.<sup>27</sup>

(c) The court charges the jury that the evidence in this case is without conflict, that the mules were not in dangerous proximity to the track when they were discovered by the men in charge of the train.

(d) When an engineer sees cattle or stock by the side of the railroad, and not on the track, it is not incumbent on him, and he is not required to attempt to stop the train or frighten the animals away by blowing the whistle or ringing the bell, unless they are in dangerous proximity to the track, that is, unless they are so near to the track that they could get thereon ahead of the train, and unless they manifest an inclination to go toward the track.

(e) The court charges the jury that the evidence in this case is without conflict, that the engineer and fireman were keeping a proper lookout at the place when the animals were found near the track on the occasion of the injury.<sup>28</sup>

the jury that the failure to blow the whistle or ring the bell, as required by our statute is negligence, yet, inasmuch as it was necessary, under the facts of that case, to fix liability upon the railway company to show that its employees were guilty of gross negligence, it was a question for the jury to determine, under proper evidence, whether such negligence existed or not.' And in *Mo. K. & T. Ry. Co. v. Russell*, — Tex. Civ. App. —, 43 S. W. 376, in which it seems that the failure to sound the whistle or ring was undisputed, it is said: 'There being no proof that appellant's servants saw the mule on the track in time to have prevented the injury, we are of the opinion that the evidence is not sufficient to warrant the conclusion that said mules were seen by said employees in time to have prevented the injury. Such being the state of evidence we think it is insufficient to show gross negligence.' This charge, by reason of the punctuation, is perhaps, not subject to the criticism that it charged appellant's servants with the duty of sounding the whistle continuously for the distance of 80 rods immediately before reaching and passing the road crossing, but we suggest that, upon another trial, the same be so drawn as to eliminate the question altogether."

27—*Central of Ga. Ry. Co. v. Dumas*, 131 Ala. 172, 30 So. 867 (867).

The above charges refused to defendant "each improperly ignore the consideration that the general duty to use due care may have called for preventive effort on the engineer's part by the animal's dangerous proximity to, as well as by its presence on, the track. This is made pertinent by some of the testimony, which is to effect that on the approach of the train the mule, though not on the track, was eating grass between ends of its cross-ties. There was no error in refusing either of the charges requested by the defendant or in overruling its motion for a new trial."

28—*Southern Ry. Co. v. Reaves*, 129 Ala. 457, 29 So. 594 (596).

"The first and third were properly refused. The third ignores the keeping of a proper lookout by the engineer; and the third assumes, and requested the court to charge as a matter of law that he was keeping such a lookout, whereas the plaintiff's evidence tends to show he was not.

When an animal is perceived near the track of a railroad, the diligence required of an engineer of a moving train is not the same as if it were on the track, and he is not required to stop or check the train,

(f) If the jury believe from the evidence that at the time the cow was discovered by the engineer, she was standing 10 or 15 yards from the track grazing alongside of it, it was not the duty of the engineer to take any notice of her, or to adopt precautionary means, until she started to cross the track, and if, after she started to cross the track, all reasonable means were adopted to prevent the accident, plaintiff cannot recover.<sup>29</sup>

§ 4093. **Rate of Speed.** If you find that the car could not be stopped in time to avoid the accident, by reason of the speed with which it was going, then you will find for the plaintiff for the damages which he has proved he sustained.<sup>30</sup>

§ 4094. **Injury to Live Stock Through Unsuitable Cattle Guards.** The court instructs the jury that, if you believe, from the evidence in this case, that the cattle guard in question was at the time in question maintained in a suitable condition to prevent ordinary horses from crossing the same, and that the colt in question at the time in question passed over the same, then the plaintiff in this case cannot recover, and you should find for the defendant.<sup>31</sup>

§ 4095. **Burden of Proof to Show Negligence in Killing Live Stock on Plaintiff.** I charge you, gentlemen of the jury, that the burden of proof is on the plaintiff in this case to show the killing, and also to show defendant's servants or employes inflicted the injury by care-

unless the circumstances indicate that the animal is likely to move on the track, or will probably be injured if it remains stationary. *Western Ry. Co. v. Lazarus*, 88 Ala. 453, 6 So. 877.

The likelihood of its moving on the track would depend of course upon the circumstances—its proximity or remoteness from the track, what it is doing, and the disposition it manifests at the time,—and this likelihood dependent upon circumstances is for the jury to determine. It is only when the engineer who is competent and vigilant, by keeping a steady lookout to discover stock, does not and cannot see the approach of an animal in dangerous proximity to the track,—that is so close to the train that the engineer cannot stop in time to prevent injuring or killing it, when it comes suddenly on the track,—that the company is not liable for injuring it. Without this as has been repeatedly held, if the train is run under such conditions, or at such a rate of speed as renders it impossible for those in charge to avoid injuring an animal coming suddenly on the track, it is negligence rendering the company liable for the consequent injury. The second is not in consonance with these principles.”

29—*Southern Ry. Co. v. Shirley*, 128 Ala. 595, 29 So. 687 (688).

This charge “is faulty, in that it might well have misled the jury to conclude that it was not the engineer's duty to take any notice of the cow until she was in the act of

crossing the track, though he might have seen her before, approaching the track in such a way as to evince her disposition to cross unless frightened away.”

30—*Fullerton v. Cedar Rapids & M. C. Ry. Co.*, 101 Ia. 156, 70 N. W. 106 (107).

“The appellant justly complains of this portion of the charge. It may have been impossible to stop the car in time to avoid the accident, without fault on the part of the defendant. The rate of speed may not have been unreasonable or dangerous, and the car may have been operated at the time with all the care and diligence which could have been reasonably required, and yet it may have been impossible to stop the car in time to avoid the collision. The rate of speed may not have caused the accident. It occurred at night, and the cows may have appeared on the track suddenly, and very near to the car, while it was moving at an ordinary and reasonable rate of speed, and yet it may not have been possible for the employes in charge of it to prevent its running against the cows.”

31—*Jarvis v. Bradford*, 88 Ill. App. 685 (688).

“This is in substance the same as the fourth instruction complained of in *Chi. & A. R. R. Co. v. Utley*, 38 Ill. 410, which the court there held properly refused, and considering which said: ‘A sufficient fence must be not merely one which will turn stock but one that will turn stock even though to some extent unruly.’”



lessness on their part, and that plaintiff must reasonably satisfy you by preponderance of evidence in these two points, and if the plaintiff has failed to do this, you will find a verdict for the defendant.<sup>32</sup>

### INJURIES BY FIRE.

**§ 4096. Elements Constituting Negligence in Injuries by Fire.** (a) The court instructs you that while it is necessary for the plaintiff, in order to recover in this action, to establish by a fair preponderance of the evidence that the defendant did something which it ought not to have done, or omitted to do something which it should have done, the doing or omission of which caused the fire to escape and do the injury complained of, in at least one paragraph of the complaint, that it is not necessary to establish such fact by direct or positive evidence. The jury, in determining whether or not the defendant is guilty of negligence as charged in either paragraph of the complaint, may take into consideration all the facts and circumstances in evidence in the case tending to establish negligence as charged therein. In case you find from the evidence that the fires, or any of them, complained of, were caused by sparks of coals of fire escaping from the defendant's engine or engines, then you may take into consideration, in determining whether or not defendant was negligent in permitting the same to escape, the number of fires, if any, started at such time upon plaintiff's premises by reason thereof, the size and number of sparks emitted from such engine if shown by the evidence, together with the distance such sparks were thrown or carried, if shown by the evidence; also the rate of speed of such engine, the amount of steam being used at the time, the draft that was permitted to escape through the spark arrester, the manner in which said engine was being operated at the time, if such facts are disclosed by the evidence, with all other facts and circumstances in evidence in the case. You should review and consider all the evidence before you, in the case tending to show the construction and condition of the spark arrester then used in such engine, and also review and consider all the evidence before you in the cause tending to show the actual conduct of the defendant's servants and employees in the operation and management of such engine at such time. And from a view of all the facts and circumstances in evidence you will determine and say whether the defendant has been guilty of that want of care required by the law, or not.<sup>33</sup>

32—*Kansas City M. & B. R. Co. v. Henson*, 132 Ala. 528, 31 So. 590 (592).

This charge by the use of the words "preponderance of" was misleading and properly refused.

33—*Pittsburg, C. C. & St. L. Ry. Co. v. Wise*, — Ind. App. —, 74 N. E. 1107 (1110).

"The concluding part of the first instruction 'and from a view of all the facts and circumstances in evidence you will determine and say whether the defendant has been guilty of that want of care required

by the law, or not' is erroneous. The court did not, in any instruction given, tell the jury the care which the law enjoined upon appellant. The instruction leaves the jury to determine not simply a question of fact, but also a question of law. The duty owing from appellant to appellee was clearly a question of law, but the instruction requires the jury to find what that duty was, and also whether such duty had been neglected to appellee's injury. After a careful reading of the evidence in this case, we cannot say that these instructions were harmless."

(b) You are instructed that a fire seen to break out in grass near and to the leeward of a railroad track soon after the passing of an engine affords a presumption that the engine set out the fire which, if you find that the defendant was operating the road, should be rebutted by evidence that the fire was set out in another way.<sup>34</sup>

(c) The fact that on a dry, windy day, about the — of February, 18—, a fire was discovered upon the line of the defendant's railroad, shortly after the passage of a train propelled by engine number —, is not of itself negligence on the part of the railroad company, or that the fire originated from the sparks, or otherwise from defendant's engine.<sup>35</sup>

§ 4097. **No Recovery Against Railroad When Origin of Fire Left to Guess or Conjecture.** (a) The jury had no right to surmise or speculate, independent of the evidence, as to how the fire arose, or as to how it was communicated to plaintiff's property, and then base their verdict thereon. Before they can find a verdict for the plaintiff, the evidence must satisfy them that a fire arose from a spark thrown out by defendant's engine, and was communicated to plaintiff's property in one of the methods alleged in the complaint; and if the evidence fails to satisfy them on both of these points, and leaves their minds in doubt, confusion and uncertainty as to them, or either of them, the jury ought to find a verdict for the defendant.

(b) The court charges the jury that the plaintiff has brought its suit in five counts, each describing how the fire occurred, and, before it can recover at all, the evidence must satisfy you that the fire occurred in one of the ways described in the complaint; and if the evidence leaves your mind in uncertainty, confusion, and doubt as to whether the fire occurred in one of the ways set out in the complaint, you should find for the defendant, although you may believe that one of the defendant's engines threw out sparks and caused the fire.<sup>36</sup>

34—*Omaha Fair & Exp. Ass'n v. Mo. Pac. R. R. Co.*, 42 Neb. 105, 60 N. W. 330 (332).

"It was not error to refuse this instruction for the reason that it presented inferences of fact and not of law."

35—*Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989 (991).

This charge "of defendant's series asserts the same proposition, in substance, that was asserted by charge 4 requested by the defendant in *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 5 So. 283, which was there held to have been properly refused; and, upon that authority, we reach the same conclusion in respect of this charge in the present case."

36—*Louisville & N. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 37 So. 760 (762).

"It is conceded by appellant's counsel that the words 'uncertainty and doubt,' if they stood alone, would vitiate the charges, notwithstanding they were faultless in other respects. But it is insisted that

because the word 'confusion' is used in connection with them in the conjunctive, and not in the disjunctive, this relieves the charges of all infirmities. We have no doubt that, if the word 'reasonably' had been used to qualify the word 'satisfy' where it appears in these charges, they would not be vicious, if good in other respects. *Calhoun v. Hannan*, 87 Ala. 277, 6 So. 291; *Marx v. Leinkauff*, 93 Ala. 453, 9 So. 818; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722; 30 Am. St. 65; *Brown v. Master*, 104 Ala. 464, 16 So. 443. In the case of *Calhoun v. Hannan*, and *Marx v. Leinkauff*, supra, the words in the charge were 'confused or uncertain,' which were condemned in *Railroad Co. v. Hill*, supra, and *Brown v. Master*, supra, and properly so. Had they been connected by the conjunction 'and,' instead of 'or,' they would not have vitiated the charges in those cases. It is manifest from what was said in the *Calhoun Case* that the judge dealt with the charge as though the words were connected by 'and,' overlooking its

§ 4098. **Rule in Texas as to Instruction of Juries in Actions for Injuries by Fire.** (a) The burden of proof in this case rests upon the plaintiff, and, before he can recover, he must establish all the facts necessary to his recovery by a preponderance of the evidence; but you are instructed, as to the burden of proof on the question of negligence, that if the plaintiff has shown by a preponderance of the evidence that the fire originated from sparks from one of the defendant's locomotives, then the burden rests upon the defendant to show that the escape of such sparks was not due to negligence on its part.<sup>37</sup>

phraseology in this respect. And so, too, this must have been true in the Marx Case, though it does not appear to be so from the opinion, except inferentially. However, we are of the opinion that the words, 'if the evidence leaves your mind in uncertainty, confusion, and doubt,' do not relieve the charges under consideration of the vitiating infirmity pointed out."

37—Galveston, H. & S. A. Ry. Co. v. Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294 (295).

"In case the testimony established that the fire originated from sparks of appellant's locomotive, the charge in question shifted the burden from appellee, and laid it upon appellant, not only of proving that its locomotive was supplied with the most approved spark-arrester, and that it was in a good state of repair, and that the locomotive was properly operated, but that the load it carried was not too heavy, that it used the proper kind of fuel, and that its right of way was kept in such condition that the fire was not communicated from it. In other words, the rule, as laid down by the trial court, in cases of this character, is that, by showing that the fire was communicated by sparks from the locomotive of a railroad company, a prima facie case of negligence is made out, and the whole burden is shifted from the plaintiff to the defendant. The general rule in Texas prohibits the judges from declaring that the proof of certain facts raises a presumption of negligence; but in cases of fires communicated by sparks from railroad locomotives an exception has been ingrafted upon the rule, and it has been held in a number of decisions that it was permissible to inform the jury that proof of the ignition of property by such sparks makes out a prima facie case for the plaintiff, unless the same has been rebutted by proof of use of the most approved spark-arresters, and proper handling of the locomotive. It is the English rule, formulated many years ago, that when premises are fired by a passing engine that fact is prima facie evidence of negligence, rendering it incumbent on the company to show that reasonable precautions had

been taken to prevent the escape of fire. The rule was first adopted in Texas in a well-considered opinion rendered by the old court of appeals through Judge Ector. *R. R. v. McDonough*, 1 White & W. Civ. Cas. Ct. App., pars. 652, 653.

The following language from a Wisconsin case was adopted in the McDonough case: 'The reasons given for requiring the companies to show that this duty has been performed on their part are that the agents and employes know, or are at least bound to know, that the engine is properly equipped, and they know whether any mechanical contrivances were employed for that purpose, and, if so, what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and cannot be obtained by them without great trouble and expense,—then often only as a favor from the company, which, under the circumstances, the company would be very likely to withhold.' In the case of *Int'l & G. N. Ry. Co. v. Timmermann*, 61 Tex. 660, the McDonough case was followed, and the same reasons given for the existence of the rule; and, indeed, no other valid reason can be given for a departure from the general rule, to the effect that the burden of proof never shifts from the plaintiff during the course of a trial. In formulating the rule, language is used in the Timmermann case that might possibly justify the charge given by the court; but the reasons given for the rule do not sustain a rule so wide in its application, and indicate that it was not so intended. In all of the cases in which the rule in the McDonough case has been followed, the only burden that has been placed upon the railway company, when proof has been introduced showing the destruction of property by sparks emitted by a locomotive, was to show that the most approved spark-arresters were used on the locomotives and that they were in good repair and skillfully operated. When the railroad company has introduced such proof, it has removed the presumption of negligence, and



(b) When fire is set out by sparks from an engine on a railroad, it is presumed that the fire is the result of negligence on the part of the railroad company, unless it is proved that the engine was provided with the best approved apparatus in use for preventing the escape of sparks from the engine, and that the engine was properly operated. If it be proved that the engine was so equipped and operated, such proof rebuts and removes the presumption of negligence. There are two propositions of fact involved in this case: First, was the fire that wrought injury to the plaintiff's property set out by sparks emitted from defendant's engine? Second, was said engine equipped with the best approved appliances in use for preventing the escape of sparks therefrom, and was said engine properly managed? If the first is proved by the evidence, and the second not proved, the plaintiff must recover. If the first is not proved, or, being proved, the second is also proved, the defendant must have the verdict. The burden of proof is upon plaintiff to establish by the preponderance of the evidence the first proposition, and, if that has been done, then

has no further burden of proof laid upon it by the mere proof of the ignition of the property by its locomotive. *Mo. Pac. Ry. Co. v. Bartlett*, 69 Tex. 79, 6 S. W. 549; *Gulf, C. & S. F. Ry. Co. v. Benson*, 69 Tex. 407, 5 S. W. 822, 5 Am. St. 74; *Gulf, H. & S. A. Ry. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440; *Gulf, C. & S. F. Ry. Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563. In the *Benson* case, above cited, the court said: 'This demand of the law as to burden of proof is, however, satisfied when the company shows by undisputed evidence that it was using at the time, and upon the very engine in question, the best and most approved mechanical appliances known and in use to prevent the escape of fire from its engine, and sparks from the smokestack, and the same were in good repair and condition, and were operated by a skillful engineer in a careful manner.' That opinion not only formulates the rule in the *McDonough* case, but it goes further, and holds that negligence is not implied from any other act of negligence, such as the accumulation of combustible matter on the right of way, and the burden is not shifted by proof of such fact. In the case of *Mo. K. & T. Ry. Co. v. Stafford*, — Tex. Civ. App. —, 31 S. W. 319, the following charge was requested and refused: 'If you believe from the evidence that engines of defendant company were properly equipped with appliances determined by practical railroad men to be among the best in use on railroads for the prevention of the escape of sparks, fire and cinders from locomotives, and that such apparatus and appliances were in good order, and that the engines were carefully and properly handled by competent employees of the defendant at the time of the alleged setting out of the fires, com-

plained of, by defendant's engines, then you are charged that, although you may believe that the fires were set out by the defendant's engines, the burden of proof is upon the plaintiffs to show that the damage complained of was the result of the negligent acts or omissions of the defendant or its employees.' The court of civil appeals held that the charge should have been given, and properly so, because the burden imposed upon the railway company had been fully met by its proof, and it had no burden imposed upon it by the fact of the fire, in regard to any other act of negligence. It had met the *prima facie* case and rebutted it, and the burden of proving negligence thereby remained with the plaintiff. In *Edwards v. Campbell*, — Tex. Civ. App. —, 33 S. W. 761, the rule under discussion is correctly and tersely formulated by the court of civil appeals of the Third district, and then it is further aptly said: 'As to negligence arising in other respects—that is, as to facts that are not peculiarly within the knowledge of the employees, the burden remains upon the plaintiff, and he must show the negligence in order to recover.' It is unnecessary to multiply authorities, of which there are numbers on the same line from other states, for the conclusion is inevitable that, under the state of circumstances in this case, where the proof is of such a nature, under the allegations, as to render it uncertain as to whether the fire was communicated by reason of faulty appliances, or the use of inferior coal, or the overloading of the engines, the charge, which made a *prima facie* case for appellee on proof of ignition of the grass by sparks from the engine, and shifted all the burden to appellant, was erroneous, and must cause a reversal of the judgment."

the burden is upon the defendant to so prove the second proposition. If you believe from the evidence on August —, while an engine of defendant was passing along its railroad, there escaped from said engine sparks that set out fire which consumed and injured plaintiff's grass and other property as alleged in his petition, and if you do not believe from the evidence that said engine was provided with the best approved appliances in use for the prevention of the escape of sparks therefrom, and that said engine was properly operated, you will find for the plaintiff. If the evidence does not show that the fire was set by sparks from defendant's engine, you will find for defendant. If you find from the evidence that the fire was set out by sparks from the engine, yet if you believe from the evidence that the engine was supplied with the best approved appliances in use for preventing the escape of sparks, and was properly operated, you will find for defendant.<sup>38</sup>

**§ 4099. Must Provide Most Improved Apparatus to Prevent Escape of Fire.** (a) The jury are instructed that it was the duty of appellant to provide its locomotive engine with a spark arrester most

38—*St. L. S. W. Ry. Co. of Texas v. Goodnight*, 32 Tex. Civ. App. 256, 74 S. W. 583.

"We think the charge correctly expressed the law with reference to the burden of proof and the presumption of negligence. It is well settled in this state that, where property is shown to have been injured or destroyed by fire from the engine of a railway company, a presumption of negligence arises, and the burden is on the company to overthrow such presumption. *Galveston, H. & S. A. Ry. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440, and authorities there cited. It was necessary for the jury to be informed of the rule, and this could be done only through the medium of the charge.

We think, however, that the charge is subject to another criticism urged against it. The learned trial judge appears to have proceeded upon the theory that the railway company was under an absolute duty to equip its engine with 'the best approved appliances in use for preventing the escape of fire therefrom,' and to keep the same in proper repair. We do not concur in this view of the law. The duty is absolute only when made so by statute. We have no such statute in this state, and the rule at common law, which holds railway companies liable only for fires negligently set out, must be applied. We so held in *St. L. & S. W. Ry. v. Miller*, 3 Tex. Ct. Rep. 580, 66 S. W. 139, and see no reason for changing our opinion. The rule that railway companies are responsible only for fires caused by their negligence appears to have been uniformly applied by the courts of this state, as a matter of course. The rule is stated by *Shearman & Red-*

*field* in their work on *Negligence*, par. 672, in this language: 'A railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam, and is not liable for injuries by sparks, smoke or coals escaping from its locomotives, if it has adopted every known reasonable precaution against such accidents, though it will be held liable therefor if such precautions are not adopted. The most that can be required of it, in the matter of providing its locomotives with suitable spark arresters, and of keeping its right of way free from combustible materials, is the exercise of ordinary care, skill and diligence to that end. If, notwithstanding the exercise of such care, sparks escape from a locomotive and set fire to adjacent property, the damage is an incident of the operation of railroads, and must be borne by the owner of the property.' It follows that, if the defendant in this case used ordinary care in selecting and keeping in good repair the proper appliances for preventing the escape of fire from the engine in question, a charge of negligence cannot be based on the fact that its said engine was not equipped with better or more efficient appliances. There was evidence tending to show that the defendant had used such care, and it was entitled to have the issue squarely presented to the jury. The court refused a special charge requested by the defendant, which was at least sufficient to call attention to this phase of the case. So, even if the error in the main charge should be held to be merely one of omission, it could not be considered harmless."

approved by those who, from experience and business, are most competent to judge and determine.<sup>39</sup>

(b) I instruct you that a railroad company is bound to use the best or most approved appliances for the purpose of preventing sparks or fire from escaping from its engines and being communicated to property of others rightfully lying upon or along the right of way. The duty to use reasonable care is performed when the company has equipped its engines with the most approved and best known spark-arresting appliances which are approved by the best practice of modern railroad managers, when it uses reasonable care to keep them in such a condition as to properly perform their functions, when it places its locomotives in charge of competent and skillful engineers, and when its locomotives are operated so as not to unnecessarily scatter fire.<sup>40</sup>

(c) If you should believe, from the evidence in this case, that the destruction of the cord wood of plaintiff was not caused by the negligence or carelessness of the defendant's employees, or that the plaintiff contributed to the loss of said cord wood by not using the proper precautions that a reasonably prudent man would have used under like circumstances, or if you should believe from the evidence that the defendant used the latest and best approved spark arrester, and the employees used reasonable caution in the operation of their engine, or that the fire that destroyed the cord wood caught from some other source than that alleged in plaintiff's petition, you will then find a verdict for the defendant.<sup>41</sup>

39—*Louisville & N. R. Co. v. Samuels' Ex'rs.*, 21 Ky. L. 1826, 57 S. W. 235 (237).

"This instruction was misleading. A railway company is not bound to adopt any particular kind of appliance for arresting the escape of sparks from its locomotives. All that the law requires is that it shall provide and use the best and most effectual appliances for this purpose in general use. See 3 Elliott, R. R., par. 1224, and *Louisville & N. R. R. Co. v. Dalton*, 19 Ky. L. 1318, 43 S. W. 431."

40—*Anderson v. Oregon R. Co.*, 45 Or. 211, 77 Pac. 119 (121-1).

"The true rule is," says Judge Sanborn, with commendable perspicuity, "that, where the defendant has exercised reasonable care to provide the most effective machinery in known practical use to prevent the burning of private property, it has fully discharged its duty in that regard." *Lesser Cotton Co. v. St. Louis*, etc. Ry. Co., 114 Fed. 133, 141, 52 C. C. A. 95. See, also, 13 Am. & Eng. Encyc. Law (2d. Ed.) 473; *Pierce, Railroads*, 433; 2 Thomp. Comm. Law Neg. par. 2253; *Gulf, C. & S. F. Ry. Co. v. Reagan* (Tex. Civ. App.), 32 S. W. 847; *M. K. & T. Ry. Co. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94; *Klinn v. Railroad Co.*, 142 N. Y. 11, 36 N. E. 1046; *Pitts. C. & St. L. R. R. Co. v. Nelson*, 51 Ind. 150; *Hoyt v. Jeffers*, 30 Mich. 181. The first above quoted instruction, therefore, states the law in the ab-

stract, but, as applied in practice, the railroad company discharges its whole duty when it uses reasonable care and diligence in supplying and putting into practical use such most approved appliances. \* \* \* The two instructions read together tell the jury, in effect, that the company is not liable unless the fire is communicated through its negligence, and that the duty to use reasonable care is performed when the company has equipped its engines with the most approved and best known spark-arresting appliances which are approved by the best practice of modern railroad managers, and when it uses reasonable care to keep them in a condition to perform their functions properly. But these do not eradicate the vice. It defines the reasonable care required to be the actual adoption of the most approved and best known spark-arresters and appliances, whereas the care and diligence required under the rule is in procuring such most approved appliances. Of course, the duty to exercise reasonable care is discharged when the appliances have been adopted and furnished, but it is also discharged when the company has exercised reasonable care and skill in its endeavor to furnish such appliances. The instructions are manifestly inaccurate in their statement of the law."

41—*St. L. S. W. Ry. Co. v. Gentry*, — Tex. Civ. App. —, 74 S. W. 607. "This charge imposes too great a



(d) The jury are further instructed that while in this state railroad companies have the right to employ fire to generate steam as their motive power for the purpose of operating their roads, the law imposes upon railroad companies in exercising this right the duty of maintaining their engines in good repair and working order manned and operated by employes competent and skillful, equipped and supplied with the best known and most approved appliances in common use for arresting the escape of sparks therefrom in the particular use to which such engines are put, and to operate such engines in such manner in order to avoid injury to the property of others by the escape of fire from such engines, and when the railroad company has exercised due diligence and is without fault in the several respects named and a fire occurs from a spark which did not escape from the engine of the railroad company while standing or passing along its railroad track entailing a loss to another, such loss must fall on the owner.<sup>42</sup>

(e) You are further instructed that if you further believe from the evidence that at the time of the escape of the cinders or sparks, if you find they did escape, causing said fire, the engine of defendant was properly constructed with the best approved appliances for preventing the escape of fire, and that the appliances were all in good repair and condition, as regards the escape of fire, or that all reasonable care and caution had been taken to keep them in such repair and condition, and that the engine was carefully and skillfully handled, as regards the escape of fire therefrom, then you will find for defendant, unless you find for plaintiff under other instructions given you.<sup>43</sup>

**§ 4100. Effect of Using Proper Spark Arrester.** If from the evidence you shall find that a traction engine, properly constructed and fitted with the proper spark arrester or means of preventing the escape of sparks, would not throw sparks which will start fires when

burden on the defendant, in requiring it to equip its engine with 'the latest and best approved spark-arrester.' There may have been later and better improved spark-arresters than the one with which its engine was equipped, but same may not have been in general use. The company was only required to show that it had used ordinary care to provide its engine with the most approved spark-arrester in general use. 2 Wood's Railway Law, 1343; Mo. Pac. Ry. Co. v. Bartlett, 81 Tex. 42, 16 S. W. 638; St. L. & S. W. Ry. Co. v. Miller, 3 Tex. Ct. Rep. 580, 66 S. W. 139; Mo. K. & T. Ry. Co. v. Carter, 95 Tex. 461, 68 S. W. 168. If defendant had shown that its engine was so equipped, and that its spark-arrester was in good repair, and its engine was being handled with ordinary care at the time the fire was set out, this would rebut the prima facie case made against it by the plaintiff."

<sup>42</sup>—American Strawboard Co. v. C. & A. R. R. Co., 177 Ill. 513 (518), 53 N. E. 97.

The court holds that this instruction

was erroneous in the use of the words "in the particular use to which such engines are put," the court saying that no authority was cited by appellee, and we know of none to sustain it.

<sup>43</sup>—St. L. S. W. Ry. Co. v. Gentry, supra.

"The charge is subject to criticism in imposing upon the railway company the duty of showing that its engine was equipped with 'the best approved appliances for preventing the escape of fire,' without limiting the requirement to those appliances that were in general use. Again, this charge imposed too great a burden upon the company, in requiring it to use 'all reasonable care and caution to keep the fire apparatus in good repair.' The expression 'all reasonable care and caution' would seem to require a higher degree of care than ordinary care, which is the care the company was required to use in keeping its apparatus to prevent the escape of fire in repair. Int'l & G. N. Ry. v. Timmermann, 61 Tex. 663; St. L. & S. W. Ry. Co. v. Miller, 3 Tex. Ct. Rep. 580, 66 S. W. 139."

the said engine is otherwise properly operated, and you shall further find that the fire by which the property of the plaintiff was destroyed and set by said traction engine of defendants, then and in that case you should find that the said engine at that time was not properly operated, and that ordinary care was not exercised in its operation.<sup>44</sup>

§ 4101. **Production of Screen for Inspection of Jury.** In the course of the trial of this case certain screens were brought into court and placed before the jury, and remained there, subject to more or less inspection on the part of the jury. These screens were presented on the part of the defendants as part of their case, but on objection on the part of plaintiff they were by the court excluded from being considered as evidence in this case; and the jury are therefore instructed that, in considering the verdict in this case, they must not take into consideration said screens as presented to you at all, as the same were not admitted in evidence, and no impression received by the jury from said inspection must be considered in this case, as the same have nothing to do with the evidence admitted here whatever.<sup>45</sup>

§ 4102. **Injury to Cotton by Fire—Engine Running at Excessive Speed.** If the jury believe from the evidence that the cotton was set on fire by sparks from the defendant's locomotive, and that said sparks were so emitted while said locomotive was running within the corporate limits of the municipality of W. P. at a greater rate of speed than six miles an hour, and in generating and maintaining that speed, then this would be negligence and the jury will find for the plaintiff.<sup>46</sup>

44—Quint v. Dimond, 147 Cal. 707, 82 Pac. 310 (311).

"This instruction is clearly inconsistent with the other instructions on the subject of defendant's negligence, and is erroneous and prejudicial. It substantially took away from the jury all consideration of defendants' carelessness, and it made all the other instructions on the subject of care or negligence absolutely meaningless and of no consequence."

45—Quint v. Dimond, *supra*.

"This instruction was, in our opinion erroneous and prejudicial. Certainly it was proper and highly important for defendant to show, if they could, that the smokestack was properly protected by spark arresters, and it is difficult to conceive of evidence more pertinent to that end than the means, the appliances, the screens, by which it was claimed the purpose of arresting the sparks was accomplished. And, even if we do not consider the screen which was subject to the inspection of the jury without objection or ruling, and the other one which was excluded upon objection, certainly the one which was formally introduced and admitted was a proper matter for the consideration of the jury."

46—Clisby v. Mobile & O. R. Co., 78 Miss. 937, 29 So. 913 (916).

"Appellant's above charge is in-

correct standing alone, and it asked no other charge on the matter of excessive speed, because it leaves entirely out of view what has heretofore been held by this court, viz.: that to be negligence as to the party suing, the excessive speed must be the proximate cause of the injury. *Railway Co. v. Carter*, 77 Miss. 516, 27 So. 993; *Jones v. R. R. Co.*, 75 Miss. 970, 23 So. 358; *Howell v. R. R. Co.*, 75 Miss. 251, 21 So. 746, 36 L. R. A. 545; *Crawley v. R. R. Co.*, 70 Miss. 340, 13 So. 74; *Farquhar v. R. R. Co.*, 78 Miss. 193, 28 So. 850; *Collins v. R. R. Co.*, 77 Miss. 855, 27 So. 837. The greatest injustice might follow from holding the excessive speed, per se, negligence, whether the proximate cause of the injury or not. Several of the expert witnesses in this case, for illustration testified, and not without reason, that, owing to the peculiar construction of locomotive engines, the faster a train runs the less liable it is to throw sparks. Were that view correct, it would be palpably unjust to hold the defendant liable for that very conduct which was best calculated to prevent the injury complained of. Says Judge Terral in *Farquhar v. R. R. Co.*, *supra*: "The argument of counsel, logically followed, would lead to the conclusion that, if the injury was inflicted upon an employee of the company while the locomotive was

§ 4103. **Dry Weeds or Grass.** (a) The court instructs the jury that the law is that as it is impossible to entirely prevent the escape of sparks and coals of fire from railway locomotives, and that as the sparks and coals of fire that do escape usually fall on the right of way, it is the duty of the railway company to keep its tracks and right of way free from dry grass, weeds and other combustible material, which are liable to be ignited by sparks and coals of fire, and thus communicate fire to the premises of others; and if you find that the railroad failed to discharge this duty, and permitted the fire to escape and communicate to the land of D., and thereby to his stacks that were destroyed, then the railroad was guilty of negligence, and you will render your verdict for plaintiff.<sup>47</sup>

(b) You are also instructed that to permit dry and inflammable matter to accumulate and to remain upon its right of way would be such negligence on defendant's part as would make defendant liable for any damage occasioned by such negligence.<sup>48</sup>

§ 4104. **Precautions to be Taken by Railroad Company in Especially Dry or Windy Weather.** The court instructs the jury that the law is that it is the duty of the railway company, in an unusually dry season, or in an unusually dry country, where all inflammable material is like tinder, and liable to be set on fire from the smallest sparks, to exercise greater precaution and care in the operation of its engines than in damp seasons and countries. So where the wind is blowing directly from the engine toward inflammable or combustible materials or property belonging to individuals, greater precautions are required in the operation of trains by the railway company. If you find from the evidence that the time when D.'s stacks were destroyed was an unusually dry time, and if you further find that the railway company did not use great precaution in operating its engines to prevent the escape of flying sparks and coals of fire, and, through its negligence, D.'s stacks were destroyed, then you will find your verdict for plaintiff.<sup>49</sup>

running through a city or incorporated town or village at a rate of speed greater than six miles an hour, the company would be liable, though the employe, willfully, and of his own wrong, and without any negligence of the company, except that of running the locomotive at a greater rate of speed than six miles an hour, should cast himself under the wheels of the locomotive and so be injured—a conclusion which would be manifestly absurd. A construction which would lead to the results above indicated could not have been in the legislative mind or purpose."

47—*Ft. Worth & R. G. Ry. Co. v. Dial*, — Tex. Civ. App. —, 85 S. W. 22.

"The charge is erroneous on account of being upon the weight of the testimony, and is further objectionable as requiring of the railroad company a greater degree of care than imposed upon it by law, and hence we sustain this assignment of error."

48—*Gulf, C. & S. F. Ry. Co. v.*

*Jordan*, 25 Tex. Civ. App. 82, 60 S. W. 784.

"It is objected that this was a charge upon the weight of the evidence, and this assignment we sustain."

49—*Ft. Worth & R. G. Ry. Co. v. Dial*, — Tex. Civ. App. —, 85 S. W. 23.

"We think the charge complained of in the above assignment of error is subject to the criticism of appellant, as it imposes upon appellant a greater degree of care or precaution than the law requires. The rule is that, under such circumstances as are shown by the evidence in this case, the railroad company would be required to exercise only that degree of care that a person of ordinary prudence would have exercised under the same or similar circumstances, and the jury should have been so instructed. *Martin et al v. T. & P. Ry. Co.*, 87 Tex. 118, 26 S. W. 1052. We are also of the opinion that said charge is objectionable on account of being argumentative."



§ 4105. **Sparks of Unusual Size and Number Being Carried an Unusual Distance.** If you find that it is established by a preponderance of the evidence in this case that sparks of unusual size and number escaped from defendant's engine at the time complained of, and that the same were carried an unusual distance, taking into consideration the condition of the wind and the weather at the time, and also that a number of fires were started in different places thereby upon the plaintiff's premises, and that injury resulted therefrom as charged in the complaint, or either paragraph thereof, then the court instructs you that the jury may infer negligence in setting fire to such premises from such facts.<sup>50</sup>

§ 4106. **Duty in Unusual and Extraordinary Weather.** The defendant could only be required to provide against usual and ordinary weather, and if the jury should find that the wind which caused the escape of the sparks and fire was unusual and extraordinary, and but for the unusual and extraordinary character of the wind the sparks and fire would not have escaped from defendant's engine, and would not have been communicated to plaintiff's premises, the defendant would not be guilty of negligence, and plaintiff could not recover.<sup>51</sup>

50—Pittsburg C. C. & St. L. Ry. Co. v. Wise, 36 Ind. App. 59, 74 N. E. 1110.

"As already stated, the negligence charged in the second paragraph of complaint was permitting combustible material to be and remain upon the right of way, which material was set on fire by a locomotive, and the fire permitted to escape to appellee's premises, while in the third paragraph the negligence charged is the defective condition of the spark arrester, and the manner in which the locomotive was operated at the time, causing it to throw sparks and coals of fire upon appellee's premises. In the second paragraph it was immaterial how the combustible material was set on fire if the fire by means of the combustible material was negligently permitted to escape from the right of way to appellee's premises; and under the third paragraph the accumulation of combustible material on the right of way was immaterial as the fire is charged to have been started on appellee's premises. Whether sparks of unusual size and number escaped from the engine, and, being carried an unusual distance, started a number of fires in different places upon appellee's premises, is not within the issue tendered by the second paragraph of complaint, but the second instruction expressly makes these conditions applicable to either paragraph of the complaint. An instruction should be relevant to the issue and applicable to the evidence. See Pennsylvania Co. v. Ebaugh, 144 Ind. 687, 43 N. E. 936; Pelley v. Wills, 141 Ind. 688, 41 N. E. 354; Meyers v. Moore, 3 Ind. App. 228, 28 N. E. 724; Lake Erie, etc. R. Co. v.

Ziebarth, 6 Ind. App. 228, 33 N. E. 256; Spades v. Murray, 2 Ind. App. 401, 28 N. E. 709; Shirk v. Mitchell, 137 Ind. 185, 36 N. E. 850; Goodbar v. Lidikey, 136 Ind. 1, 36 N. E. 691, 43 Am. St. 296."

51—Blue v. Aberdeen & W. E. R. Co., 116 N. C. 955, 21 S. E. 299 (300).

"As to the nature and kinds of the winds, the testimony was variable and conflicting. Some of the witnesses described it in such general terms as 'wind blowing in gusts, hard wind, blowing hard, wind blowing very hard, very windy, unusual wind, unusually and extraordinarily windy.' As to witnesses who testified to particulars, some said: 'Wind would have blown hat fifty yards, sparks further.' 'Sparks from stack would have blown fifty or seventy-five yards.' 'Wind would have blown sparks one or two hundred yards.' We think the exception is well taken. The instruction is all right so far as it goes, but the language used is too general. It contains no explanation to the jury as to the manner in which they were asked to consider the testimony, whether by comparison with other winds in the same climate or other seasons of the year, or whether to be taken in connection with that testimony which went into the particulars of the wind or to be considered as an independent proof. The words 'unusual and extraordinary,' as in common use very often are exaggerations of speech, and in many cases if properly inquired into and explained, would be found not to be synonymous with 'unnatural or unexpected wind.' We think that his honor should have so explained the meaning of the words 'unusual and extraordinary,'

§ 4107. **Reasonable Care and Diligence Only Required of the Company—Presumption of Negligence—Burden of Proof.** And in this case if you find that plaintiff has established by a preponderance of the evidence that fire did escape from the engine of defendant, and caused the destruction of plaintiff's property, and that plaintiff's property was destroyed without any carelessness or negligence on his part, then your verdict should be for the plaintiff, unless the defendant has established by a preponderance of the evidence that its engine was fully supplied with a spark arrester and other contrivances of the most approved style and pattern to prevent the escape of fire from the engine, and that the defendant's engine was being operated by careful and skillful men, and that said fire did not originate from defendant's engine by the carelessness and negligence of defendant's servants having the same in charge. And if the defendant has established, by a preponderance of the evidence, the facts as indicated in this instruction, which the defendant is required to establish, then your verdict should be for the defendant. But if the evidence as to these facts should be evenly balanced, or should preponderate in favor of the plaintiff, then your verdict should be for the plaintiff, and it will be your duty to assess plaintiff's damage at such sum as you think the evidence shows plaintiff has sustained, if you find for the plaintiff.<sup>52</sup>

§ 4108. **Power of Railway Company to Foresee Consequences of Fire.** You are charged that the defendant in no event can be held liable for any loss on account of the burning, by the fire complained of, of plaintiff's chickens, geese and goats, or for the loss of any other property alleged to have been destroyed in the burning of plaintiff's barn, unless you believe from the evidence that defendant could reasonably have foreseen that, in burning plaintiff's barn as it stood immediately before the fire, that said chickens, geese and goats would have been destroyed.<sup>53</sup>

§ 4109. **Burden of Proof.** (a) The court instructs the jury that if they shall believe from the evidence that defendant's locomotive engines which passed by plaintiff's premises on the morning of

in conjunction with the particular testimony offered, as to have presented the question whether or not this wind could reasonably have been anticipated and expected by the defendants in the climate and season and section of country."

52—*Shipman v. Chi. B. & Q. R. R. Co.*, — Neb. —, 110 N. W. 535.

"This court is now committed to the doctrine that the burden of proof does not shift during the progress of the trial. While the necessity of the case has induced us to go to the limit in indulging presumptions as substitutes for proof in establishing negligence in the spread of fires from railroad trains, yet, in the absence of a statute making railroads insurers against loss by fire started from their engines, we see no reason to extend the rule of liability beyond the doctrine announced in *B. & M. R. R. Co. v. Westover*, 4 Neb. 268, and *Union Pac. Ry. Co. v. Keller*, 36 Neb. 189, 54 N. W. 420. Especially should

this not be done in a case like the one at bar in which the plaintiff's showing of negligence hangs only on the eyebrows of a very weak and emaciated presumption. We therefore conclude that the giving of the instruction above set out was prejudicial to rights of defendant."

53—*Highland v. Houston E. & W. T. Ry. Co.*, — Tex. Civ. App. —, 65 S. W. 649 (650).

"We are clear that the evidence presented no such issue as was submitted by this charge, even if it be conceded that a railway company can defend against the consequences of a fire by proof that it could not reasonably foresee that certain of the destroyed personalty would be kept in or about the destroyed premises. By this charge, the jury were told that, as the evidence stood, they might find for the company upon this issue. . . . They, therefore, could award nothing for the loss of the barn, under the proof and the charge of the court."

———, between the hour of — o'clock and the time his house caught fire, were equipped with suitable and approved fire arresters, in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable, they must find for the defendant, even if they shall believe, from the evidence, that said fire was caused by sparks escaping from the engines unless they shall further believe that the defendant's employes in charge of said engines operated them so negligently as to cause fire, and the burden is on the plaintiff to prove said engines were operated negligently and carelessly at said time and place. Negligence is the absence of ordinary care, and ordinary care is such care as an ordinarily prudent man would use under similar circumstances, involving his own interests.<sup>54</sup>

(b) I charge you, gentlemen of the jury, that the burden is upon the plaintiff to reasonably satisfy the conscience of each individual juror that the fire which destroyed the house in which the plaintiff was living was communicated to that house by sparks from an engine of the defendant, and, unless the conscience of each juror is satisfied that the house was set on fire by sparks communicated by an engine of the defendant, the jury cannot tender a verdict in favor of the plaintiff.<sup>55</sup>

§ 4110. **Degree of Care Required of Landowners.** (a) The court charges the jury that if they believe from the evidence that a carpenter employed by the plaintiff to reshingle a shed, in doing so, threw shingles, or parts of shingles, into the street, or placed combustible material therein, and that the defendant placed hay, dry grass, weeds, or other combustible materials in the streets, and that one of defendant's engines threw out sparks which started the fire which destroyed the plaintiff's property, but are not satisfied from the evidence whether the fire originated in the hay, dry grass, weeds, or other combustible material placed in the street by the defendant, or in the shingles, or parts of shingles, or other combustible material placed in the street by the plaintiff's carpenter, or whether it started partly in the material placed in the street by the carpenter, and partly in the combustible material placed in the street by the defendant, they ought to find a verdict for the defendant.<sup>56</sup>

54—*Mills v. Louisville & N. R. Co.*, 25 Ky. L. R. 488, 76 S. W. 29 (31).

"So much of the third instruction as told the jury that the burden was on the plaintiff to prove that the engines were operated negligently should not have been given, as the court should not instruct the jury upon burden of proof, but simply so frame the instructions as to indicate on whom the burden of proof lies."

55—*Birmingham Ry. L. & P. Co. v. Hinton*, 141 Ala. 606, 37 So. 635 (636).

"The law undertakes by the oath administered to jurors to bind their consciences to return verdicts according to the conviction of their minds. Evidence is addressed to their minds, and not to their con-

sciences; and it would tend to their confusion to give prominence to the givings out of their consciences to the exclusion or subordination of their mental faculties as the court was asked to do by the above charge."

56—*Louisville & N. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 27 So. 760 (761).

"The charge set out in the seventh ground of the motion was certainly bad, if for no other reason than that it exacts too high a degree of proof, in requiring the verdict to be based upon evidence which 'satisfies' the minds of the jury. Evidence is sufficient to justify a verdict if it reasonably satisfies and convinces the mind. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348; *Moore v. Heineke*, 119 Ala. 627, 24 So. 459."



(b) If you believe from the evidence that plaintiffs' employes placed or left the shucks from their corn in such position that they would probably be blown or carried upon defendant's right of way, and that they were so carried thereon, and in dangerous proximity to plaintiffs' buildings, and permitted to remain there in hot, dry weather, and that the said employes, either in placing said shucks where they did, or in permitting them to remain where they were, did not act as men of ordinary prudence would act, having due regard for the safety and preservation of plaintiffs' property, and that such conduct on the part of said employes proximately contributed towards causing the fire in question, you will find for the defendant.<sup>57</sup>

§ 4111. **Contributory Negligence of Landowner.** The jury are further instructed that if you believe from the evidence F. saw the fire just as it was starting, or near that time, but nevertheless went on with his usual work, and took no steps to extinguish the fire, and did not go to the place of the fire until several hours thereafter, and if the jury believe from the evidence that he could have extinguished the fire and saved his oats and straw when seen by him just as it was starting and did not do so or make any effort to do so, or manifest any interest in the same, then such conduct and failure on his part was contributory negligence on his part and bars his right of recovery in this suit without regard to whether there was negligence on the part of the railroad company or not; and in such case you should find the defendant not guilty.<sup>58</sup>

§ 4112. **Right of Adjoining Landowner to Stack Straw near Right of Way.** The court instructs the jury that the law is that, where a person owns land adjoining the right of way of a railway company, he has a right to presume that the railway company will not be guilty of negligence, and he is not bound to remove dry and combustible material from his land in anticipation of probable negligence on the part of the railway company. The plaintiff had a right to use

57—Texas & P. Ry. Co. v. Woolbridge. — Tex. Civ. App. —, 63 S. W. 905 (907).

"It has been held without exception, so far as we know, that the railway company is bound to keep its right of way through the country reasonably clear of dry, combustible matter which is liable to ignite from sparks, and a failure to do so, whereby fire is started thereon, caused by sparks or cinders emitted from its engines, is prima facie negligence, and renders the railway company liable for the value of grass and other property destroyed by fires thus set out. It has never been contended in such cases, so far as we are aware, that it was the duty of the farmer or owner of the pasture through whose lands the railway lies to keep the right of way clean or that their failure to do so would be contributory negligence, so as to bar their right to recover the value of their grain or grass burned; and the writer is unable to perceive any sound reason why the rule should be different at railway yards and stations."

58—Franey v. I. C. R. R. Co., 104 Ill. App. 499 (502).

"The instruction omitted all reference to the fact of the engrossing character of the work in which appellant was engaged at the time he saw the smoke, and of the necessity of giving his entire attention to the cattle he was driving. The smoke which appellant saw was on the right of way, and this instruction amounts to saying, as a proposition of law, that if a man sees smoke on the right of way of a railroad, indicating a fire there, he cannot rely upon the railroad employes to perform their duty and put it out, but must leave his own employment, no matter how engrossing or important it may be at the time, to go and extinguish the fire; and if he fails to do so and the fire spreads to his own property and destroys it he is absolutely barred from recovering for his loss. This cannot be true as a rule of law. It was for the jury to say whether the facts enumerated, under all the circumstances of the case, constituted negligence, and not for the court."

his property in the ordinary and usual way, and, so long as he did so, he is not guilty of contributory negligence. As the plaintiff had a right to use his property in the ordinary and usual way, so he had a right to stack his straw on his own land, wherever his convenience might indicate—even near the right of way of the railway company.<sup>59</sup>

§ 4113. **Dedication of Lands for Use by Railroads.** (a) If the jury find from the evidence that the plaintiffs were the owners of the land in question at the time of the construction of the defendant's railroad thereon, and knowing that the same was being built by the defendant upon the belief that it had the title thereto, stood by and made no objection or protest to the defendant against its construction upon their said land, then the plaintiffs are estopped from making their claim in this action, and your verdict must be for the defendant.

(b) If the jury find from the evidence that the plaintiffs induced the P. Co. to locate its railway upon their property, and knew that the defendant in so constructing its road relied upon its title to said way, and its right to so construct its road, then the plaintiffs are estopped from asserting any claim to any portion of said land, and your verdict must be for the defendant.

(c) It was competent for these plaintiffs to waive the right to insist upon an abandonment, and if the jury find that the plaintiffs requested the L. S. Co. to cede to the defendant twenty-five feet of the said right of way for the purpose of erecting and maintaining its track thereon, and made no claim to either company, and gave no notice that such action would be treated as an abandonment, the plaintiffs would now be estopped to claim that such ceding or grant was an abandonment.

(d) If the plaintiffs knew of their rights, and, knowing them, permitted the L. S. Co. to grant the right to the defendant herein to build, maintain, and operate its track, in the belief that it had the right so to do, and the plaintiffs saw the defendant spending money in making valuable and permanent improvements thereon without knowledge of plaintiffs' rights, and the plaintiffs kept silent until after the expenditure and improvements were made, they will be estopped from claiming either compensation or damages, and your verdict must be for the defendant.<sup>60</sup>

59—Ft. Worth, A. & R. G. Ry. Co. v. Dial, supra.

"This instruction is erroneous in that it does not embody a correct principle of law, and also on account of its relieving plaintiff from the exercise of ordinary care to protect from fire that might be caused by appellant's negligence, his stacks of straw which he alleged were burned. *Martin v. T. & P. Ry. Co.*, supra; *Bennett v. M. K. & T. Ry. Co.*, 11 Tex. Civ. App. 423, 32 S. W. 834; *Edwards v. Campbell*. — Tex. Civ. App. —, 33 S. W. 762."

60—*Pennsylvania Co. v. Platt*, 47 Ohio St. 366, 25 N. E. 1028 (1935).

"The first instruction is in conflict with *Goodin v. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95. The second

omits the essential elements that the plaintiffs knew of their own title and the defendant was ignorant of it. Besides there was evidence tending to prove that the defendant located and constructed its road on lands belonging to the plaintiffs other than that for which they were claiming compensation in the action, and the instruction if given would have been misleading, for it would have authorized the jury to find the estoppel, if the plaintiffs induced the defendant to locate its road on any of their property. The instruction, if otherwise correct, should have been limited to the property for which the plaintiffs were seeking compensation. The defect in the third instruction is that it is not

## SWITCHES AND FARM CROSSINGS.

**§ 4114. Defective Bridge at Farm Crossing.** If the appearance of this crossing, with its approaches and immediate surroundings, was such as to indicate to an ordinarily prudent man that he ought not, in the condition that it was in, drive upon it with a two-horse team and wagon, and the wagon loaded with wood, the plaintiff cannot recover. If the plaintiff, by failing himself to make a proper examination of such bridge before driving upon it, or if in any particular he was negligent, and such negligence contributed to his injury, the plaintiff cannot recover and your verdict will be for the defendant. If the appearance of this bridge, with its approaches and immediate surroundings, was such as to indicate to a man of ordinary prudence that he should examine as to its safety before attempting to cross it, and if you find the plaintiff made no such examination, and that his failure so to do contributed in part or in any way to his injury, the plaintiff cannot recover.<sup>61</sup>

## INJURIES TO ADJACENT LAND AND PROPERTIES.

**§ 4115. Injury to Abutting Property by Construction of Railroad.** If, from the preponderance of the evidence in this case, you believe that the defendant company, without the authority and consent of the plaintiff, L., built and constructed its track, and runs its trains on E. street and across C. street, in the town of C., Tex., and near to his property and established its depot nearby, and constructed and used certain stock pens in the rear or nearby plaintiff's property, and that the said defendant depreciated and reduced the market value of the plaintiff's property at the time and in the manner alleged in petition, and as shown by the evidence, then the defendant company would be responsible therefor, and you will find for the plaintiff.<sup>62</sup>

made necessary to the estoppel that the request of the plaintiffs should have been acted upon by, or have influenced the conduct of either company; and the fourth is not substantially different from the first."

61—*Stewart v. Cincinnati W. & M. Ry. Co.*, 89 Mich. 315, 50 N. W. 852 (854), 17 L. R. A. 539.

"The court, in disapproving the above instruction, said that such bridge constituted a mere license to use or pass over the railroad track, and, while it might have been terminated by the railroad company at any time, so long as it had not given notice of such termination it became and was the duty of the company to keep it in safe repair not only for the use and convenience of the farmer for whom it has been originally constructed, but also for such persons as he might invite to go upon his premises and use said crossing, and the fact that the in-

jury in this case was to a stranger did not release the company from liability. The above instruction was held reversible error. In deciding the case, the court quoted numerous authorities in support of its position."

62—*Dallas, C. & S. R. R. Co. v. Langston*, — Tex. Civ. App. —, 98 S. W. 425.

"This charge tells the jury 'that said defendant depreciated and reduced the market value of the plaintiff's property at the time and in the manner alleged in the petition, as shown by the evidence.' Whether the defendant had, by the building of its railroad and stock pens, so depreciated plaintiff's property was the very question at issue, and to charge the jury that defendant depreciated and reduced the market value of plaintiff's property, as shown by the evidence, was charged on the weight of evidence, and was error."



§ 4116. **Injury to Adjoining Land by Noise, Confusion and Maintenance of Unsightly Structures.** (a) The court instructs you that the plaintiff can not recover in this action any damages to her property alleged to have been caused by reason of any noise, confusion or disturbance occasioned by the operation of the defendant's trains in the yards, or upon the tracks of the defendants, or for unsightly structures on the defendant's premises in front of the plaintiff's property.<sup>63</sup>

(b) If you believe from a preponderance of the evidence in this case, that the plaintiff, C. D., and his wife have been personally annoyed and discomforted in the use and enjoyment of their home by smoke or coal dust, or by vibrating, grating, or disagreeable noises coming from defendant's coal yards and coal hoist into or on the house and premises of plaintiff, then you will find for plaintiff, and award to him by your verdict such damages as, in your judgment, will reasonably and fairly compensate him for such annoyance or discomfort suffered by himself and wife not to exceed the amount sued for for annoyance.<sup>64</sup>

63—Chi., M. & St. P. Ry. Co. v. Darke, 148 Ill. 226 (231), 35 N. E. 750.

"In considering the propriety of this instruction, it will be unnecessary for us to determine whether the plaintiff could be entitled, in any event, to recover damages for her property, caused by the erection and maintenance of unsightly structures on the defendant's right of way in front of her premises, since, if the instruction was erroneous in holding that she could not recover damages caused by any noise, confusion or disturbance occasioned by the operation of the defendant's trains it was properly refused."

64—Daniel v. Ft. Worth & R. G.

Ry. Co., — Tex. Civ. App. —, 69 S. W. 198.

"The depreciation in the value of appellant's premises, if any, comprehended his entire legal damage, both past and prospective, and an allowance in addition to this would, in effect, constitute a double recovery. No special damage other than mere annoyance and discomfort arising from smoke, noise, etc., was averred or proven. The dust, noise, and consequent discomfort are mere incidents in the computation. They are but circumstances rendering appellant's premises less desirable as a home, and compensation therefor is therefore necessarily involved in an allowance for the depreciated value."

## CHAPTER CLIII.

### NEGLIGENCE—STREET RAILROADS.

See Approved Instructions, Chapter LXX, Vol. II.

#### IN GENERAL.

- § 4117. Negligence defined — Mere omission to perform duty as to negligence.
- § 4118. Negligence complained of must be proximate cause of injury.
- § 4119. No prejudice should exist against street railway corporations, as such.
- § 4120. Admissions of plaintiff—Comment upon evidence by trial court.

#### LIABILITY FOR NEGLIGENCE AS TO CARRIERS OF PASSENGERS.

- § 4121. Degree of care due passengers — Varying statements of different courts.
- § 4122. Not an insurer of safety of passengers—Argumentative statements of rule.
- § 4123. Same subject—Defining degree of care as to facts not in issue.
- § 4124. Burden of proof as to passengership relation.
- § 4125. Mere happening of accident as affording presumption of negligence.
- § 4126. Passenger's duty to obey instructions.
- § 4127. Injury to passenger through negligent equipment, management or operation of vehicle.
- § 4128. Use of ordinary means by motorman to stop car on wet or slippery rails.
- § 4129. High rate of speed.
- § 4130. Collisions between cars of street car company and other vehicles—Fire department engines and wagons.
- § 4131. Presumptive liability when car derailed.
- § 4132. Presumptive liability when passenger injured through collision.
- § 4133. Negligently starting car while plaintiff is in the act of boarding it.
- § 4134. Negligently starting car while passenger is alighting.
- § 4135. Same subject—What will be sufficient to sustain burden of proof.
- § 4136. Duty of motorman when passenger is alighting.
- § 4137. Failure of conductor to warn passenger of danger known to conductor, unknown to passenger.
- § 4138. Duty of motorman on approaching car.
- § 4139. Rule to stop at further crossing, only.
- § 4140. Failure to have both a motorman and conductor on car.
- § 4141. Posted warnings in cars.
- § 4142. Liability for unauthorized act of stranger.
- § 4143. Contributory negligence of passengers—In general.
- § 4144. Distinguishing between slight negligence which did, and slight negligence which did not, contribute to the injury.
- § 4145. Contributory negligence — Failure of plaintiff to discover bolt on which dress was caught.
- § 4146. Contributory negligence — Standing on platform.
- § 4147. Contributory negligence — Standing on platform by direction of employes in charge of car.
- § 4148. Contributory negligence — Riding on running board.
- § 4149. Contributory negligence — Getting on car while in motion.
- § 4150. Contributory negligence — Care to be exercised in alighting from electric car.
- § 4151. Contributory negligence — Getting off car while in motion.
- § 4152. Degree of care in alighting from car.
- § 4153. Contributory negligence — Failure to take hold of hand rail while alighting.

- § 4154. Contributory negligence — Plaintiff's prior course of conduct in alighting from cars.
- § 4155. Intoxication as contributory negligence.
- § 4156. Injury to passenger while trying to escape from apparently imminent danger.
- LIABILITY FOR INJURIES TO PERSONS OTHER THAN PASSENGERS OR EMPLOYES.**
- § 4157. Degree of care.
- § 4158. Care due trespasser on car.
- § 4159. Joint liability with other individuals or corporations.
- § 4160. Delegation by municipality to street railway company of duty to keep streets safe.
- § 4161. Duty of street car company as to removal of snow and ice from track.
- § 4162. Duty as to electric wires.
- § 4163. Sounding bells and gongs—Use of proper brakes.
- § 4164. Failure to provide cars with proper headlight.
- § 4165. Running cars on wrong track.
- § 4166. Rate of speed.
- § 4167. Same subject—As to infants.
- § 4168. Frightening animals—Car operated in ordinary manner.
- § 4169. Right of way of street cars over other vehicles driven along or near tracks—Collision with same.
- § 4170. Street crossings—Pedestrians.
- § 4171. Street crossings—Vehicles crossing track.
- § 4172. Collision with persons on or near track.
- § 4173. Bicyclist falling under fender of car—Duty of motorman.
- § 4174. Failure of motorman to stop car, or check speed when possible to avoid injury.
- § 4175. Horses of street railway company running away and injuring persons, through the negligence of companies' servants.
- § 4176. Duty to avoid injury to dogs on track.
- § 4177. Contributory negligence of persons other than passengers or employees—In general.
- § 4178. Rule as to contributory negligence in Tennessee.
- § 4179. Same subject — Burden of proof.
- § 4180. Same subject—Rule to stop, look and listen.
- § 4181. Same subject — Crossing in front of approaching car.
- § 4182. Same subject — Failure of driver of vehicle passing along or near track to use reasonable care.

### IN GENERAL.

§ 4117. **Negligence Defined—Mere Omission to Perform Duty as Negligence.** (a) The court now instructs you that negligence may generally be defined as the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff (without negligence on his part proximately contributing to produce the accident) has suffered injury to his person.<sup>1</sup>

(b) The jury are instructed, as a matter of law, that the mere omission on the part of the defendant to perform any duty which it ought to perform, is not, of itself, sufficient to render the defendant liable.<sup>2</sup>

1—Memphis St. Ry. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 394.

"Objection is made to the matter appearing in parenthesis. This matter was improperly inserted, but we do not think the error is grave enough to warrant a reversal; certainly not upon plaintiff in error's application. If any injury was done, it was to the defendant in error, since the jury were told, in substance, that, as a condition of find-

ing negligence against the plaintiff in error, they must also find that the defendant in error was without negligence on his part proximately contributing to produce the accident. *Burke v. Citizens' St. Ry. Co.*, 102 Tenn. 409, 52 S. W. 170."

2—N. C. S. R. R. Co. v. Eldridge, 151 Ill. 542 (548), 38 N. E. 246.

"This instruction was a mere abstract proposition, and for that reason there was no error in re-



**§ 4118. Negligence Complained of Must Be Proximate Cause of Injury.** (a) The jury are instructed that to enable the plaintiff to recover in this case, it must appear by a preponderance of the evidence that the negligent act or acts complained of were the proximate cause of said injuries. Therefore, if the jury believe, from the evidence, that the negligent act or acts complained of were not the proximate cause of said injuries, that is, said acts were such that the injury to plaintiff might not have been foreseen or expected as a result thereof, then the jury should find the defendant not guilty.<sup>3</sup>

(b) When we speak of the proximate cause of an injury, we mean not only the direct or natural cause of the injury, but also such a cause as a person of ordinary intelligence and prudence might in the light of the attending circumstances, have reasonably foreseen would produce such an injury. So that to answer this question in the affirmative, you will have to find two things: First, that the want of ordinary care on the part of the servant or servants of the defendant was the direct and producing cause of the injury, without the existence of which such injury would not have occurred; and second, that the injury resulting therefrom was such as a person of ordinary intelligence and prudence would in the light of the surrounding circumstances have reasonably foreseen as the probable result of such want of care.<sup>4</sup>

**§ 4119. No Prejudice Should Exist Against Street Railway Corporations, as Such.** The jury are instructed that it is their duty to consider the case in all its bearings, the same as they would a case between two private citizens, instead of a case in which the defendant is a corporation. Corporations are just as much entitled to fair and unprejudiced treatment in courts of law as individuals would be under like circumstances. Hence the jury are instructed that it is

fusing it. Furthermore, whether the mere omission on the part of the defendant to perform a duty which it ought to perform would render the defendant liable, must depend upon the consequences of such omission. If it was shown to have resulted in injury to the plaintiff, the court could not say, as a matter of law, that it, of itself, did not involve the defendant in liability to the plaintiff."

3—Met. W. Side El. Ry. Co. v. McDonough, 87 Ill. App. 31 (38).

"There was no error in refusing this instruction . . . because the definition therein contained of proximate cause is not accurate."

4—Meyer v. Milwaukee Elec. Ry. & L. Co., 116 Wis. 336, 93 N. W. 6 (7).

"It cannot be doubted that this instruction is incorrect in several respects. Primarily, it is said that the negligence in order to be the proximate cause of the injury must have been the 'direct and natural' and the 'direct and producing cause' without the existence of which such injury would not have occurred. It is somewhat surprising that after all that has been said by this court

in recent years upon this subject, correct definition of this somewhat metaphysical conception of proximate causation in cases of negligence should be evaded by trial courts. It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause. It is the natural cause when either it acts directly in producing the injury, or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event. But such causation cannot be proximate cause in law to arouse liability unless an ordinarily prudent and intelligent person ought, in the exercise of such intelligence to have foreseen that an injury might probably result from the negligence under like circumstances. Deisenrieter v. Malting Co., 97 Wis. 279, 72 N. W. 735; Dehoy v. Light Co., 110 Wis. 412, 85 N. W. 973; Seaver v. Town of Union, 113 Wis. 322, 89 N. W. 163."

their duty to consider the evidence in this case without prejudice, and to base their verdict upon the evidence and the instructions of the court regardless of all else.<sup>5</sup>

**§ 4120. Admissions of Plaintiff—Comment upon Evidence by Trial Court.** The plaintiff by his petition declares that the conductor caught hold of plaintiff's arm with a view of assisting him to reach the platform of the car. Plaintiff further declares from the witness stand that said conductor did not release his hold of plaintiff's arm until commanded to do so by plaintiff himself. In view of these admissions of plaintiff, which you are bound to accept as true, the court instructs you that if, from the evidence, you believe that plaintiff's fall and injury were directly due or were directly contributed to by the conduct of plaintiff in causing the conductor to release his hold of plaintiff's arm, then plaintiff cannot recover, no matter whether defendant's servants in charge of the car are guilty of negligence or not.<sup>6</sup>

### LIABILITY FOR NEGLIGENCE AS CARRIERS OF PASSENGERS.

**§ 4121. Degree of Care Due Passengers—Varying Statements of Different Courts.** (a) The jury are instructed by the court that if they believe, from the evidence, that the plaintiff was a passenger on the car of the defendant, as alleged in the declaration, and if they believe she had paid her fare, then the defendant was bound to exercise the highest degree of care and foresight for the safety of its passengers, consistent with the practical operation of its road.<sup>7</sup>

5—*Kornazsewka v. West Chi. St. R. R. Co.*, 76 Ill. App. 366 (368).

"This instruction may be said, as counsel claim, to imply that corporations do not get the same fair and unprejudiced treatment that individuals do, but we do not think that this implication is such error as would be ground for a reversal."

6—*Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228, 83 S. W. 783 (785).

"It is now well recognized in this state that the solemn admissions of a party made in the course of a trial have the same effect as if contained in his pleadings, and, at least for the purposes of the action, the latter are to be taken as true. *Feary v. Ry. Co.*, 162 Mo. 75, 62 S. W. 452; *Septowsky v. Transit Co.*, 102 Mo. App. 110, 76 S. W. 693; *Cogan v. Ry.*, 101 Mo. App. 179, 73 S. W. 738. This instruction, however, was properly disregarded by the trial court, as it is a comment upon the evidence, and emphasizes and renders conspicuous for the consideration of the jury parts of the testimony of plaintiff."

7—*C. U. Traction Co. v. Yarus*, 221 Ill. 641, 643, 644, 77 N. E. 1129.

"The objection to this instruction is, that it does not limit the degree of care to be exercised by appellant to those matters which it could

reasonably do with the mode of conveyance adopted. Under other facts and circumstances the giving of a similar instruction has been held reversible error by this court, (*No. Chicago St. R. Co. v. Polkey*, 203 Ill. 225,) but under the facts disclosed by the proofs in this case the giving of said instruction should not, we think, work a reversal of the case. Was the appellee injured by the car from which she was alighting being prematurely started, or was she injured by reason of her attempting to alight from the moving car, were the questions submitted to the jury for decision. There was nothing within the issues before the jury requiring the submission to the jury of the question claimed to have been omitted from the instruction. The giving of the instruction was not, therefore, reversible error."

In *W. C. St. R. R. Co. v. Tuka*, 72 Ill. App. 60, the following instruction was held erroneous:

The court instructs the jury as a matter of law that it is the duty of a common carrier like a street railway to carry its passengers safely, and to afford them reasonable opportunity to alight after coming to a full stop.

The court said: "This instruction is erroneous in that it makes ap-

(b) If, in this case, the injury resulted to the plaintiff while the driver of the car was conducting his business in the usual and ordinary way, the plaintiff cannot recover.<sup>8</sup>

(c) You are charged that it is the duty of defendant railway company, in operating its cars for the purpose of transporting passengers in the city of W., to furnish and provide reasonably safe cars for the purpose of transporting said passengers in said city and it is further the duty of said defendant railway company to cause said cars to be operated in a reasonably safe manner, and a failure upon their part to provide either reasonably safe cars for the public or to permit said cars to be operated in an unsafe manner would constitute, in law, negligence upon their part.<sup>9</sup>

(d) The court charges you that there is a higher degree of care imposed upon street railways than upon ordinary steam railways, and if you should find in this case, by the evidence, that the plaintiff was a passenger on one of defendant's cars on the night in question, returning from B., bound for her home in W., and in giving her ticket to the conductor, notified him that she wished to be put off at the regular stopping place in said city, known as S., it was the duty of the defendant, the street car company, to carry the plaintiff safely to said stopping place, and its duty toward the plaintiff as carrier of passengers was not discharged or ended until they had conveyed her to the point designated, and set her down as safely as the means of conveyance employed and circumstances of the case would permit, she exercising at the time due diligence and care, and not being guilty of contributory negligence.<sup>10</sup>

pellant an insurer of the safety of passengers, whereas its duty as a common carrier is that it should exercise the highest degree of care, skill and diligence for the safety of its passengers that is reasonable and consistent with the efficient use and operation of its road."

8—Britton v. Street Ry. Co. of Grand Rapids, 90 Mich. 159, 51 N. W. 276 (278).

"If the driver's usual and ordinary way of doing business was to start his horses suddenly and violently with a whip while passengers were in the act of alighting, the instruction was not good law."

9—Citizens Ry. Co. v. Sinclair, 36 Tex. Civ. App. 266, 81 S. W. 329.

"The plaintiff was a passenger on one of the defendant's cars, and, while the defendant owed her that high degree of care as was held in Int'l G. N. Ry. Co. v. Welch, 86 Tex. 204, 24 S. W. 390, 40 Am. St. 829, it was not its absolute duty to furnish her a reasonably safe car, nor to operate the same in a safe manner. The measure of its duty was to exercise the high degree of care referred to in the case cited for the purpose of furnishing a safe car and operating it in a safe manner. Texas & P. Ry. Co. v. McCoy, 90 Tex. 266, 38 S. W. 36; Gal., H. & S. A. Ry. Co. v. Lynch, 22 Tex. Civ. App. 336, 55 S. W. 517; Houston E. & W. T.

Ry. v. Greer, 22 Tex. Civ. App. 5, 53 S. W. 58."

10—W. R. Tract Co. v. Baker, 167 Ind. 262, 78 N. E. 196 (197).

"The opening statement embodied in this instruction, that a higher degree of care is imposed upon street railways than upon ordinary steam railways, is not approved either as a proper method of defining a duty or as a correct statement of the law, although it was taken from the opinion in Anderson v. Citizens', etc. Ry. Co., 12 Ind. App. 194 (197), 38 N. E. 1109. The care required of a steam railroad for its passengers is nowhere stated in the instruction, but the company is not before us, and if it were could not complain because its duty was understated. The duty of a street railway company towards passengers is defined with reasonable accuracy in the residue of this instruction. Indianapolis, etc. Ry. Co. v. Hockett, 159 Ind. 678, 66 N. E. 39; Citizens', etc. Ry. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Citizens', etc. Ry. Co. v. Hoffbauer, 23 Ind. App. 614, 56 N. E. 54; Kentucky, etc. Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. 338, 5 A. & E. Encyc. of Law 558. In view of this strict requirement, and of other instructions given, and of the conceded facts, we are clear that the objectionable part of this instruction could not have misled the jury or harmed appellant."



(e) If the jury believe, from the evidence, that the defendant was engaged in the business of transporting passengers for hire upon a street railroad operated by it, then the law denominates the defendant a common carrier of passengers. And if the jury believe, from the evidence, that the plaintiff was a passenger on board the car of defendant, as charged in the declaration, then, while he was such passenger, the defendant, through its servants in charge of such car, was required to do all that human care, vigilance and foresight could reasonably do, in view of the character and mode of conveyance adopted, to safely carry him as such passenger; and if the jury believe from the evidence, that while he, the plaintiff, was such passenger on said car he was unlawfully assaulted and afterwards unlawfully thrown off said car, while the same was in motion, by the conductor of said car, and was injured thereby, then the defendant company is, in law, liable to the plaintiff in damages for such act.<sup>11</sup>

**§ 4122. Not an Insurer of Safety of Passengers—Argumentative Statement of Rule.** The court instructs the jury that the fact that the law does not make a common carrier an insurer of the safety of its passengers does not, even to the slightest extent, relieve such common carrier of its legal duty to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its vehicle.<sup>12</sup>

**§ 4123. Same Subject—Defining Degree of Care as to Facts Not in Issue.** (a) If you find from the evidence that plaintiff got upon one of the defendant's cars at a place where it was and had been accustomed to take on passengers, and that he was unable to get any further than the steps of the rear platform of said car, and that he was there without notice or knowledge of any objection to his being upon said step at said time, and with the knowledge and acquiescence of the defendant's servant in charge of said car, and that the plaintiff was retaining his position upon said step as well as he could by using such supports which were within his reach, and that he was thrown off the step of said car upon which he was standing as aforesaid by reason of a severe jolt or jerk caused by said car going over

11—Tri-City Ry. Co. v. Gould, 217 Ill. 317 (320), 75 N. E. 493.

"The judgments in this case must be reversed for error in giving the instruction, given for appellee, as the same are set forth in the statement preceding this opinion. The instruction is erroneous, because it does not limit the degree of care, required of the carrier, to such care as is consistent with the practical operation of the road. In other words, that part of the second instruction, which told the jury that 'the defendant, through its servants in charge of such car, was required to do all that human care, vigilance and foresight could reasonably do, in view of the character and mode of conveyance adopted, to safely carry him as such passenger,' should have read as follows: 'The defendant, through its servants in charge of such car, was required to do all that human care, vigilance

and foresight could reasonably do, in view of the character and mode of the conveyance adopted, and consistently with the operation of the road, to safely carry him as such passenger.' Such was the holding of this court in North Chicago St. R. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793. The seventh instruction was condemned in Keller v. Hansen, 14 Ill. App. 640, and Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760."

12—Chi. U. T. Co. v. O'Brien, 219 Ill. (309), 76 N. E. 341.

"The purpose of instruction is to state and explain the law applicable to the case, and the practice of injecting an argument in an instruction is not approved. (Ludwig v. Sager, 84 Ill. 99.) There was no question in the case to which this prefatory statement was in any way related, and while the statement of law was not incorrect it should have been omitted."

a switch or frog which was old and much worn, *or for any other cause which the defendant could have guarded against by the exercise of the highest degree of skill and foresight for the safe carriage of its passengers upon said car*, and that the plaintiff was injured by being thrown off said car at said time because of said severe jolt or jerk, then I charge you that it is for you to determine whether or not the plaintiff was guilty of negligence on his part, contributing to his injuries; and in determining whether or not he was guilty of negligence on his part, materially contributing to his injuries, you have a right to take into consideration the crowded condition of said car and whether or not plaintiff could have secured a safer place and all the other facts and circumstances connected with the transaction.<sup>13</sup>

(b) The court instructs the jury that, after the plaintiff boarded the car, it was then the duty of said defendant or defendants to provide plaintiff, not only a safe track, roadbed and car, but also as safe an access to the seats on said car as a high degree of care and foresight could provide, as described in another instruction. And if the jury further find from the evidence that immediately thereafter (that is, after he had boarded the car) the plaintiff was going along the inner footboard to a seat, and was exercising such care as ordinarily prudent men would exercise under similar circumstances, and that while doing so he was stricken from the car he was riding on by a west-bound train on the north track of said railway, and run over by one or both of said cars, and thereby injured, and that such striking and running over of plaintiff, and the injuries he sustained thereby, were caused by the failure on the part of said defendant or defendants, their servants, agents or employes, to exercise the high degree of care and foresight incumbent upon the carriers of passengers, as described in another instruction, then plaintiff is entitled to recover.

(c) The jury are further instructed that the law requires a carrier of passengers to exercise the highest practicable care, diligence and skill for the safety of his passengers, which a prudent and cautious person would observe in a like business and under similar circumstances, and that the care required of a passenger is ordinary

13—Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935 (1938).

"The part of this charge to which appellant seriously objects is that embraced in italics. This clause or portion it is insisted takes the case outside of the issues therein, and the jury were thereby informed or given to understand that they might deal with or enquire in regard to acts of negligence on the part of the appellant other than those which were charged or assigned in the complaint. . . . The court thereby in effect gave the jurors the liberty or privilege to enquire or investigate as to whether the plaintiff's injury was due to his being thrown off the car by reason of a severe jolt or jerk of the car caused by its going over the switch or frog as alleged in the second paragraph of the complaint. . . . But they

also were at liberty to enquire or investigate as to whether he was thrown off the car by reason of a severe jolt or jerk due to 'any other cause which the defendant could have guarded against by the exercise of the highest degree of skill or foresight.' The jury manifestly must have understood by the charge in question that they were not limited to the acts of negligence on the part of appellant charged in the complaint, but that they had the right and privilege to go outside of these issuable facts. . . . It is not only possible but quite probable that the jurors in their investigation were misled to the prejudice of appellant by the charge in question. . . . We are not able to say in this appeal that the jury was not misled by the charge to the prejudice of appellant."

care, by which is meant such care as a person of ordinary prudence would ordinarily exercise under the same or similar circumstances.<sup>14</sup>

§ 4124. **Burden of Proof as to Passengership Relation.** (a) The court instructs the jury that the plaintiff has alleged in his declaration, and in each count thereof, that at the time and place in question he was a passenger on one of the cars of the defendant. This is a material allegation of the declaration and the burden of proof is upon the plaintiff, and he must prove said allegation by a preponderance of greater weight of the evidence before he can recover in this case. If you find from the evidence, under the instructions of the court, that the plaintiff has failed to prove by a preponderance or greater weight of the evidence in this case that at the time and place in question the plaintiff was a passenger on said car, then he cannot recover and you should find the defendant not guilty.<sup>15</sup>

(b) You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured while a passenger of the defendant, the extent of his injuries, and the damage occasioned thereby.<sup>16</sup>

§ 4125. **Mere Happening of Accident as Affording Presumption of Negligence.** (a) The court instructs the jury that if they believe, from the evidence in this case, that the plaintiff on ——— boarded

14—Allen v. St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1143 (1145).

"The question which the instruction propounds to the jury is, was the plaintiff's injury caused by the negligence of the defendants or their servants, not in respect to the condition of the track, roadbed, car or access to seats in the car, but in any respect whatsoever? The instructions for the defendants having practically withdrawn from the consideration of the jury every phase of the case on which it could be said that there was any evidence tending to show negligence, there was no definite issue submitted to the jury, and their verdict is responsive to nothing. Whatever may be said concerning the sufficiency of the petition, when the time came to submit the case to the jury, the instructions should have defined the issues that the jury were to try. The above instructions failed in this respect and were erroneous."

15—Morris v. Chicago U. T. Co., 119 Ill. App. 527, 533, 534).

"This instruction prevents the plaintiff from recovering for injuries inflicted upon him by the employees of defendant in charge of the electric car, notwithstanding they may have been guilty of the grossest negligence, unless the jury believe that the plaintiff has proved by a preponderance of the evidence 'that at the time and place in question he was a passenger on one of the cars of the defendant.' If the plaintiff while crossing the street had fallen upon the tracks of the defendant in a fit, and thus been rendered unconscious, the defendant, through its servants in charge of the electric car, would owe him the duty of ex-

ercising ordinary care not to run over him. As we read the declaration, the allegation is that plaintiff was a passenger on the train from which he was knocked off. It is only by inference that he can be considered as a passenger while lying on the ground. There is no direct allegation to that effect. It does not follow that plaintiff's action necessarily must fail if he has not established by a preponderance of the evidence that he was a passenger on one of the cars of the defendant. If the evidence shows that the plaintiff, without fault on his part, was injured by and through the negligence of the defendant's employees, he is entitled to a recovery, whether or not he was or had been a passenger. If of the matters alleged in the declaration enough are proved to support a claim for damages, it is a matter of indifference that other allegations are not supported by the evidence. Rock Island v. Cuinely, 126 Ill. 411; approved in Joliet v. Johnson, 177 Ill. 180. This instruction selects and sets forth one allegation of substance in the declaration, and tells the jury unless that allegation be proven they must find the defendant not guilty. This is not the law. In actions of tort the plaintiff may prove a part of his charge, if the averment is divisible, and there be enough proved to support his case."

16—Omaha St. Ry. Co. v. Boeson, 68 Neb. 437, 94 N. W. 619 (621).

"This part of the instruction may be correct as a general proposition, but it was hardly correct taken in connection with the allegations of the petition, and the proof adduced on the trial."



the cable car of the defendant at or about ——— street in this city on his way down town, and paid the price of transportation, to-wit, ——— cents; and that while riding as a passenger and observing ordinary care for his personal safety plaintiff's foot was brought in contact with a horse, harness or wagon passing or standing at or near the tracks of defendant along which said cable car was being operated by defendant's servants, then to avoid liability for such injuries the defendant must prove by a preponderance of the evidence that its servants exercised the highest degree of care for the personal safety of the plaintiff in the operation of said cable car at the time said injuries were inflicted.<sup>17</sup>

(b) The court instructs the jury that there is no presumption of negligence arising against the defendant or its agents from the simple fact that the plaintiff was injured in connection with the defendant's car.<sup>18</sup>

§ 4126. **Passenger's Duty to Obey Instructions.** (a) The court instructs the jury that it is the duty of a passenger upon a street car

17—*Western Transportation Co. v. Downer*, 11 Wall. 129.

"The weight of authority seems to be in favor of the proposition that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier. The rule is thus stated by Wuth in his work on Street Railway Law (sec. 361): 'The mere fact that a passenger has been injured en route, without any evidence whatever as to the manner in which the accident occurred, does not raise a presumption of negligence against other parties, but the burden of proof shifts where the accident proceeds from an act of such character that, when due care is taken in its performance, no injury ordinarily ensues from it, or where it is caused by the mismanagement of a thing over which the defendant has immediate control, or for the management or construction of which it is responsible. Where the injury occurs by reason of the defect in the machinery or cars or apparatus or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, a presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of vis major, or the tortious act of a stranger, tending to produce the accident, no such prima facie case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident and the circumstances

surrounding it, rather than from the mere accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the act are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage coach, or of the derailment of a car, or of a collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway. *Bradner on Evidence*, pp. 422 & 424; *Hutchinson on Carriers*, §§ 799-801; *Patterson on Railway Accident Law*, p. 438; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Le Barron v. E. Boston Ferry*, 11 Allan 312."

18—This instruction was held error in *West Chicago St. Ry. Co. v. Petters*, 196 Ill. 298 (300), aff'g 95 Ill. App. 479. The court said: "If an instruction of this nature were held proper, it would be possible for a defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, and while each particular link might not, of itself, constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them."

to obey the reasonable instructions of those in charge of the same, and if such passenger is injured because of his failure to obey such reasonable instructions, he cannot recover damages for such injury.<sup>19</sup>

(b) If you believe from the evidence that the plaintiff, C, entered and was riding upon one of the defendant's cars in pursuance of a promise made by P., the employe of defendant who was in charge of said car, to the effect that he would give plaintiff and some other boys a ride for turning the trolley on said car at the end of the line; and if you further believe that after plaintiff had ridden on said car to a point on S. street, in the city of D., said P. told plaintiff and his brother, G. C., that they would have to get off of said car; and if you further believe from the evidence that plaintiff, in obedience to said order of P., did alight from said car while the same was in motion, and was run over by said car and injured, as alleged in his petition; and if you further believe, from the evidence, that in ordering plaintiff to get off of said car, if he did order him to get off, said P. was guilty of negligence; or if you believe that in failing to stop said car said P. was guilty of negligence, that is, if he failed to exercise ordinary care to stop said car; and if you further believe from the evidence that the negligence, if any negligence you find there was on the part of P. in either of said respects, that is, in ordering plaintiff to get off said car at the time and under the circumstances that then existed, or in failing to stop said car, proximately caused the injury, if any, received by the plaintiff,—you will find for the plaintiff, unless you find for the defendant under the instructions hereinafter given you.<sup>20</sup>

§ 4127. **Injury to Passenger Through Negligent Equipment, Management or Operation of Vehicle.** The jury are instructed that it is the duty of a railway company, such as the defendant, engaged in the business of operating a street railway, in the carriage and transportation of its passengers, to have, take, and exercise the highest degree of care reasonably practicable for the personal safety and safe carriage of such passengers, and that this care should be used and exercised for the purpose of safely operating its cars, or trains of cars, in having its tracks and switch appliances, and the connections of its tracks, constituting a part of such railway, maintained and kept in reasonably good and safe condition, and for such purpose to take and exercise about the same the highest degree of care reasonably practicable in inspecting and keeping such tracks, switch ap-

19—W. C. St. Ry. Co. v. Estep, 162 Ill. 130 (132), 44 N. E. 404.

"This instruction was properly refused. It assumes the existence of facts whose existence was for the jury to determine, and it does not necessarily refer to the pending case. C. & A. R. R. Co. v. Saunders, 154 Ill. 531, 39 N. E. 481; I. C. R. R. Co. v. Larson, 152 Ill. 326, 38 N. E. 784."

20—Denison & S. Ry. Co. v. Carter, — Tex. Civ. App. —, 70 S. W. 322 (323).

"In order to authorize a recovery by plaintiff on the ground that he was induced to jump from the mov-

ing car by the remarks of the conductor, such remarks must have been the proximate or moving cause of his jumping from the moving car, and if those remarks were not the proximate cause, but plaintiff was induced to jump from some other cause, i. e., a desire not to be separated from his brother and his two companions, then the remarks of the conductor would not be the proximate cause, and the plaintiff could not recover. Other charges were requested by appellant embracing this contention. The court should have submitted this phase of the case to the jury in a proper charge."

pliances and connections and parts of tracks in good and reasonably safe working order and position.<sup>21</sup>

§ 4128. **Use of Ordinary Means by Motorman to Stop Car on Wet or Slippery Rails.** (a) If the jury believe, from the evidence, that the coming together of the two cars was caused by an unavoidable slipping of the hind or following car upon a wet or slippery rail, then the jury should return a verdict of not guilty.

(b) If the jury believe, from the evidence, that the coming together of the two cars in question was caused by the following car becoming uncontrollable, then the jury must determine, from the evidence, whether or not the becoming uncontrollable of said car, was due to negligence on the part of the employees in charge of it. If after considering all the evidence, the jury believe that the employees in charge of said car undertook to stop it in the usual manner and with the usual means, and that there was no failure on their part to use the highest degree of practical care in the operation of said car, then the jury must find the defendant not guilty. The motorman of said car was not required to do anything inconsistent with the practical or reasonable running of his car.<sup>22</sup>

§ 4129. **High Rate of Speed.** (a) The court instructs the jury that if they believe from the evidence that S. was a passenger for hire on one of the cars of the defendant on the ——— day of ———, and that he alighted from said car on K. street at its intersection with C. street, and in the exercise of due care for his personal safety he attempted to pass over the two parallel tracks of the defendant at or near the crossing of said C. street, on the east side of K. street, on his way to the house of his mother, and that the east bound car of the defendant was running on the south of said parallel tracks at a high and dangerous rate of speed, and that the motorman on said car was thereby unable to stop the same so as to avoid striking said S. while so passing over said south parallel track, and while in the exercise of due care for his own safety he was run down by said car and thereby killed, then the jury should find the defendant guilty.

(b) The court instructs the jury that if you believe from the evidence that the deceased, S., was passing along K. street where it

21—*Logan v. Met. St. Ry. Co.*, 183 Mo. 582, 82 S. W. 126 (128).

"That this instruction is not as clear as it should be must be conceded; but when fairly construed, and taken in connection with defendant's instructions, we are not prepared to say that it misled the jury. By the use of the words 'and this care should be used and exercised for the purpose of safely operating its cars or train of cars, in having its tracks and switch appliances, and the connection of its tracks constituting a part of such railway maintained and kept in a reasonably safe condition,' evidently meant at the place of the accident; for there is no pretense that the condition of the track at any other point had anything to do or connection with the accident, and no other conclusion can fairly be drawn from the use of this language."

22—*Chicago C. Ry. Co. v. Schmidt*, 217 Ill. 396 (402), 75 N. E. 383.

"Both of these instructions are subject to the criticism that they ignored entirely one theory of plaintiff's case,—that is, that the motorman did not commence his efforts to control the car in proper time. The sixth is liable to the construction that the unavoidable slipping, if without negligence on the part of the employees, would excuse the defendant, whereas reasonable diligence by the motorman required him to act before the slipping of the wheels upon the rails. The ninth excuses the defendant if the motorman undertook to stop the car in the usual manner and with the usual means, whereas it was his duty to use unusual means because of the unusual condition of the rails at the time."



intersected with C. street with due care for his own safety, and the defendant ran one of its cars toward the said S. without keeping a sufficient lookout to see and observe the said S. while he was so passing along said street, and without keeping control of said car, so that it could be stopped or the speed thereof slackened so as to avoid injury to said S. as he was passing along said street, and that in consequence of such failure to keep such a lookout and keep such control of said car the said S. was struck thereby, and killed, the jury should find the defendant guilty.

(c) The court instructs the jury that if you believe from the evidence that S., after alighting from one of the cars of the defendant, was in the act of passing along K. street, where said street intersected C. street, with due care and caution, and the defendant by its servants propelled one of its cars along C. street toward K. street at a high and dangerous rate of speed, without having said car under such control that by the exercise of ordinary care it could be stopped, or its speed slackened in time to prevent injury to the said S., as charged in the declaration in this case, and thereby said car struck said S. and killed him, then you should find a verdict for the plaintiff.<sup>23</sup>

§ 4130. **Collisions between Cars of Street Car Company and Other Vehicles—Fire Department Engines and Wagons.** The court instructs the jury that there is no liability on the part of the railway company, defendant, to the plaintiff, merely because the hook and ladder wagon ran into the car, and the plaintiff was injured, and has brought this suit against the company, and the jury must not presume any liability on the part of the company merely on that account; and the court further instructs the jury that the burden of proof is upon the plaintiff to prove that the collision was caused by the negligence of the gripman, as defined in the other instructions, and this she must do by a preponderance of evidence; and, if the jury believe that the collision was caused solely by the negligence of the driver of the hook and ladder wagon, then your verdict must be for the defendant.<sup>24</sup>

§ 4131. **Presumptive Liability When Car Derailed.** And the burden of proof is upon the defendant to show by a preponderance of the evidence that such injuries, if any, were received, while a passenger, by being thrown from a car because of the derailment thereof, were without fault on its part, and they could not have been

23—Springfield Con. R. Co. v. Sommer, 55 Ill. App. 553.

The above "instructions given for the plaintiff were seriously at fault in assuming that the matters therein mentioned constituted negligence on the part of defendant. Whether so or not was for the jury and not for the court. It is familiar in this State that the court should not instruct the jury that certain acts or omissions are, per se, negligence, unless so declared by statute.

"In this instance, the matters referred to were the alleged high and dangerous rate of speed and the alleged omission to keep a sufficient lookout, and to keep control of the

car so that it could be stopped in time to avoid injury."

24—Olsen v. Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470 (471).

"The plaintiff being absolutely free from negligence on her part, and the collision having occurred and injured her, we think a prima facie case was made; and the court did not err in refusing to declare the law as asked by defendant, even though plaintiff had not herself invoked this presumption. Booth, St. Ry. Law, ¶ 361; Clark v. R. R. Co., 127 Mo. 210, 29 S. W. 1016; Jackson v. R. R. Co., 118 Mo. 224, 24 S. W. 192; Hill v. R. Co., 109 N. Y. 239, 16 N. E. 61."

avoided by the exercise of the highest degree of skill and diligence on the part of the defendant, consistent with its business.<sup>25</sup>

**§ 4132. Presumptive Liability When Passenger Injured Through Collision.** If you believe from the evidence that the plaintiff's wife was injured by a car colliding with a water cart, as charged in his petition, and in the manner as charged in the petition, then you will find for the plaintiff such damages (if any) as the plaintiff has received by reason of the injury, taking into consideration the expense of cure, and such amount as the services of plaintiff's wife have been to him diminished in value by reason of the injury, and the jury may take into consideration the permanency of such injury as they may find from the evidence in estimating the damages, if any. If the jury do not believe the plaintiff's wife was injured as charged in plaintiff's petition and in the manner therein charged, they will find for defendant.<sup>26</sup>

**§ 4133. Negligently Starting Car While Plaintiff Is in Act of Boarding It.** If you believe from the evidence that by the starting of the car the plaintiff was not jerked, slung or thrown one way, and by the stopping of the car the plaintiff was not jerked, slung or thrown the other way, your verdict must be for the defendant.<sup>27</sup>

**§ 4134. Negligently Starting Car While Passenger Is Alighting.** (a) The court instructs the jury that it is the duty of common carriers of passengers for hire to use the highest degree of care, vigilance and foresight consistent with the character and mode of con-

25—*Omaha St. Ry. Co. v. Boeson*, 68 Neb. 437, 94 N. W. 619 (621).

"By this paragraph the court attempted to tell the jury on whom the burden of proof rested. It is certainly vague, confusing, and uncertain. It placed the burden of proof on the defendant to show that the injuries received by the plaintiff, if any, were received while a passenger; that the injuries were received by being thrown from the car because of the derailment thereof, notwithstanding the defendant had generally and specifically denied that its car was ever derailed, or that the plaintiff was thrown therefrom by reason of its derailment; that the injuries which the plaintiff received were without fault on its part; and that the injuries could not have been avoided by the exercise of the highest degree of skill and diligence on the part of the defendant. It cannot be said that the defendant company was required to prove that plaintiff's injuries were received while he was a passenger on the car, when it had specifically denied that he had received any injuries at all, and alleged that, if any such injuries were received, they were caused by the contributory negligence of the plaintiff himself, and not by reason of any negligence of the company. Neither can it be successfully claimed that defendant was required to prove that the plaintiff's injuries were caused by a derailment of the car, when it had specially denied that fact."

26—*Houston El. Co. v. Nelson*, 34 Tex. Civ. App. 72, 77 S. W. 978.

"To this charge, several objec-

tions are urged, the first being that the charge is a virtual assumption that plaintiff may recover if his wife was injured, and this regardless of whether the company's negligence caused the collision or not. That there was a slight collision between the car and a water cart is undisputed; and while the charge, read in the light of the petition, may be correct in the abstract, it is clearly misleading on the face of it. The most easy and natural construction to place on it is that, if the plaintiff has shown a collision, and consequent injury to his wife, liability is established irrespective of other proof. Whatever may generally be the probative weight of the accident itself on the issue of negligence in passenger accident cases, this is certainly not a case in which the court might assume that proof of the collision established the allegation of negligence. The nature of the accident and its causes were fully disclosed, and, if the jury believed the witnesses adduced by the defendant, the servants of the defendant were without fault.

"The action of the court in referring the jury to the pleadings for the issues is also criticised. Ordinarily, this might not be error requiring a reversal, but we nevertheless regard it as a practice which should not be encouraged. What issues are made by the pleadings is a question of law for the court, and they should be so determined and distinctly presented in the charge. *Bradshaw v. Mayfield*, 24 Tex. 483; *Barkley v. Tarrant Co.*, 53 Tex. 257."

27—*Birmingham Ry. & E. Co. v.*

veyance adopted to safely carry and deliver their passengers, and in so doing it is their duty, when their cars stop or slow up, as in the act of stopping at a place where passengers are in the habit of getting on or off of their said cars, not to start the train or to suddenly increase the motion of said car until they have ascertained whether or not passengers are in the act of getting on or off of said cars; and if passengers are in the act of alighting therefrom, not to start or suddenly increase the motion of said car until the passenger has safely alighted therefrom; and the court instructs the jury that if you believe from the evidence that the plaintiff was a passenger on one of defendant's cars on or about the ——— day of ———, and that while such passenger, said car slowed up or stopped on the south side of the B. Road on W. Avenue, as alleged in plaintiff's declaration, and you further believe from the evidence that the said defendant had been in the habit of stopping at said point and receiving and discharging passengers therefrom, and you further believe from the evidence that the plaintiff with all due care and caution, was in the act of alighting from said car at said point, and that while in the act of alighting therefrom the said defendant suddenly started or increased the forward motion of said car before the plaintiff had safely alighted therefrom, and you further believe from the evidence that the plaintiff by reason of the sudden starting or increasing the motion of said car was thrown from said car and sustained injuries in consequence thereof, then you will find the defendant guilty.<sup>28</sup>

(b) The court instructs the jury as a matter of law that if they find, from the evidence, that the plaintiff in this action was a passenger on one of the cars of defendant, and had with him rightfully on said car his wife and several of his small children, and that the car had come to a stop for the purpose of enabling passengers to alight, and plaintiff had alighted, then it was the duty of the agents and servants of defendant in charge of said car to afford plaintiff a reasonable opportunity of taking his small children from the car; and if the jury finds that the car started without affording such opportunity, and the accident resulted therefrom, such starting of the car was an act of negligence on the part of the defendant.<sup>29</sup>

(c) The court instructs the jury as a matter of law that if they find from the evidence that the plaintiff in this action was a passenger on one of the cars of the defendant, and had with him rightfully on said car his wife and several of his small children, then after the car had come to a stop and the plaintiff had alighted it was the

Ellard, 135 Ala. 433, 35 So. 276 (282).

This instruction "asked by defendant and refused, when applied to the whole complaint was an improper one. The jury might have found for the plaintiff on less than is therein hypothesized."

28—West Chi. St. Ry. Co. v. Winters, 107 Ill. App. 221 (224).

"The giving of this instruction was error. This instruction told the jury, as matter of law, that if the facts therein set forth were true, the plaintiff should recover—which statement was precisely equivalent to telling the jury that the facts

therein set forth constituted, in the law, negligence. It must be conceded that the plaintiff could not recover unless the defendant were found guilty of negligence. If there is evidence legally tending to sustain the issues in plaintiff's behalf, it is not the province of the court to tell the jury that certain acts constitute negligence. Ill. Cent. R. Co. v. Griffin, 184 Ill. 9, 56 N. E. 337; C. B. & Q. R. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708."

29—West Chi. St. R. Co. v. Luka, 72 Ill. App. 60 (62).

"This instruction is erroneous



duty of the agents and servants of defendant in charge of said car to afford plaintiff a reasonable opportunity of taking his small children from the car; and if the jury find that the car was started without affording such opportunity, such starting of the said car was an act of negligence on the part of the defendant.<sup>30</sup>

(d) The jury are instructed that the rule read in evidence by plaintiff's attorney, claimed to be a rule of the defendant relating to the conduct of conductors and motormen at railway crossings, was not admitted by the court, nor should it be considered by the jury, as furnishing a substantive ground of complaint to the plaintiff, and there can be no recovery in this case based on said rule.<sup>31</sup>

(e) The jury are instructed that if they believe, from the evidence, that the plaintiff, D., on or about the \_\_\_\_\_ day of \_\_\_\_\_ became and was a passenger upon the street car of the defendant and then being operated by the defendant, and that the conductor of said car was notified of her desire to alight from said car at or near the corner of F. and S. streets upon the line of the road of the said defendant, it was the duty of said defendant to bring said car to a full stop so as to enable said plaintiff to safely step from said car to the ground, and to give said plaintiff a sufficient length of time to alight from said car; and if the jury believe, from the evidence, that said car did come to a stop at or near the corner of F. and S. streets, and if the jury also believe, from the evidence, that while the car was at a stop the plaintiff used ordinary care and diligence in endeavoring then and there to alight from the car, if the jury so believe from the evidence, and also further believe, from the evidence, that the car was suddenly started while she was

in that it tells the jury that certain facts are negligence. *Chi. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 597, 9 N. E. 263; *Chi. & Ind. R. R. Co. v. Lane*, 130 Ill. 122, 22 N. E. 513."

30—*West Chi. St. R. R. Co. v. Luka*, supra. This instruction is erroneous for the same reason.

31—*Chi. City Ry. Co. v. Lowitz*, 119 Ill. App. 360, 363, 367, aff'd 213 Ill. 24, 75 N. E. 755.

"In *West Chi. St. Ry. Co. v. Peters*, 196 Ill. 298, 63 N. E. 662, the court said: 'We think the appellant was not prejudiced by the refusal of the trial court to give this instruction to the jury. This class of instructions, which select one item of evidence or one fact disclosed by the evidence, and state that a certain conclusion does not follow as a matter of law, from that fact, are calculated to mislead and confuse a jury. \* \* \* If an instruction of this nature were held proper, it would be possible for a defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, and while each particular link might not of itself constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts,

and take away the consideration of facts from them.' The instruction commented upon in the above language was to the effect that no presumption of negligence arises against the defendant from the mere fact that the plaintiff was injured in connection with the defendant's cars. We regard the comments of the court as equally applicable to the refused instruction in this case. One is as correct, in point of law, as the other. The plaintiff in that case could not have made out his case by proving that he was injured in connection with defendant's cars. The plaintiff in this case could not make out his case by proving the rule of the defendant. If this instruction had been given, the jury might easily have concluded that the court meant to tell them that there could be no recovery in the case based on the act of the motorman in starting up the car while appellee was in the act of alighting therefrom, without using proper care to ascertain that no passenger was attempting to get on or off the car. Or, to speak more generally, the jury might easily mistake the language of the requested instruction to mean that there could be no recovery based on the violation of the rule of duty imposed by law upon appellant, which was sought to be enforced by the rule of appellant. We do not think there was error in refusing the instruction."

in the act of alighting, and she was thereby injured, then plaintiff is entitled to recover.<sup>32</sup>

**§ 4135. Same Subject—What Will be Sufficient to Sustain Burden of Proof.** The burden is upon the plaintiff to satisfy you by a preponderance of the evidence that the plaintiff was thrown from the car by a sudden jerk of the car while the plaintiff was stepping from the car, and if the plaintiff has not so satisfied you by such preponderance of the evidence, you must find for the defendant.<sup>33</sup>

**§ 4136. Duty of Motorman When Passengers Are Alighting.** (a) Keeping in mind the instructions hereinbefore given you relating to such subjects you are instructed that if you find that plaintiff had given a signal when and in the manner claimed by her, and that such signal had been or ought to have been observed by the acting motorman, then, having so found it became the duty of such motorman to anticipate that, as he brought his car to a standstill the plaintiff would make the attempt to get off the car, and it was his duty to look to see if she was about to do so; and upon ascertaining that she was making the attempt it was his further duty to hold the car without starting it forward, until she could safely alight therefrom. It follows as a matter of course that, if the motorman failed in the duties so imposed upon him, the facts having been found by you as stated, he was guilty of negligence, which would be the negligence of the defendant, and you will be authorized to so find in making up your verdict.<sup>34</sup>

(b) In this case there is no evidence tending to show that the driver knew that the plaintiff desired to alight from the car, and if in fact the car stopped for a reasonable length of time for all passengers desiring to alight to do so, and plaintiff delayed alighting

32—*Chi. City Ry. Co. v. Dinsmore*, 162 Ill. 658 (660), 44 N. E. 887, rev'g 62 Ill. App. 473.

"This instruction is erroneous. It told the jury as a matter of law that if the facts therein set forth were true, the plaintiff should recover, whereas the plaintiff was not entitled to recover unless the defendant had been guilty of negligence and the acts of negligence mentioned in the instruction do not necessarily constitute negligence. Whether or not the defendant was negligent was a question for the jury to determine. It is no answer to this objection to say that the defect was cured by instructions given for the defendant, for it was not."

33—*Birmingham Ry. L. & P. Co. v. Lindsey*, 140 Ala. 312, 37 So. 289 (289).

"In civil cases the burden of proof is sustained by evidence sufficient to reasonably satisfy the jury. The above charge would have imposed upon the plaintiff too high a degree of proof."

34—*Root v. Des Moines Ry. Co.*, 122 Ia. 469, 98 N. W. 291 (292).

"On the former hearing we said with reference to the sufficiency of the evidence that it 'was such that the jury may have found that the plaintiff reasonably assumed that the car was stopping for her to

alight, and that the conductor ought to have anticipated her action in leaving it.' The point now made was not raised in argument nor passed upon by the court as the opinion clearly shows. Nor do we think that, under the circumstances of the case, the motorman was bound as a matter of law to know that plaintiff would undertake to step from the car where she did, even though signaled to stop as claimed. The rule of the company was to stop at street crossings only. Had the car stopped there, it may be, as counsel contends, that the motorman must be assumed to have known that one who had requested the stop would attempt to get off. And the circumstances might be such as to foreclose inquiry where the stop has been made a short distance further on. But if moving so rapidly as to render an attempt to alight dangerous, then, surely, he ought not to be required in the absence of knowledge, to assume that any one will take the risk. The vice in the instruction is that it entirely overlooks the operation of the car, and irrespective thereof, fixes upon the motorman the imperative duty of anticipating the purposes of the passengers regardless of whether they act in the reasonable belief the car is stopping for them or not."

beyond the period allowed therefor, and the driver was ignorant of the plaintiff's desire to alight when he did, and such delay contributed to plaintiff's injury, he cannot recover.<sup>35</sup>

**§ 4137. Failure of Conductor to Warn Passenger of Danger Known to Conductor, but Unknown to Passenger.** If the jury find from the evidence that, at the time of the accident in controversy, the defendant was running the car in question, and on which the plaintiff was a passenger, north upon C. avenue upon the west track of its C. avenue line, so that the running board of said car was on the side next the trolley pole, and that the defendant was running the car in question without giving any warning to the passengers on said car or to the plaintiff of danger from the trolley poles, then such acts on the part of defendant's employes would constitute negligence on the part of the defendant.<sup>36</sup>

**§ 4138. Duty of Motorman on Approaching Car.** If the jury believe from the evidence, under the instructions of the court, that the plaintiff was riding upon defendant's train proceeding in a north-westerly direction upon M. avenue, and that he was clinging to one of the cars on the side next to the parallel track, and that he jumped or dropped or fell or was knocked off said car and fell upon the track, and if you further believe from the evidence, under the instructions of the court, that he lay with one leg over one of the rails of said track in front of an electric car which was following

35—*Britton v. Street Ry. Co. of Grand Rapids*, 90 Mich. 159, 51 N. W. 276 (278).

"The passengers upon a street-car have the right to assume that the car will not be started, after it has stopped to let off passengers, without the driver first using reasonable care and diligence to ascertain whether any passenger is in the act of alighting; and also that when the car is started it will be with reasonable care, and not in a sudden and violent manner."

36—*Citizens' St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54 (58).

"Appellee testified that the conductor, who was on the rear platform of the car, saw him as he arose from his seat, and as he was going back towards him on the running board. There was evidence that no warning was given the passengers. The care and diligence required of carriers of passengers is expressed variously by the different courts, but all are agreed that the highest degree of care is required to prevent injury to passengers. Thus in *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550, it is said: 'Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence.' \* \* \* The instruction in effect states an abstract principle of law. It is true the instruction is to be construed in connection with all the other in-

structions in the case, and it is limited to the time and place of the accident. But it is, in effect, a statement to the jury that certain acts are negligence per se. The principle stated in it is not qualified by any facts or circumstances that may have existed at the time. The question is thus presented whether the instruction did not take from the jury the right to find the ultimate fact of negligence. \* \* \* The jury were told that if they found the two facts, namely, that the car was on the wrong track, with the running board next to the poles, and that the passengers were not warned, negligence was shown. This was taking from the jury the question which they should decide from all the facts and circumstances existing at the time. Although the carrier of passengers is held to the highest degree of care, it will not do to say that this care is the same under any and all circumstances. It is true that contributory negligence, as matter of law, has been declared under certain facts, but the rule is based upon the injustice of allowing a party who has shown an utter disregard for his own safety to complain of another's negligence. And, where a statute or municipality has prescribed a certain duty, a failure to perform that duty has been by the courts declared to be negligence. The rule exists because of the statute, and until the statute, did not exist. For the reasons above given, we think the above instruction is too broad, and should not have been given."



the train upon which he had been riding, then the court instructs you that the servant or servants in charge of said electric car were only bound to exercise ordinary care and caution to avoid injuring the plaintiff after they had time and opportunity in the exercise of ordinary care and caution, to become conscious of his danger and reasonable time and opportunity to perform such duty as thus defined. And if the jury believe from the evidence, under the instructions of the court, that the servant or servants of the defendant in charge of said electric car, became conscious as soon as possible by the exercise of ordinary care, of the plaintiff's danger and that they exercised ordinary care to avoid injuring him after becoming conscious of the plaintiff's danger, in such case the plaintiff cannot recover herein for an injury by said electric car.<sup>37</sup>

§ 4139. **Rule to Stop Only at Further Crossing.** In this case, if you find the fact to be from the evidence that it was the custom of the cars to stop only at the further crossing, you will determine that question; and if you so find it I charge you that this was a reasonable regulation on the part of the street-railway company, and, if the injury to the plaintiff resulted from his failure to observe such regulation, he cannot recover in this action.<sup>38</sup>

§ 4140. **Failure to Have Both a Motorman and Conductor on Car.** The fact that there was not both a motorman and a conductor on the car on which plaintiff was a passenger does not of itself establish negligence on the part of defendant, such as would render it liable in this action; but you may take such fact into consideration, in connection with all the other facts and circumstances proven upon the trial of the case, in determining whether or not the defendant was guilty of negligence, and in this connection you will carefully consider all of the other instructions herewith given you.<sup>39</sup>

§ 4141. **Posted Warnings in Cars.** The fact that no notices were posted in the cars warning passengers to keep off the inner footboard was not of itself such negligence as authorizes the plaintiff to re-

37—*Morris v. Chicago U. T. Co.*, 119 Ill. App. 527 (534, 535).

"The jury are not called upon by this instruction to find from the evidence that the plaintiff was not a passenger, and was not riding where he is stated to have been with the knowledge and consent of the servants in charge of the outbound train. It is silent as to the crowded condition of that train. It forbids a recovery, no matter how gross was the carelessness of the servants of the passing trains which caused him to be 'knocked off said car,' if the servants in charge of the electric car exercised ordinary care to avoid injuring him after they became conscious of his danger. This instruction in effect told the jury that the servants of the carrier may knock a passenger off the train upon which he is riding, either by careless management of the train, or even wilfully, and the defendant go scot free, if its servants in charge of its following train cuts off one of his legs without fault upon their part. In

our opinion this instruction violates the plainest principles of law, and the giving of it is reversible error."

38—*Britton v. Street Ry. Co. of Grand Rapids*, 90 Mich. 159, 51 N. W. 276 (278).

"The fact whether this was or was not a reasonable regulation had no bearing upon the case whatever under the facts as claimed by either side."

39—*Root v. Des Moines Ry. Co.*, 122 Ia. 469, 98 N. W. 291.

"This was doubtless in the way of caution, and given in the interest of defendant. Its object was to guard against improper inferences being drawn from the departure of the motorman, and to call the jury's attention to the fact that but one man was operating the car. To avoid the possibility of a misunderstanding upon another trial, however, it may be well to eliminate the latter portion of the paragraph, as the issues must be determined on the theory that the acting motorman was competent and properly alone in control."

cover in this action. But the jury are to consider such fact, in connection with all the other facts in the case, in determining whether the defendants or their servants negligently operated the car upon which plaintiff was a passenger when he received the injuries complained of.<sup>40</sup>

§ 4142. **Liability for Unauthorized Act of Stranger.** If you believe from the evidence that the witness, F. L., threw the switch in question, and if you further believe from the evidence that the accident and injury would not have occurred except from the fact that the switch was so thrown, if so shown by the evidence, then plaintiff cannot recover, and your verdict should be for the defendant.<sup>41</sup>

§ 4143. **Contributory Negligence of Passengers—In General.** The plaintiff, you will observe, has upon her the burden to establish by a preponderance of the evidence that she was not guilty of contributory negligence, or, stating the proposition in another way, that she did not by her own acts or conduct cause or contribute in any material degree to her own injury. It was her duty to exercise such care and diligence to avoid injury to herself as an ordinarily prudent and careful person would exercise under all of the circumstances shown by the evidence, and if she failed to do this she was guilty of negligence; and if you find such to be the fact she cannot recover in this action, notwithstanding that you may have already found that the defendant was also guilty of negligence. \* \* \* If you find that she did not so act, and that consequently her accident and injury was in whole or in any material part the result of contributory negligence on her own part, then she cannot recover in this action, and you will so say by verdict. If, on the other hand, you find that she did not in any material sense or degree contribute to her accident and injury, then you will proceed to the further consideration of the case as you are hereinafter instructed.<sup>42</sup>

40—Allen v. St. L. Transit Co., 183 Mo. 441, 81 S. W. 1143 (1148).

"It was error to have given this instruction as charged. There was no duty devolving as to the defendants to post such notices, and therefore the omission to do so was neither negligence nor evidence of negligence."

41—Elgin, A. & So. Trac. Co. v. Wilson, 120 Ill. App. 371 (379), aff'd, 217 Ill. 47, 75 N. E. 436.

"If this instruction states a correct rule of law, the court should have directed a verdict for the appellant. The facts upon which it is predicated cannot be disputed from this record. The effect of this instruction is to withdraw from the jury all consideration of the alleged negligence of appellant."

"If appellant was guilty of the negligence charged, and the jury believed such negligence was a concurring and efficient cause of the injury, the fact that the switch was wrongfully turned by an unauthorized person, thereby affording a condition of things which made the injury possible, is no defense to the action."

42—Root v. Des Moines R. Co., 122 Ia. 469, 98 N. W. 291 (292).

"Instructions in similar language have been twice condemned by this court. Artz v. C. R. I. & P. R. Co., 38 Ia. 293; Banning v. C. R. I. & P. R. Co., 89 Ia. 74, 56 N. W. 277. See also, Laflam v. Missisquoi Pulk Co., 74 Vt. 125, 52 Atl. 526. In the first cited case in passing upon an instruction to the effect that if defendant was negligent, causing the injury, 'and the plaintiff did not by carelessness on his part materially contribute thereto,' he was entitled to recover, but could not if, 'by carelessness on his part he materially contributed thereto,' the court said: 'Had the court informed the jury that for the plaintiff to contribute in any degree to the injury by his own negligence would have been material, and would defeat his recovery, the use of the term 'material' would have been harmless, though unnecessary. Without this explanation the jury would naturally understand the court as informing them that the plaintiff might have been guilty of a degree of negligence which was not material, and notwithstanding which he might recover. One of the meanings of the

§ 4144. **Distinguishing between Slight Negligence Which Did and Slight Negligence Which Did Not Contribute to the Injury.** The court instructs the jury that slight negligence is not necessarily incompatible with due and ordinary care, and hence, if you believe from the evidence that the plaintiff was guilty of slight negligence, and slight negligence only, yet if you further believe from the evidence that before and at the time of the injury in question he was exercising due and ordinary care for his own safety, then he did all the law required of him in this regard. Ordinary care, as mentioned in these instructions, is that degree of care, which an ordinarily prudent man, situated as the plaintiff was, before and at the time of the injury, would have exercised for his own safety.<sup>43</sup>

§ 4145. **Contributory Negligence—Failure of Plaintiff to Discover Bolt on Which Dress Was Caught.** The court instructs the jury, as a matter of law, that if the plaintiff knew, or might by the exercise of ordinary care have discovered the bolt in question, and the danger, if any, of such bolt, then your verdict must be for the defendant, even though you should believe that plaintiff fell by reason of her catching her dress on such bolt.<sup>44</sup>

term 'material' is 'in an important degree' (see Webster's Dict.), and this is the meaning which would properly be attached to it as used in these instructions. They very clearly import that there might be a degree of negligence on the part of the plaintiff contributing to the injury which was not important, and would not defeat his right to recover; that if he did not by carelessness on his part, contribute in 'an important degree' to the injury he might recover. In other words, that the plaintiff might contribute in some degree to the injury, but that if his carelessness contributed to the injury in a higher or greater degree which the court terms 'material' he would not be entitled to recover. True, contributory negligence was correctly defined, but the defect in the charge in the cited case is that it undertook to limit the influence which must be exerted on the result in order to defeat recovery. If it in fact contributed to the injury as an efficient cause the law will not measure the extent thereof, nor compare it with that of defendant's negligence. Nor is there anything in the suggestion that by the language used the court merely intended that the negligence of plaintiff must have directly or approximately contributed to the injury. The extent to which the negligence contributed was plainly what the court sought to define. Another portion of the instruction criticised is substantially a copy of one requested by defendant, and for this reason it cannot be heard to complain."

43—Lindberg v. Chi. C. Ry. Co., 83 Ill. App. 433 (434).

"This instruction is technically correct in the proposition of law contained. While any negligence, how-

ever slight, which contributed to the injury would bar a recovery, the law regarding any negligence which contributes as a cause of the injury as negating an exercise of ordinary care, yet, if there be negligence which cannot be said to have contributed to the injury, and if the plaintiff is found to have been in the exercise of ordinary care, the plaintiff is not barred by reason of negligence which had nothing to do with causing the injury. But while to a lawyer the instruction may thus convey a correct proposition of law, yet it is calculated to mislead a jury, for it is not to be expected that they would, without direction, distinguish between slight negligence which did, and slight negligence which did not, contribute to the injury. It is likely to mislead."

44—No. Chi. St. R. R. Co. v. Eldridge, 151 Ill. 542 (548, 549), 38 N. E. 246.

"This instruction held, in effect, that if the plaintiff knew, or by the exercise of ordinary care might have discovered the bolt in question, then her catching her dress on the bolt was negligence per se, and must be so declared, as a matter of law. This was clearly erroneous. Negligence, in all cases of this character, is a mere question of fact, or, at most, a mixed question of law and fact, and whether the party is negligent in the particular instance, must be found by the jury, and not declared by the court. Doubtless the fact, if it were a fact that the plaintiff knew, or by the exercise of ordinary care might have discovered the bolt upon which she caught her dress, would be evidence tending to prove negligence, but it cannot be pronounced negligence as a conclusion of law."



§ 4146. **Contributory Negligence—Standing on Platform.** (a) If the jury find from the evidence that the defendant, the E. R. C., by its servants in charge of its car, on the ——— day of ——— received the plaintiff as a passenger on the rear platform of its said car, and that the plaintiff was carried as such passenger upon said platform, and that the plaintiff paid his fare as such passenger upon said platform to defendant's conductor, in charge of said car, then the fact if true, that the plaintiff was riding as such passenger upon said platform just before the collision, is not of itself, as a matter of law, a want of ordinary care on the part of the plaintiff.

(b) If the jury finds the defendants guilty, they should assess the plaintiff's damages at such a sum as they may believe from the evidence will be a fair compensation to him: First, for any pain of body or mind that the plaintiff has suffered, or will hereafter suffer, by reason of his injuries, and directly caused thereby. Second, for any loss of the earnings of his labor directly caused by his injuries. Third, for any expenses necessarily incurred for medical attention, medicines and nursing, directly caused by his injury.<sup>45</sup>

(c) If the plaintiff left his seat inside the car and voluntarily went on the platform, without the request of the defendant or its agent, the conductor, while there was ample standing room inside, then the plaintiff is presumed to have assumed increase of risk incident to riding on the platform instead of inside the car. And if you find such is the case, and if you further find plaintiff would not have been injured had he remained inside the car, you should find for the defendant.

(d) Before the plaintiff can recover in this case, he must prove either that the car was so crowded that he could not conveniently sit or stand inside of the car, and went onto the platform on account thereof, or he must prove that he was asked or directed by the conductor to stand upon the platform.

(e) A passenger who rides upon the rear platform of an electric street-railway car, when there is ample room inside of the car, in which there are pendant straps to which a person may hold while standing, is guilty of contributory negligence; and if an injury result to him which would not have occurred had he been inside the car, he cannot maintain an action against the carrier operating the car.<sup>46</sup>

§ 4147. **Contributory Negligence—Standing on Platform by Direction of Employes in Charge of Car.** The plaintiff in order to recover in this cause must prove his case according to the allegations and theory of his complaint. His complaint proceeds upon the theory that he was instructed by the conductor to ride upon the platform,

<sup>45</sup>—St. Louis, B. & S. Co. v. Hopkins, 100 Ill. App. 567 (569, 570).

"These instructions are both vicious. Whether appellee was in the exercise of due care and caution for his own safety on the occasion of the injury and what acts and conduct in fact constituted want of ordinary care, were material questions of fact for the jury to determine from the evidence alone. The first has no proper place in the series and is misleading. \* \* \* The second assumes the existence of

every element of damage referred to in it, and it refers to about all that could exist in any case of this character."

<sup>46</sup>—Terre Haute El. Ry. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703 (706).

"These instructions were correctly refused. The court will not presume that it is dangerous to ride upon the rear platform of a street car, and it is not negligence per se to do so with or without directions from the conductor."

and that the conductor undertook to carry him safely while so riding. If he fails to sustain this theory, you should find for the defendant, provided you also find that he would not have been injured had he remained inside the car.<sup>47</sup>

§ 4148. **Contributory Negligence—Riding on Running Board.** If the jury believe from the evidence that R., while riding on the foot-board of the defendant company's car in question, was injured by reason of a wagon coming in contact with the side of the said car, and if the jury further believe from the evidence that the servants in charge of said car, under all the circumstances shown by the evidence, could not have avoided the collision between the said wagon and the said car by the exercise of the highest degree of care and caution reasonably consistent with the practical operation of said car, and if the jury further believe from the evidence that the said collision was caused by the swinging or turning of said wagon after the front of the car had passed it, so that some part of said wagon swung into or struck against the side of said car and caused the injury complained of, then the jury should find the defendant company not guilty.<sup>48</sup>

§ 4149. **Contributory Negligence—Getting on Car While in Motion.** (a) The court instructs the jury that even if you believe from the evidence that the plaintiff attempted to board the car in question

47—*Terre Haute El. Ry. Co. v. Lauer*, 21 Ind. App. 466, 52 N. E. 703 (706).

Appellant asked and the court refused the above. "In this we think there was no error. Appellee had the right to ride upon the platform without the request of the conductor. Appellee was not bound to prove the facts precisely as alleged."

48—*Chi. C. Ry. Co. v. Math*, 114 Ill. App. 352.

"The only objection pointed out to this instruction is that it singles out and renders unduly prominent appellant's theory of the manner in which the collision was brought about and the accident happened. While it is the well-settled and long-established rule that an instruction should not single out and call the attention of the jury to one alleged fact more than another, yet this rule is subject to another one, that each party is entitled to an instruction hypothetically outlining the evidence and state of the case upon which he relies for obtaining a verdict, and directing the jury to find for the party in whose favor they find the facts constituting either the cause of action or the defense. 'An instruction may properly embody the theory of the party asking it. It is not error for the court at the request of the party to state his theory upon which the case is tried, and then announce the law applicable to such theory.' *Pennsylvania Co. v. Backes*, 133 Ill. 255, 24 N. E. 563. In *Frame v. Badger*, 79 Ill. 441, after giving very weighty reasons why 'it is unfair to select isolated portions of the evidence and

give them prominence by calling the attention of the jury especially to them,' the court expressly adds: 'The court should always instruct that if the facts averred in the issue are proved, reciting them, then they should find for the party in whose favor they shall find the facts, or if either party holding an affirmative fails to prove the affirmative facts, the jury may be told that if they so find they should find against him.' In *Chi. B. & Q. R. R. Co. v. Camper*, 199 Ill. 569, 65 N. E. 448, although an instruction had been given which stated in a general way the doctrine of assumed risk as between master and servant and directed a verdict of not guilty if the jury believed that the injury was the result of one of the risks ordinarily incident to the work, in which the servant was engaged, yet the judgment in favor of the plaintiff was reversed because of the refusal to give a more specific instruction on the same point asked by defendant, the Supreme Court saying (p. 577): 'The instruction given was mainly abstract and wholly general in its character, and did not, as the other would have done, direct the attention of the jury to the real issue on which their verdict would have to be based and to the evidence under that issue.' This is precisely what the instruction refused in the case at bar would have done. It was not covered by any other given instruction, and we cannot say that it was not harmful error to refuse it. *Chi. & A. R. R. Co. v. Harrington*, 192 Ill. 9 (24), 61 N. E. 622; *West Chi. St. R. R. Co. v. Kautz*, 89 Ill. App. 309."

while the car was in motion, that fact, if it be a fact, does not necessarily charge the plaintiff with contributory negligence as a matter of law. The question is still for the jury whether, in view of that fact and of all the other facts and circumstances of the case, the plaintiff was or was not exercising ordinary care, under the circumstances, for his own safety.<sup>49</sup>

(b) The court instructs you that if you believe, from the evidence, that the train in connection with which it is claimed plaintiff was injured had stopped at the north side of T. street, and started up therefrom before plaintiff attempted to step upon the grip-car thereof, and that while the same was in motion the plaintiff attempted to board the same, and, in consequence thereof, received the alleged accident and injury, then the plaintiff cannot recover and your verdict should be not guilty.<sup>50</sup>

(c) The court instructs you that if you believe, from the evidence, that the train in connection with which it is claimed plaintiff was injured had stopped at the north side of A. street, and started up therefrom before plaintiff attempted to step upon the grip-car thereof, and that while the same was in motion, the plaintiff attempted to board the same, and, in consequence thereof, received the alleged accident and injury, then the plaintiff cannot recover, and your verdict should be not guilty.<sup>51</sup>

49—*Lindberg v. Chi. C. Ry. Co.*, 83 Ill. App. 433 (434, 435).

"This instruction presents a correct statement of the law, but it is argumentative. It undertakes to tell the jury what is not necessarily and as a matter of law negligence. It is calculated to impress the jury with an argument that the very fact most relied upon by the defendant as constituting contributory negligence need not be so considered by them. It is undoubtedly a correct proposition that the jury might have determined that this fact did not constitute contributory negligence, but they should have been left to reach such conclusion, if at all, by their own determination of what did, under the given circumstances, constitute ordinary care."

50—*Pope v. Chi. C. Ry. Co.*, 113 Ill. App. 503 (504).

"It has often been held by our Supreme Court and by this court that it is not negligence per se and as a matter of law for a passenger to get on a street car while it is in motion."

51—*Pope v. Chi. C. Ry. Co.*, 113 Ill. App. 504.

"It has been often held by our Supreme Court and by this court that it is not negligence per se, and as a matter of law, for a passenger to get on a street car while it is in motion. No. *Chi. R. R. Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407; *Chi. R. R. Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075. It follows that in the absence of special circumstances which take the case out of the rule above stated, it would be error in an action against a street railroad company to instruct the jury that if

they find that the plaintiff attempted to get upon the street car while in motion and in so doing received the injuries complained of, they must find the defendant not guilty. This rule of law is not controverted by counsel for appellee, but their contention is that the plaintiff and his witnesses testified that the car was standing still when he attempted to get upon it; that such evidence tended to prove only the first and fourth counts of the declaration, which charge that the car had been stopped at the place where, etc., to receive plaintiff as a passenger, and while it was standing still and while plaintiff was attempting to board it, it was suddenly and violently started, etc.; that as there was no evidence given or offered in support of the other counts of the declaration there was an abandonment of those counts and in examining the instruction the declaration must be considered as containing only the first and fourth counts. Counsel then in effect argue that the declaration charged and the evidence on the part of the plaintiff tended to show that the car stopped at the place where, etc., to receive passengers; that while it was standing still and plaintiff was attempting to get upon it, it was suddenly started up, etc.; that the evidence for defendant tended to show that the car had made its stop at the usual place on the north side of A street and had there taken on and let off passengers and then started on its way, and that after it had gone some distance, and attained half the usual speed, plaintiff attempted to board it, and was in-



§ 4150. **Contributory Negligence—Care to be Exercised in Alighting from Electric Car.** The court instructs the jury that in determining the question whether the plaintiff was negligent in and about alighting from the street car in question, under the circumstances under which the jury find from the evidence the plaintiff did so, they are to take into consideration, not alone the age and condition of the plaintiff at the time, but also the relative danger and risks attending the act of alighting from a car propelled by electricity, as the one in question was, and the character and condition of the locality, and the plaintiff's prior knowledge of its character and condition; and they are instructed that the plaintiff was required to exercise care for her safety in proportion to the danger and risks attending the act of alighting from an electric car under such circumstances, and a failure on her part to exercise this care is negligence, which deprives her of the right of recovery in this action; and if the jury believe from the evidence in this case that the plaintiff did not exercise such care, and was guilty of such negligence, and that such failure to use such care and such negligence contributed in any way to the injury complained of in this action, then the jury should find the defendant not guilty.<sup>52</sup>

§ 4151. **Contributory Negligence—Getting off Car While in Motion—Comparative Negligence.** (a) The jury are instructed that if

jured, and then say that the issue was not as to whether plaintiff was guilty of contributory negligence in attempting to board the train, but whether he attempted to board it while it was stationary or while it was in motion; that the allegation that the car was standing still when plaintiff attempted to get upon it was a material allegation of the first and fourth counts, a failure to prove which was fatal to his right to recover, and therefore the instruction was proper.

"This contention cannot be sustained. There was no abandonment by the plaintiff of any count of the declaration. The second count does not state that the train was stopped or that the car was standing still when plaintiff attempted to board it, but does allege that the defendant negligently and violently started the train with sudden jerks whereby, etc. This count and the sixth and seventh counts are counts charging the negligent running and management of the train without regard to whether the train was in motion or standing still when plaintiff attempted to get upon it."

52—Hope v. West Chi. St. Ry. Co., 82 Ill. App. 311 (314, 315).

"The appellant's theory, as stated in her declaration, was that the car had stopped for the purpose of allowing her to alight, when she attempted to alight. There was no evidence that there is any danger on alighting from an electric car when it is at rest. Manifestly, the propelling power of a car is a circumstance of no moment as affecting the risk of alighting therefrom when it is at rest. The power un-

der such circumstances can not possibly increase the danger of alighting, if there is any danger in alighting, from a stationary car. But the court, in the instruction, assumes not only that there is danger in alighting from a standing car, but that there is greater danger in alighting from an electric car while at rest than from some other kind of street car, thereby inviting the jury to require greater care on the part of appellant in alighting from the car on which she was a passenger when it stopped, than she would be required to exercise while alighting from a car at rest, propelled by power other than electricity. This is at variance with the views expressed in *Cicero & P. St. Ry. Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331. The language is, 'the relative danger and risks attending the act of alighting from a car propelled by electricity, as the one in question was.' And the jury were instructed, 'that the plaintiff was required to exercise care for her own safety in proportion to the danger and risks attending the act of alighting from an electric car under such circumstances.' This plainly assumes that there was apparent danger in alighting from the car under the circumstances, because, certainly, the appellant could not be required to guard against danger not apparent. The instruction was calculated to create the impression in the minds of the jury, that there was danger in alighting from an electric car even when at rest, and induce them to require a high degree of care on the part of appellant."

they find from the evidence that the plaintiff was injured while alighting from the cars while it was in motion, and that such conduct on her part under all the circumstances shown by the evidence was a want of ordinary care for her own safety which materially contributed to the injury complained of, then she cannot recover in this case, and your verdict should be for the defendant.<sup>53</sup>

53—*Chi. C. R. Co. v. Canevin*, 72 Ind. App. 81 (84).

"The rule is well settled by numerous adjudications that there can be no recovery if the plaintiff's negligence contributed in any degree to the injury. This was the rule in this State prior to the decision in *Galena & C. U. R. R. Co. v. Jacobs*, 20 Ill. 478, the doctrine of which case has been repudiated by the Supreme Court, and it is the rule now, as will appear by reference to the decisions prior to and since the decision of the *Jacobs* case. *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *C. & M. R. R. Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65. In the last case the court, *Ib.* 202, say: 'While the courts will as to passengers and freight apply the enforcement of the strictest diligence, skill and care, and for want of them measure the liability for slight negligence, yet the injured party must be free from such negligence as contributes to the injury complained of. *Galena & C. U. R. R. Co. v. Yarwood*, 15 Ill. 468, 65 Am. Dec. 682; *Galena & C. U. R. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Aurora Branch R. R. Co. v. Grimes*, *supra*; *Knight v. Albert*, 6 Pa. St. 472, 47 Am. Dec. 478; *New York & E. R. Co. v. Skinner*, 19 Ill. 301; *T. R. Co. v. Munger*, 5 Denio 264, 4 Comst. 357; *Clark v. Syracuse & U. R. Co.*, 11 Barb. 114; *Talmadge v. R. & S. R. Co.*, 13 Barb. 496; *Marsh v. N. Y. & E. R. Co.*, 14 Barb. 365.

"These decisions concur in this, as a general rule, and are sustained by more than fifty decisions referred to in them, made under a variety of circumstances."

After the doctrine of comparative negligence, which had its origin in this state in the *Jacobs* case, was abandoned, the rule as announced in *C. & M. R. R. Co. v. Patchin*, *supra*, was revived. In *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905, the court say: 'We have repeatedly held in effect in the later decisions beginning with *Calumet Iron & S. Co. v. Martin*, 115 Ill. 358, 3 N. E. 456, that the doctrine of comparative negligence, as announced in the earlier cases, is no longer the law of this State, and it is to be no longer regarded as the correct rule of law applicable in cases of this character. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246. The doctrine announced in the latter decisions as applied to this class of

cases requires as a condition to recovery by the plaintiff that the person injured be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant.'

"In *No. Chi. St. R. R. Co. v. Eldridge*, 151 Ill. 542 (549), 38 N. E. 246, the court say: 'The rule to which the court is now committed by repeated decisions is that the plaintiff, before he can recover on the mere ground of negligence, must show that the injury of which he complains was caused by the negligence of the defendant and that he himself at the time was in the exercise of ordinary care. When the party injured at the time of the injury is in the exercise of ordinary care, no contributory negligence is legally attributable to him, although he may not have been in the exercise of the highest degree of care.' See also *Ill. Cent. R. R. Co. v. Ashline*, 56 Ill. App. 475, and *Kinnare v. C. R. I. & P. Ry. Co.*, 57 Ill. App. 153.

"The rule that in order to entitle a plaintiff to recover for injury alleged to have been occasioned by the negligence of the defendant it must appear that the plaintiff himself was in the exercise of ordinary care for his own safety, has been settled in this State by numerous decisions, very many of which are cited in *Calumet Iron & S. Co. v. Martin*, 115 Ill. 358-368, 3 N. E. 456. It seems too clear to require argument that if a plaintiff must have exercised ordinary care to recover, it necessarily follows that any want of ordinary care must prevent a recovery; and such is the rule announced by text writers and the courts. *Beach, Contributory Neg.*, § 11; 2 *Thompson, Trials*, § 1679; 2 *Thompson, Neg.*, pp. 1151-1152; 1 *Shearman & Redf. Neg.*, 5th ed., § 93; 1 *Bevan, Neg.*, p. 175, n. 4.

"It has been expressly held erroneous to instruct the jury that the plaintiff would be entitled to recover if his own carelessness did not materially contribute to the injury. *Arts v. C. R. I. & P. R. Co.*, 38 Ia. 294; *Monongahela City v. Fischer*, 111 Pa. St. 9, 2 Atl. 87, 56 Am. Rep. 241; *Mattimore v. Erie City*, 144 Pa. St. 14, 22 Atl. 817. In *N. J. Express Co. v. Nichols*, 33 N. J. L. 439, 97 Am. Dec. 722, the court say: 'The injury must be attributable to the defendant's negligence, and to that alone; if occasioned in any degree by the plaintiff's own negligence, he is without redress,' citing numerous authorities.

(b) The mere fact that the car started before the plaintiff's wife had time to alight would not give her the right to alight from the car while the same was going at a rate of speed which would make it dangerous to do so.<sup>54</sup>

(c) The jury are instructed that the rule read in evidence by plaintiff's attorney, claimed to be a rule of the defendant relating to the conduct of conductors and motormen at railway crossings, was not admitted by the court, nor should it be considered by the jury, as furnishing a substantive ground of complaint to the plaintiff, and there can be no recovery in this case on said rule.<sup>55</sup>

(d) If you find that a preponderance of the testimony before you shows that, on the occasion of the accident about which the witnesses before you have testified, the defendant's conductor and motorman, or either of them, failed to exercise such care for the plaintiff's safety as a very prudent, cautious, and competent person would have exercised under like circumstances, and that such failure to exercise such care, if there was such failure, caused said accident, and that as the direct result of said accident plaintiff was injured, then, unless a preponderance of the testimony shows that the plaintiff failed to

"In *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546, which was a case for negligence for not keeping a highway in repair, the court, p. 276, say: 'In actions of this kind, it is well settled that if the damage sustained has been in any degree directly caused by his own fault or negligence, the plaintiff cannot recover against the town,' citing a large number of cases.

"In *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, the defendant asked the court to charge that 'If the negligence of the deceased contributed in any manner to cause the collision which resulted in his death, the plaintiff cannot recover,' which the court refused to do. Held, that the charge requested stated the law in precise words, and that the refusal was error. *Ib.* 442. In *Blanchard v. Lake Shore & M. S. Ry. Co.*, 126 Ill. 416, 18 N. E. 799, 1 L. R. A. 403, 9 Am. St. 630, the court quotes with approval Wharton on Negligence, as follows: 'The burden is upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part.'

See § 2072, instructions omitting the word "materially," where above was approved.

54—*Indianapolis St. Ry. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39 (42).

"While it is very true that the wrongful and premature starting of the car would not of itself justify the plaintiff's wife in leaving it while in motion, yet so far as the instruction might convey the idea that the plaintiff's wife had no right under any circumstances to attempt to get off the car while it was in motion, it was too narrow. Usually there is a time before a street car comes to a full stop and after start-

ing when a passenger ordinarily active may safely alight from the step to the street. There are also other times when a car is going at such a rate of speed as to make it dangerous, and when an attempt to alight would be negligence. So whether the alighting or the attempt to alight from a moving street car not running at a dangerous rate of speed is itself negligence or due care, is a question for the jury, to be determined upon its own facts under proper instructions by the court. And if it is shown that the plaintiff acted as those of ordinary prudence and caution ordinarily act in getting off of moving street cars, the act should not be counted as negligence. *Connor v. Ry. Co.*, 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; *Citizens' St. Ry. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446; *Corlin v. Ry. Co.* 154 Mass. 197, 27 N. E. 100; *Cicero & P. St. Ry. Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331."

55—*Chi. C. Ry. Co. v. Lowitz*, 218 Ill. 24 (31, 32), 75 N. E. 755.

"If this instruction had been given, the jury might easily have concluded that the court meant to tell them that there could be no recovery in the case, based on the act of the motorman in starting up the car, while appellee was in the act of alighting therefrom, without using proper care to ascertain that no passenger was attempting to get on or off the car. Or, to speak more generally, the jury might easily mistake the language of the requested instruction to mean that there could be no recovery, based on the violation of the rule of duty imposed by law upon appellant, which was sought to be enforced by the rule of appellant. We do not think there was error in refusing the instruction."



exercise such care for his own safety as a person of ordinary prudence would have exercised under like circumstances, and that such failure on his part to exercise such care, if there was any such failure, caused said accident, or if you fail so to find that plaintiff was injured as the direct result of said accident, or if you do so find that the plaintiff failed to exercise such care for his own safety, then in either such event your verdict should be for the defendant.<sup>56</sup>

§ 4152. **Degree of Care in Alighting from Car.** (a) The court instructs the jury that the ordinary care required of the plaintiff, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an ordinarily prudent person, under the circumstances surrounding deceased at the time of the alleged injury, and, in order to ascertain what the surrounding circumstances were, the jury have the right to take into consideration the manner and place in which the cars of the defendant have passed each other on the switch of the defendant before the killing of A. B., so far as the evidence may show such manner and place, together with all the other facts and circumstances in evidence.<sup>57</sup>

(b) The court instructs you that if you find from the evidence that the plaintiff by the use of due care, caution and vigilance on her part could have done anything which would have prevented the accident and injury in question, then she cannot recover, and your verdict should be not guilty.<sup>58</sup>

(c) The court instructs the jury that, if they find from a consideration of the evidence concerning all that happened at, before and after the time of the accident that the plaintiff was exercising reasonable and ordinary care, and that the defendant by its agents was guilty of negligence, as charged in plaintiff's declaration, and that

56—Dallas Consol. E. St. Ry. Co. v. McAllister, — Tex. Civ. App. —, 90 S. W. 933 (936).

"Under the pleadings and evidence the jury by this charge, in order to return a verdict for defendant, were required to find, first, that the appellee was injured in attempting to alight from a moving car; second, that his so doing was negligence; and, third, that such negligence contributed to his injuries. If appellee was injured in attempting to alight from a moving car, and his act in so doing was negligence, he could not recover; and in requiring the jury to find that such act contributed to his injury the charge submitted an issue not raised by the pleadings or evidence, and was confusing and misleading. Such a charge in similar cases has been held erroneous. *Tex. & Pac. Ry. Co. v. McCoy*, 90 Tex. 264, 38 S. W. 36; *Gulf, C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Gulf, C. & S. F. Ry. Co. v. Vizard*, 13 Tex. Ct. Rep. 448, 88 S. W. 457; *Gulf, C. & S. F. Ry. Co. v. Hill*, 29 Tex. Civ. App. 12, 70 S. W. 103; *Gulf, C. & S. F. Ry. Co. v. Bryant*, — Tex. Civ. App. —, 66 S. W. 808; *Mercher v.*

*Railway*, — Tex. Civ. App. —, 85 S. W. 470; *Ebert v. Railway*, — Tex. Civ. App. —, 49 S. W. 1105; *Wilcox v. S. A. & A. P. Ry. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 361."

57—*Springfield Cons. Ry. Co. v. Sommer*, 55 Ill. App. 553 (554).

"We are of the opinion that the above instruction is erroneous in that it singles out and calls undue attention to the evidence as to 'the manner and place in which the cars of defendant had passed each other on the switch before the killing of A. B.'"

58—*Elwood v. Chi. C. Ry. Co.*, 90 Ill. App. 397 (400).

"This instruction is bad in that it assumes a want of due care, caution and vigilance upon the part of the plaintiff. It is also bad as stating an incorrect rule, for there were many things which the plaintiff might have done while exercising ordinary care which would have avoided the injury, such, for instance, as remaining at home, and yet was not bound to do in order to be in the exercise of ordinary care and to be entitled to recovery for the negligence of others."

plaintiff was injured thereby, then the jury should find the issues for the plaintiff.<sup>59</sup>

§ 4153. **Contributory Negligence—Failure to Take Hold of Handrail While Alighting.** If there were handrails which plaintiff could have held to until she reached the ground, and if the plaintiff stepped from said platform a distance of seventeen or eighteen inches to the ground without holding to said handrail or handrails or other object to support herself, then, in that event, I instruct you that she was guilty of contributory negligence, and your verdict should be for the defendant.<sup>60</sup>

§ 4154. **Contributory Negligence—Plaintiff's Prior Course of Conduct in Alighting from Car.** Some evidence was admitted referring to the question of the plaintiff's getting on and off cars since the time of the alleged injury. This evidence was submitted to you for your consideration in connection with the proposition as to the extent of Mr. B.'s injury. You, of course, are to determine whether it illustrates that question or not; and if so, to what extent. It is not to be considered by you as to whether at the time of the alleged injury, Mr. B. was then in the exercise of ordinary care or not.<sup>61</sup>

§ 4155. **Intoxication as Contributory Negligence.** If it be the case that the plaintiff, at the time he was injured, was under the influence of liquor or intoxicated, nevertheless it does not follow that he cannot recover in this action. Whether he was under the influence of liquor or intoxicated is material only as bearing on the question of whether, in attempting to get on said car, he was, under the circumstances, exercising ordinary care, that is, such care as prudent persons ordinarily exercise under like circumstances.<sup>62</sup>

59—West Chi. St. R. R. Co. v. Luka, 72 Ill. App. 60 (63).

"This instruction is erroneous in that it tells the jury in effect that they may consider evidence of what happened after the accident on the question of the appellee's care and appellant's negligence. While such an instruction would be proper in reference to damages, it opens too broad a field on the question of care and negligence."

60—Crump v. Davis, 33 Ind. App. 88, 70 N. E. 886 (888).

"The instruction selected one of the facts connected with appellee's conduct, and ignored the others. The question of negligence was for the jury to determine in view of all the circumstances under which she acted. It is not negligence per se for a passenger to fail to take hold of the handrail in alighting from a street car. 3 Thompson, Neg., 2nd. Ed., p. 949, ¶ 3589; p. 953, note 516; p. 895, note 216; Schaefer v. Central C. Ry. Co., 30 Misc. 114, 61 N. Y. Supp. 806; Neslie v. Second, etc., Ry. Co., 113 Pa. 300, 6 Atl. 72; Martin v. Ry. Co., 35 N. Y. Supp. 220; McDonald v. Ry. Co., 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. 437."

61—Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41 (49).

"The practice of plaintiff as to his manner of departing from street cars on other occasions, either before or after the injury complained

of, could not be legitimately considered by the jury as throwing any light upon his conduct at the time he was injured. Counsel for plaintiff in error contended that this testimony was admissible for the purpose of showing that the plaintiff was a man who persisted in getting off the cars in the way that suited him. This might open the door in any case of this sort to an endless investigation. If the defendant company is allowed to prove what plaintiff had done on another occasion, the plaintiff would certainly have a right to justify or explain his conduct upon such occasion. The question is whether he was guilty of any act of negligence, either contributing to or causing his injury; and the general character of the plaintiff touching his want of care or diligence with reference to the particular subject matter under investigation is not a question in issue. The testimony was therefore irrelevant. Atlanta & N. P. R. R. Co. v. Smith, 94 Ga. 107, 20 S. E. 763."

62—So. Chi. C. Ry. Co. v. Dufresne, 200 Ill. 456 (462-463), 65 N. E. 1075, aff'g, 102 Ill. App. 493.

"This instruction was objectionable for different reasons. In the first place, it was argumentative in form. Instructions should merely state the law for the guidance of the jury and not employ the language of counsel in argument."

**§ 4156. Injury to Passenger While Trying to Escape from Apparently Imminent Danger.** The court instructs the jury that, where one is by negligence or misconduct of another placed in a position of such apparent danger as to cause, by fright or otherwise, a loss of self-possession, or is placed in a position of compulsion and without reasonable opportunity for reflection, then the party so guilty of such negligence or misconduct cannot complain that the party has not exercised cool presence of mind, and has, by consequence thereof, placed himself in a position of increased danger, and thereby been injured, but in such case the party guilty of such negligence or misconduct will be liable for such injury so resulting. And in this case, if the jury believe from the preponderance of the evidence that the conductor suddenly spit and struck at the plaintiff, and that by reason of such conduct, through fright or otherwise, plaintiff sprang from the car, and without reasonable opportunity for reflection staggered or ran against the horse of the approaching car, and was thereby knocked down and injured, then plaintiff would be entitled to recover in this action.<sup>63</sup>

#### LIABILITY FOR INJURIES TO PERSONS OTHER THAN PASSENGERS OR EMPLOYES.

**§ 4157. Degree of Care.** The jury are instructed that one who uses the public streets has a right to expect from others using the same highway ordinary prudence and care to avoid accidents, and to rely upon that presumption in determining their own manner of using such streets.<sup>64</sup>

**§ 4158. Care Due Trespasser on Car.** The court instructs the jury that mere negligence or indifference or want of care on the part of the defendant will not sustain the plaintiff's case, and even if the jury believe, from the evidence, that the defendant was guilty of negligence or indifference or want of care, they cannot find the defendant guilty unless the plaintiff also shows by a preponderance of the evidence the act complained of by the plaintiff was willful, wanton or malicious.<sup>65</sup>

63—Hagestorm v. West Chi. St. R. R. Co., 73 Ill. App. 574 (576).

"This instruction, if correct in other respects, which we are inclined to think is very doubtful, was properly refused because it in effect tells the jury that certain facts, if established, entitle appellant to a recovery. In other words, that these facts constitute negligence. This the court should not do in a case like this, but leave the jury to determine whether the enumerated facts establish negligence. Ill. Cent. R. R. Co. v. Slater, 139 Ill. 199, 28 N. E. 830; Village of Clayton v. Brooke, 150 Ill. 105, 37 N. E. 574, and cases cited."

64—No. Chi. St. R. R. Co. v. Irwin, 202 Ill. 545 (548), rev'g, 104 Ill. App. 150, 66 N. E. 1071.

"This instruction omits element of ordinary care, and invades province of jury, whose duty it is to determine such fact."

65—Kirton v. No. Chi. St. R. R. Co., 91 Ill. App. 554 (556).

"The objection urged to this instruction is that it says to the jury in effect that, although they may believe, from the evidence, that the act of the conductor amounted to trespass, yet that the plaintiff in error could not recover unless such act was 'willful, wanton or malicious.'"

"The four counts in the original declaration charged that the act complained of was willful, wanton and malicious. Four additional counts were filed, which were the same as the original counts except that instead of charging that the act was 'willful, wanton or malicious,' the charge is made that such act was 'wrongful.'"

"Any unlawful act committed with violence to the person of another is trespass. One who does an unlawful act, or a lawful act in an un-



**§ 4159. Joint Liability With Other Individuals or Corporations.**

If you believe from the evidence that plaintiff's wagon wheel struck the rail of the X. Company, and that the striking of the same was the proximate cause of plaintiff's fall and injury, and that the striking and sliding of the wheel upon the defendant's rail, if it did so strike and slide upon the same, did not cause plaintiff's fall, then your verdict will be for the defendant.<sup>66</sup>

**§ 4160. Delegation by Municipality to Street Railway Company of Duty to Keep Streets Safe.** The jury are instructed that cities and villages in this State are by law primarily charged with the duty of keeping their streets reasonably safe and free from obstructions, and this is a duty which the city of C. in this case cannot delegate to any one else, nor can it shift such responsibility or duty to the defendant, the W. R. C., except upon its tracks and right of way.<sup>67</sup>

**§ 4161. Duty of Street Car Company as to Removal of Snow and Ice From Tracks.** (a) The court instructs the jury that even though they believe from the evidence that the defendant, the W. R. C., was negligent in pushing or throwing the snow off of its tracks and right of way into the street, by the use of snow plows and sweepers, at the time and place where the accident complained of in this case occurred; and if the jury further believe from the evidence in this case that certain storekeepers or other persons at the time and place in question did shovel snow and ice off from the sidewalk into the street, and did make paths between the sidewalk and defendant's tracks and right of way by throwing the snow and ice to either side out of such paths, thereby making piles of snow and ice between such sidewalk and defendant's right of way at the time and place in

lawful manner, to the injury of another, is liable as a trespasser.

"In such case, the person injured may be entitled to recover damages whatever may have been the trespasser's motive. Want of malice is not a bar to a right to recover. *Shanley v. Wells*, 71 Ill. 81.

"If an unlawful act causes immediate injury, whether it be intentional or not, trespass lies. *Guille v. Swan*, 19 John. 381; *Maye v. Tappan*, 23 Cal. 306.

"The question of whether the act was willful, wanton or malicious relates only to damages, not to the right to recover. If the act complained of be willful, wanton or malicious, the jury is authorized by law to give smart money or punitive damages. *Donnelly v. Harris*, 41 Ill. 129; *Hawk v. Ridgeway*, 33 Ill. 475; *Little v. Mimson*, 54 Ill. App. 438-439. If the act is not willful, wanton or malicious, the jury may not give punitive but may give actual damages. It was error to say to the jury, as this instruction does in effect, that the plaintiff in error could not, under the declaration in this case, recover actual damages, unless the conductor acted willfully, wantonly or maliciously. The giving of this erroneous instruction may have had a controlling influence with the jury, and the judgment must be reversed."

66—*Shelton v. No. Tex. Trac. Co.*, 32 Tex. Civ. App. 507, 75 S. W. 338 (339).

"The authorities clearly establish appellant's proposition under the assignment under consideration, to the effect that 'if an accident occurs from two causes, both due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for the injury resulting, and the negligence of one furnishes no excuse for the negligence of the other.' See *Markham v. Navigation Co.*, 73 Tex. 27, 11 S. W. 131, 3 L. R. A. 368; *Gulf, C. & S. F. Ry. Co. v. McWhirter*, 77 Tex. 357, 14 S. W. 26, 19 Am. St. 755; *Gonzales v. City of Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. 17; *Gulf, C. & S. F. Ry. Co. v. Godair*, 3 Tex. Civ. App. 517, 22 S. W. 777."

67—*Kornazsewka v. West Chi. St. R. Co.*, 76 Ill. App. 366 (369).

"We think the above instruction was calculated to mislead the jury because the case had been discontinued as to the city, and the jury might reasonably infer from the instruction that the court meant that appellee was not liable in case the obstruction was outside of its tracks and right of way. This may have been the basis of the verdict."

question, and if the jury, after considering all the evidence in the case, are unable to determine which of the acts above described was the direct cause of the accident complained of, then the jury should find the defendant not guilty.<sup>68</sup>

(b) If the jury believe from the evidence that the snowstorm occasioning the deposit of snow upon the track of the company was an extraordinary one, the court instructs the jury, that it was the duty of the defendant company in clearing its tracks, to use commensurate exertions not to create obstructions to the passing of pedestrians at street crossings, and if by the use of such exertions, the company might have avoided such obstructions at the intersection of H. and M. streets, and that it nevertheless did create such obstructions, then such obstruction existed without a warrant of law.<sup>69</sup>

§ 4162. **Duty as to Electric Wires.** The court instructs the jury that the business of distributing electricity on wires strung over the streets of the city of C. is a dangerous business, and the persons or corporations engaged in the same are held to the utmost degree of care and diligence in the construction and maintenance of its line of wire so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured.<sup>70</sup>

§ 4163. **Sounding Bells and Gongs—Use of Proper Brakes.** (a) So, therefore, if you find from a preponderance of the evidence that on ———, plaintiff was driving a covered wagon along McL. avenue,

68—*Kornazsewka v. West Chi. St. R. R. Co.*, 76 Ill. App. 366 (368).

This "instruction is erroneous in that it tells the jury that, although appellee was negligent and the storekeepers and others were negligent, if they were unable to determine which of the acts of negligence was the direct cause of the accident, then they should find for appellee. This assumes that the accident may have been caused by either appellee or the others, whereas we have seen that the evidence would justify a finding that it was the result of their joint acts. If the latter be true, then appellee is liable. *Pullman P. Car Co. v. Laack*, 143 Ill. 261, 32 N. E. 285, 18 L. R. A. 215, and cases cited."

69—*Newport News & O. P. Ry. & E. Co. v. Bradford*, 99 Va. 117, 37 S. E. 807 (809).

"The instruction given for the plaintiff was misleading if not erroneous. It said in effect to the jury that if they believed that the snowstorm causing the deposit of snow on the defendant's track was an extraordinary one, then it was the duty of the defendant to use extraordinary exertions not to create obstructions at street crossings. It was the duty of the defendant to exercise ordinary care and prudence in removing the snow from its track. What is ordinary care depends upon the facts of the particular case. That which would be ordinary care in one case might be gross negligence in another. *Bertha Zinc Co. v. Martin's Admr.*, 93 Va.

791 (805, 806), 22 S. E. 869; 1 *Shear. & Redf. Neg.*, § 53; *Elliott, Roads & S.*, § 409. But the mere fact that the deposit of snow upon the defendant's track was caused by an extraordinary snowstorm did not require the defendant to use extraordinary exertions to avoid obstructing street crossings in removing the snow, but only required it to use that degree of care and prudence which ordinarily prudent persons exercise under like circumstances."

70—*Calumet El. St. Ry. Co. v. Grosse*, 70 Ill. App. 381 (383, 384).

"We will not by any present holding deny the high degree of care to be exercised by persons or corporations in the use along the public highways of the powerful and secret agency of electricity, but under the circumstances of this case, where it was also shown that the defect in the insulation was not discernible from below, and could only be seen by a close inspection at the very point of imperfection, we can not assent to the proposition, as one of law, that the 'utmost degree of care and diligence'—that is to say, such a degree of care as might be observed by the exercise of everything that human ingenuity could suggest—was required. And because such instruction, under the facts of this case, is unsupported by authority, and is contrary to what we conceive to be the law, and was probably prejudicial to the appellant, we are constrained to reverse the judgment and remand the cause for another trial."

in this city, and was driving said wagon beside and so near the track of defendant company that a car could not pass that wagon without a collision; and if you find that the servants of the defendant company propelled an electric car along the track on said street from the rear of and against the wagon of plaintiff, overturning it and throwing plaintiff out and injuring him; and if you further find that defendant's servant saw, or by the exercise of ordinary and reasonable diligence could have seen, said wagon turning into the track, or moving in such position that it could not be passed without a collision, and failed, when he had reason to apprehend danger, to regulate the speed of his car so that it might be quickly stopped, should occasion require it, or that he failed, when the danger became imminent, to apply the brakes and sound the gong or bell, or give other signal, and use every means in his power to stop the car and prevent an accident; and if you find that such negligence and want of care of defendant's servants, if shown, was the proximate cause of (that is to say, the cause which led to or directly contributed to produce) the accident or injury—then there can be a recovery, and your verdict should be for the plaintiff.<sup>71</sup>

71—Memphis St. Ry. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374 (376).

"It is said that the rule thus laid down would impose upon the motorman the performance of duties which were practically impossible of accomplishment; that by this rule he is required to sound his gong, or give other signal, to apply his brake, and to use every means in his power to stop his car; and that this would make the motorman capable of reversing with one hand, of winding the brake with the other, and at the same time stamping his gong to warn the person who had thrust himself or fallen into danger. We have no statute declaring that the special acts referred to by the circuit judge, or any other special act, should be performed by the servants of the company. The question, then, is one at large, to be determined upon general considerations drawn from the nature of the particular business, and the habits and customs of the people whom it serves. Street cars are designed to ply their business upon public streets—many of the streets densely crowded. People in vehicles and on foot must be constantly encountered, going in both directions, with the course of the car and in the opposite course, and most generally in the hurry of business. In other words, the car may at any time have to pursue its way through the throng of a city's business. Under such circumstances, and even when the streets are not crowded, a mishap may at any moment occur, and may come in a manner which no man can accurately forecast in all its details. The person propelling the car should be left free to choose the best means of preventing the accident at the time, as the situation is then presented to him. The means at hand for pre-

venting the collision are the sounding of the gong for the purpose of warning the person about to be collided with, in order that he may save himself, the putting on of brakes, and the application of the reverse lever. In some situations the sounding of the gong may be the means which the occasion requires as the best means for the prevention of the accident; in others, it may be best to apply the brake; in others, the reverse lever. Sometimes it may be reasonably within the power of the motorman to put in use two of these means, and sometimes, perhaps, all of them, sometimes only one of them; and under some circumstances, we may well assume, it would be best that he should attempt only one of the means provided, as being the most efficient, time lacking to use the others, or even to attempt their use. Subsequently, when his conduct is displayed in the evidence for examination before a court and jury, it is not for the judge to say that, under the circumstances surrounding and attending the accident detailed, he should have done this or that particular thing; but, on the contrary, when all of the circumstances are shown, and it is made to appear what he did at the time for the prevention of the accident, it is for the jury to say whether he did all that he could do (that is, all that a man of ordinary intelligence and prudence and of reasonable alertness could have done under the special circumstances proven) to stop the car and prevent the accident. An instruction that the motorman should do some special thing is an invasion of the province of the jury and is the more marked, because, while the evidence tended to show that the motorman did reverse his car, there was no



(b) If you find that the motorman did everything in his power to stop the car and avert the injury after discovering the perilous situation of the horse, your verdict should be for the defendant, even though you find that the failure to stop the car and avoid the collision was due to the inexperience of the motorman or the defective brakes or appliances, if you further find that the plaintiff's own negligence contributed to the injury.<sup>72</sup>

(c) With respect to the failure to sound the gong, or to give warning of the car's approach, you are instructed that such warning is not required under all circumstances, and before you can find against defendant on account of failure to sound its gong, you must find that failure to sound its gong, under the facts and circumstances in the testimony, would have amounted to negligence, and not then unless you find that failure to so sound its gong was the cause of the death of plaintiff's son.<sup>73</sup>

**§ 4164. Failure to Provide Car with Proper Headlight.** In this case, even if you find from the evidence that the plaintiff was negligent in having his buggy on or so near the track of the defendant that it was struck by one of its moving cars, still the plaintiff is entitled to recover if you further find from the evidence that the injury was caused entirely by the negligence of the defendant in failing to have on its said car such a headlight as would have enabled the motorman to have discovered the buggy of the plaintiff in time to have stopped the car before it collided with such buggy by a proper use of the appliances on said car for stopping it and that the injury to the plaintiff would not have happened, notwithstanding the negligence of the plaintiff, if such a headlight had been on such car.<sup>74</sup>

evidence tending to show that he put on the brake. The circuit judge, in effect, told the jury that he should have applied the brake."

72—Little Rock T. & El. Co. v. Morrison, 69 Ark. 289, 62 S. W. 1045 (1046).

"This was refused by the trial court, and we think properly so; for it only makes the defendant company liable for the personal negligence of its motorman in not exercising the proper care to avoid the injury after he saw the perilous situation of the horse, and ignores the question of the incompetency of the motorman and the defect of the brakes and appliances, as factors which, one or both, may have been the real cause of the failure to avoid the injury after the danger was apprehended. If a motorman does not know how to stop a car when it is desired to stop it, and the circumstances go to show that the incompetency was known or should have been known to the master when he put the motorman in charge of the car, the master is directly to blame; for he has, in effect, failed to provide himself with the means to prevent injuries which he could otherwise do. And the same rule applies in the case of defective brakes and other appliances."

73—Masterson v. Transit Co., 204 Mo. 507, 98 S. W. 504.

"The plaintiffs' criticism of that instruction is that it tells the jury that they cannot find for the plaintiffs on the issue as to the sounding of the gong, unless they find that the failure to sound the gong was the cause of the accident, instead of saying that it caused, or was one of the causes contributing to, the accident. Viewing the instruction as an abstract proposition the criticism is not entirely without merit. Where several acts of negligence are charged, either one of which, it is alleged, caused, or contributed to cause, the accident, the jury ought not to be instructed that unless they should find one particular act to have been the sole cause of the accident, they should disregard it entirely. But the defendant, in drawing this instruction, followed exactly the charge in the petition where it is said that, in consequence of the failure to sound the bell, the boy was killed."

74—Met. St. Ry. Co. v. Rouch, 66 Kas. 195, 71 Pac. 257 (258).

"Whatever injury occurred in this case resulted from the collision of the buggy and the car. Having the buggy on or near the track was absolutely necessary to a collision. Without that no collision could possibly occur. Having the buggy on or near the track was therefore a proximate cause of the collision and

§ 4165. **Running Cars on Wrong Track.** The court instructs the jury that they are the sole judges as to what facts are proven by the evidence in the case, and as to whose fault it was that X. was injured, if they find from the evidence that he was injured. They are further instructed, that if they find from the evidence that said X. was in the exercise of ordinary care for his personal safety at and prior to the time of the injury, and if they further find that the railroad company was guilty of negligence which caused the injury, either in running a car northwardly on a track generally used for south-bound traffic (if they find track was so used, and that said car was so run), or in running said car at a rate of speed which was high and unsafe, considering that said car was on the track usually devoted to south-bound traffic (if the jury find it to have been on said track), or if they find that such injury was caused by said car having been driven in a careless and reckless manner (if they find it to have been so driven), then the jury should find the issues for the plaintiff, and assess her damages at such amount as they find from the evidence would be a just compensation for the pecuniary loss sustained by the next of kin of said deceased; not, however, exceeding the sum of — dollars, if they find that said injuries resulted in the death of said X. But whether running the car on the south-bound track, or the speed, or the manner of driving the car was or were negligence, is a question for the jury only.<sup>75</sup>

§ 4166. **Rate of Speed.** (a) The court instructs the jury that unless they believe from the greater weight of the evidence that the defendant, through its servants in charge of its car at the time and place of the accident, negligently ran its car at a speed greater than ten miles per hour, or failed to keep a vigilant watch for persons and vehicles about to be in danger of being struck thereby or negligently

directly contributed thereto. The plaintiff might or might not have been negligent in having the buggy on or near the track, but if he was negligent in so doing he was negligent in a manner that was proximately causative of and directly contributive to the collision and hence to the injury. When therefore the court postulated negligence in the plaintiff in having his buggy on or near the track, so that the car struck it, the court postulated negligence proximately causative of and directly contributing to the collision and the injury. But if the plaintiff's negligence was a cause of the collision and contributed thereto, the collision could not have been caused entirely by anything else. While the defendant's negligence might be in part causative of and contributive to the collision, it could not be the sole and entire cause when another proximate and direct contribution had been hypothesized on the part of the plaintiff. The instruction therefore presented to the jury a contradiction and an impossibility. \* \* \* Since this instruction authorized the jury to ignore want of ordinary care on the part of the plaintiff, proximately causing and directly contributing to his injury, it was erroneous. Such negli-

gence defeats recovery in this state. If the court had in mind a rule applicable to a state of facts in which a plaintiff negligently places himself in a position of peril at the hands of a defendant and then is injured under such circumstances that his negligence is not the proximate cause, while that of the defendant is, such rule was not presented to the jury."

75—No. Chi. St. R. R. Co. v. Irwin, 82 Ill. App. 146 (147, 148).

"This instruction is clearly open to the objection urged against it by appellant's counsel. By it the jury were authorized to find the appellant company guilty of negligence 'in running a car northwardly on a track generally used for south-bound trains.' To so run a car is not negligence in itself, independent of the other circumstances and conditions. We can not say that this instruction was not prejudicial. It seems to express the theory upon which the case was presented to the jury, inasmuch as the court refused an instruction requested by appellant's counsel, 'that the act of the defendant in running its car on the west track in a northerly direction is, of itself and alone, not sufficient to charge the defendant with negligence.'"

failed to ring the gong, and that one or more of such acts of negligence were the cause of the accident and the plaintiff's injuries, then their verdict will be for the defendant. And even though the jury should find that the defendant, through its servants, was guilty of one or more of the acts of negligence hereinbefore stated, if they further find that the plaintiff was himself guilty of negligence which directly contributed to the bringing about of the accident, then their verdict must be for the defendant.<sup>76</sup>

76—Holden v. Mo. Pac. R. Co., 177 Mo. 456, 76 S. W. 973 (1975).

"This instruction clearly confines the right of recovery, so far as rate of speed is concerned, to a rate of speed in excess of 10 miles an hour. This, in our opinion, is a misconception of the law in the operation of railways across busy public streets in a large populous city. \* \* \* The rate of speed at such points must be regulated alone by the conditions and circumstances that confront the operator or motorman at the time. Operating a car at a rate of speed in excess of 10 miles an hour from which an injury resulted would be negligence, because in violation of the ordinance under which the railway assumed to operate its cars. Operating a car across a public street at the rate of 5 miles per hour, from which an injury resulted, if the conditions and circumstances were such as to prompt a reasonable and careful operator to lessen the speed and thereby avoid the injury, would be equally negligent, and the city of St. Louis cannot, by ordinance, absolve the railway company from liability, for want of care and caution in operating its cars across the public streets by limiting and regulating their speed. This rule is clearly announced in numerous cases by this court.

"In Vanatta v. Ry. Co., 133 Mo. 13, 34 S. W. 505, Burgess, J., speaking for the court, said: 'What constitutes negligence in any given case must necessarily depend upon the facts connected with the accident which is claimed to have been occasioned thereby, and the place where it occurred. What would be a negligent rate of speed for an electric street car in one locality would not necessarily be so in another part of the same city or the same street. Plaintiff's right to the use of the street where the accident occurred was concurrent with that of defendant company. It happened under circumstances where and when the law required of those in charge of the car, the exercise of such care and watchfulness, including its rate of speed, as the circumstances of the case and the place where the accident occurred demanded. Under the facts and circumstances in evidence the court would not have been justified in declaring, as a matter of law, that the car was not moving at a rapid rate of speed at the time of the accident. There was sufficient

evidence on this question to justify giving the instruction.' \* \* \* We find also in *Burger v. Ry. Co.*, 112 Mo. 246, 20 S. W. 439, 34 Am. St. 379, a very clear expression and approval of the well settled rule in respect to the duties of railroad companies to the public. MacFarlane, J., in announcing the opinion of the court, said: 'We do not think it follows, from the fact that the statute only enjoins these crossing signals, that no others are required under any circumstances. Our courts have declared, over and over again, that the greatest diligence, watchfulness, and care should be observed by those running and operating trains in towns and cities, especially on and over streets and other public places therein. These duties they owe to every one who has the right to use such public places in common with them.'

"To the same effect is the case of *Frick v. Ry. Co.*, 75 Mo. 609. The court said in that case: 'A less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at the street crossing, or when running longitudinally in a street; but undoubtedly some vigilance is required even between the streets, and the degree required will necessarily vary with the attendant circumstances. In any case the requisite degree of vigilance may be properly designated by the words 'ordinary care,' that is, such care as would be ordinarily used by prudent persons performing a like service under similar circumstances.'

"Thus we find the charge of negligence as to rate of speed in operating cars, from which an injury results, is always one to be determined from the attendant conditions and circumstances. This unbroken line of expression as to the subject being discussed is emphasized in the dissenting opinion of Sherwood, J., in *Lamb v. Ry. Co.*, 147 Mo. 204, 48 S. W. 659, 51 S. W. 81.

While their views are expressed in a dissenting opinion, it is apparent from the majority opinion that in the expression herein quoted, there was no disagreement. The clear announcement of the doctrine by that able and distinguished judge is pertinent to the question involved in above instruction given in this cause, and fully supports the views as herein expressed. He said: 'Outside of the statute, and under the principles of the common law, a



(b) The court instructs the jury that a street-railway company is not obliged to stop its cars or slow up because there are persons, adults or children, on the pavement; that the defendant the St. L. R. Co. had the right to run its train, at Lemp avenue and approaching it, at — miles an hour, and the gripman was not required to slow up or stop merely because there were persons on the pavement, and you must not presume any negligence on his part merely from that fact; and if you believe, from the evidence, that, as he was approaching L. avenue and crossing it, he was looking ahead of him down the street, attending to his duties as defined in the instructions, and that while M. S. was running from the pavement towards him he saw her so quickly as he could by the exercise of ordinary care on his part, under all the circumstances in evidence, and promptly did his best to stop the train, then the jury will find their verdict in favor of the defendant; and the court further instructs you that if you believe he did not do so, but was negligent, and you also believe from the evidence that M. S. was also negligent for one of her age and capacity, as explained in these instructions, in running directly in front of the train and so near to it as she did, and that she thereby contributed to the accident, then your verdict must be for the defendant.<sup>77</sup>

(c) The first question for you to decide is the rate of speed of the car. The only charge of negligence against the defendant in the complaint is that the car was running at a high and negligent rate of speed, and that no bell or other alarm was rung in approaching the street. The ordinance of the city of T. declares that the maximum rate of speed allowed to any car on that portion of P. avenue where the accident occurred is nine miles per hour. If you find that the car was not running to exceed nine miles an hour at the time the accident happened, and if you find that the gong or bell was sounded at a reasonable distance before reaching the crossing you will find for the defendant.<sup>78</sup>

railroad corporation would not perform its full duty of ordinary care unless those employed on a switching engine, engaged in its customary avocation should ring its bell, or, if necessary, take any other precaution adapted to the exigency of the situation. It is this exigency which, like the mercury in the thermometer, determines to what degree prudence shall rise in order to reach the mark of ordinary care.

"The petition in this case is broad enough to include the charge of a negligent rate of speed at the public crossing of Thirteenth and Pine streets, and that question should not have been ignored in the declarations of law. We have reached the conclusion that above instruction as given by the trial court at the request of the defendant was erroneous in limiting plaintiff's right of recovery to the violation of the city ordinance."

77—Schmidt v. St. Louis R. Co., 149 Mo. 269, 50 S. W. 921 (922), 73 Am. St. 380.

"Instructions are to be understood as applied to the facts of the case. Therefore when the court gave above instruction for defendant, which

contains this expression, 'that defendant, the St. Louis Railroad Company, had the right to run its train, at Lemp Avenue and approaching it, at 12 miles an hour,' it meant that the railroad company had the right to do so then and there and under the circumstances that culminated in this accident. The court doubtless did not intend that, but that is what it means, and it was error to have so given it. The same instruction, also, in submitting the question of the child's contributory negligence to the jury, assumes that she did the act charged, and submits only the question of whether or not in doing so it was to be considered negligence in one of her age and capacity. That was error."

78—Atherton v. Tacoma Ry. & P. Co., 30 Wash. 395, 71 Pac. 39 (42).

This "instruction given at the request of defendants directs, if the jury find the speed of the car was within nine miles—the limit of the ordinance—and the bells were rung they must find for defendants. Whether the rate at which the car is running is negligent, must be found in view of all the surrounding circumstances. Safety in the

(d) There is now no law or ordinance fixing the speed at which street cars may be run in the city of I., but it is a question for a jury under the evidence in the cause to determine whether, at the time and place of the accident in controversy, the car was run at such a speed as to be unsafe and dangerous to persons or travelers on the street. The rate of speed at which a car may be safely run is not the same at all places or under all circumstances; a car may be run at a higher rate of speed in the suburbs or sparsely settled parts of a city than it may be in the thickly settled, populous or crowded portion thereof; and, in determining whether the car in controversy was run at a dangerous and unsafe rate of speed, you should take into consideration the time, the place and conditions surrounding the accident. And if you believe that a reasonably careful and prudent motorman, under the conditions surrounding the accident in controversy as shown by the evidence, would have run his car at the rate of speed at which this car was run at the time of the accident, then you would be warranted in finding that the defendant was not guilty of negligence in running said car at the speed at which it was run. But if you believe from the evidence that such motorman under such circumstances would not have run his car at such speed, then you would be warranted in finding that the defendant was guilty of negligence in running the car.<sup>79</sup>

§ 4167. **Same Subject—As to Infants.** (a) If the jury believe from all the evidence and under the instructions of the court that at and immediately before the time of the accident the motorman was driving said street car at a dangerous rate of speed under the circumstances, and that he was careless and negligent in so doing, and that

speed is relative and depends on the facts in each case, and where they are disputed it must be submitted to the jury. *Roberts v. Railway Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

"The jury had already been correctly instructed on the effect of the ordinance as a rule of care in the operation of the cars, but the duty imposed on the defendants was reasonable care in the rate at which the cars were running in view of all the facts occurring at the time of the accident."

79—*Indianapolis St. Ry. Co. v. O'Donnell*, 35 Ind. App. 312, 74 N. E. 253, 73 N. E. 166.

"The principal objection made to the instruction is that by use of the word 'should' the court invaded the province of the jury. There are decisions of both this and the Supreme Court tending to support such contention, but such decisions, in so far as their facts are similar to the facts in the case at bar, cannot at this time be considered as expressive of the law. Of course the court cannot properly instruct the jury as to the weight of evidence, but evidence is admitted by the court for the purpose of being considered and weighed by the jury. 'The instruction amounts to no more than a statement that it is the duty of the jury, in determining the weight

to be given to the testimony of the witnesses, to consider all the evidence bearing on that question.' *Deal v. State*, 140 Ind. 354 (364), 39 N. E. 930; *Anderson v. State*, 104 Ind. 467-472, 4 N. E. 63, 5 N. E. 711, and cases cited; *Smith v. State*, 142 Ind. 288 (291, 293), 41 N. E. 595; *White v. State*, 153 Ind. 689 (691), 54 N. E. 763. The statement in the instruction that 'a car may be run at a higher rate of speed in the suburbs or sparsely settled parts of a city than it may be in the thickly settled, populous, or crowded portion thereof,' was the statement of a fact, which it is the province of the jury to determine, and which may not properly be stated by the court as a matter of law. The measure of care required is at all times the same, i. e., ordinary and reasonable care. *Lake S. & M. S. R. R. Co. v. McIntosh*, 140 Ind. 261 (270), 38 N. E. 476. The body of the instruction contained a correct statement of the law, and the error is not a reversible one for the reason that the evidence and answers to interrogatories returned, with the general verdict show, without room for diverse inference, as we are all agreed that defendant was negligent in the operation of the car as charged in the complaint. *La Plante v. State*, 152 Ind. 80 (85), 52 N. E. 452; *Elliott's Appellate Procedure*, § 642, p. 571."

such carelessness and negligence was the direct and proximate cause of the injury to deceased, then in such case the jury should find the defendant guilty.

(b) If the jury believe from all the evidence and under the instructions of the court that at and immediately before the time of the accident the servant of the defendant in charge of said car was not keeping a reasonable and careful look-out ahead of said car, and that he was negligent in failing to keep such reasonable look-out, and that said negligence was the immediate and proximate cause of the injury to the deceased, then the jury should find the defendant guilty.<sup>80</sup>

#### § 4168. Frightening Animals—Car Operated in Ordinary Manner.

(a) The court instructs the jury that it was the motorman's duty to be watchful so as to exercise ordinary care in the operation of his car, and in running his car to look out and see whether teams are being thereby frightened, so as not to put in danger the person in charge of such team, or other persons who were rightfully and lawfully using the bridge approach, and if he saw, or by the exercise of ordinary care ought to have seen, that a team of horses in front of him on the approach was frightened at the noise of his car, or at the sound of his gong, so as to endanger its driver, or other persons on said approach, then it was his duty to do what he reasonably could in the management of his car to diminish the fright of the team, and if it was necessary to accomplish that purpose, then he should stop the sound of his gong, or even stop the car itself.<sup>81</sup>

80—McNulta v. Jenkins, 91 Ill. App. 309 (311).

"The essential element of care on the part of parents of the child is omitted from each of these instructions, and the instructions are for that reason erroneous. The motorman may have been negligent in driving the car at a dangerous rate of speed, and this may have been the proximate cause of the injury; or he may have been negligent in not keeping a reasonable or careful lookout ahead of the car, and such negligence may have been the proximate cause of the accident, and yet the parents may have been guilty of such negligence in the care of the child as contributed to the injury, which would preclude a recovery. Whether they were guilty of such negligence was a question for the jury, but under either of the instructions quoted, the jury would have been warranted in omitting altogether consideration of the care of the parents."

81—East St. L. & St. L. El. St. Ry. Co. v. Wachtel, 63 Ill. App. 181 (185).

"The instructions were carefully prepared and are evidently based on the language of the opinions in cases of Benjamin v. Holyoke St. Ry. Co., 160 Mass. 3, 35 N. E. 95, and Ellis v. Lynn & B. Ry. Co., 160 Mass. 341, 35 N. E. 1127. The above instruction tells the jury, as a matter of law, what it was necessary for the motorman to do in this case, with the necessary implication that

if he did not do so then he was guilty of negligence; that is, if he saw the team was frightened, so as to endanger the driver or other person, then, if necessary, he should stop sounding the gong, or even stop the car itself.

"In Penn. Co. v. Frana, 112 Ill. 404, the court instructed the jury that 'It is the duty of a person before attempting to cross a railway track to stop if necessary and look and listen for the approach of trains, before entering upon such track.' The court say: 'It is no doubt true that it is the duty of a person about to cross a railroad track to approach cautiously, etc., but it is always a question of fact for the jury to determine from the evidence, whether the person injured has exercised proper care and caution, and not a question of law.' The instruction was held to be bad. In Myers v. I. & St. L. Ry. Co., 113 Ill. 386, 1 N. E. 899, it is said 'after reviewing the authorities, 'Under the ruling in the cases cited, an instruction which tells the jury as a matter of law, that certain facts constitute negligence, is erroneous.' In the case of No. Chi. St. R. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672, an instruction was held to be erroneous which told the jury it was negligence to attempt to get on a street car while in motion. In telling the jury, as a matter of law, what the duty of the motorman was, under the facts of this particular case, was, as stated in the Frana



(b) You will therefore determine from the evidence whether there was one of defendant's cars there and whether the motorman on defendant's said electric car on the north side of the approach of the bridge across this river at St. L. behind the team of horses being driven by one W. K. sounded the gong of his car, and whether the said team became frightened at that noise; also whether said motorman saw, or by the exercise of ordinary care ought to have seen, that said team was being frightened thereby, and whether he continued to sound said gong after he saw, or ought to have seen, said team was so frightened, and whether in consequence thereof said team became unmanageable and ran into the buggy in which the deceased B. was riding, and thereby so injured said B. that he died, and also whether said motorman in continuing to sound said gong failed to exercise ordinary care for the safety of the driver and said B. and whether the injury to B. was the natural and ordinary consequence of such failure. If you so find, and also find that said B. was at the time he was so injured and immediately before, exercising ordinary care for his own safety, and that he left as next of kin the persons named in the declaration, and that they sustained pecuniary loss by reason of his death, then you should find for the plaintiff.<sup>82</sup>

(c) The mere fact, if true, that the horse which plaintiff was driving frightened at the cable train, and plaintiff was thereby thrown from his vehicle and injured, gives him no right to sue defendant and recover damages. Before, in any event, plaintiff can recover, you must find from the greater weight of all the testimony in the case: First, that defendant was negligent in some particular respect submitted to your consideration; and, second, that the negligence so found was the direct cause of frightening the horse, so that it ran away and injured plaintiff. If you do not find both these facts to be true, then defendant is entitled to the verdict; or, if the plaintiff was negligent, and thereby contributed to his own injuries, then defendant is entitled to the verdict, and this is so even if you find that the defendant was also negligent. The act of negligence charged in the petition, and to which your attention must be confined in considering whether defendant was negligent, was this: The trainmen saw, or by the exercise of ordinary care, would have seen, plaintiff in a dangerous position, and were negligent in permitting the train to approach plaintiff and causing the gong to be rung so as to frighten the horse

case, *supra*, an invasion of the province of the jury. To say that under a certain state of facts, a duty to do a certain thing was imposed by law, is equivalent to saying if that certain thing was not done then there was negligence. The evidence shows in this case the car was even, alongside the team, after it came up, and it may be that other conditions existed requiring the sounding of the gong or continuous movement of the car, or that by going ahead the car would soon pass the team, which as is generally known allays fright. At least, under the repeated decisions of our courts, the particular things that should have been done or omitted in order to exercise proper care, usually are and were

in this case facts for the determination of the jury, and not law, for the determination of the court."

<sup>82</sup>—*East St. L. & St. L. El. St. Ry. Co. v. Wachtel*, 63 Ill. App. 181 (186).

"The above instruction seems to make liability depend upon whether the motorman saw or might have seen that the team was frightened by the sound of the gong from which considered in connection with the duty imposed by the last above foregoing instruction, the jury might conclude that in such case it was his duty to stop sounding the gong, or stop the car itself, although being so frightened the team was at the time under control, if thereafter it became unmanageable and ran away."

and cause it to run away. The difference between negligence on the part of the defendant and on the part of the plaintiff is this: Defendant's negligence, if any, must be found by the jury to have been the direct cause of the injury, whereas plaintiff's negligence, if any, defeats a recovery of it but contributes to the injury; and this is so even though defendant was also negligent. If negligence of defendant and negligence on the part of plaintiff combine to cause the injury, then the plaintiff cannot recover.<sup>83</sup>

§ 4169. **Right of Way of Street Cars over Other Vehicles Driven Along or Near Tracks—Collision with Same.** (a) The court instructs the jury that the defendant company has the superior, but not the exclusive, right to the use of that portion of the street occupied by its tracks, and that when the plaintiff undertook to use that portion of the street it was his duty to use reasonable diligence to keep out of the way of the defendant's cars using the same track.<sup>84</sup>

(b) The court instructs the jury that a cable railway company operating its cars on and along the public streets of a city must know and in law is bound to know that persons and vehicles have an equal right to the use of the street, and it is the duty of the company's ser-

83—Oates v. Metropolitan St. Ry. Co., 168 Mo. 535, 68 S. W. 906 (909), 58 L. R. A. 447.

"Above instructions given for the defendant sharply drew a distinction between the negligence of the defendant and the contributory negligence of the plaintiff. Those instructions declared the law to be that the defendant was not liable unless its negligence was the direct cause of the injury, while the plaintiff was not entitled to recover if his negligence 'but contributes to the injury;' that is, that the defendant was liable only for direct negligence while the plaintiff was cut off from recovery if he was guilty of any negligence, however slight or remote or indirect it may have been. The law is that a defendant is liable if his negligence was the direct and proximate cause of the injury, unless the plaintiff has also been guilty of such negligence as directly contributed to the happening of the injury; and the defendant is not liable, no matter how negligent he may have been, if the plaintiff's negligence has thus contributed to the injury, for the doctrine of comparative negligence has never obtained in this state. Hurt v. Ry. Co., 94 Mo. 264, 7 S. W. 1, 4 Am. St. 374. In each instance the negligence and the contributory negligence must be direct; that is, must have entered into and formed a part of the efficient cause of the accident. Hoepfer v. Hotel Co., 142 Mo. 388, 44 S. W. 257; Beach, Contrib. Neg. (2d Ed.) 24; Mathews v. Toledo, 21 Ohio Cir. Ct. R. 69; Dunkman v. Railway Co. 16 Mo. App. 518; Corcoran v. Ry. Co. 105 Mo. 399, 16 S. W. 411, 24 Am. St. 394; Murray v. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. 601; Kelley v. Railway Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; Hicks

v. Railway Co., 46 Mo. App. 304; Pinnell v. Railway Co., 49 Mo. App. 170; Meyers v. R. R. Co., 59 Mo. 223. Mere negligence without any resulting damages, no more bars a plaintiff's recovery than it creates a liability against a defendant. Dickson v. R. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. 429. Remote negligence, which does not become an efficient cause neither creates nor bars a liability. Kennedy v. R. R. Co., 36 Mo. 351; Meyers v. Railroad Co., supra. It is only where the plaintiff's negligence contributes directly to his injury that it precludes his recovery therefor. Moore v. R. R., 126 Mo. 265, 29 S. W. 9. And the plaintiff's contributory negligence must mingle with the defendant's negligence as a direct and proximate cause in order to bar a recovery. Nolan v. Shickle, 69 Mo. 336; Frick v. Ry. Co., 75 Mo. 542. These instructions, were therefore, erroneous, and the jury were misdirected."

84—Greene v. Louisville Ry. Co., 27 Ky. 316, 84 S. W. 1154 (1156).

"This instruction was misleading, and should not have been given. In lieu of this instruction given by the court and in lieu of this instruction asked by the plaintiff the court should have told the jury that the plaintiff was lawfully upon the street, and had the right to use any part of it; that the defendant was entitled to the use of its tracks for the free passage of its cars; that it was the duty of those in charge of the defendant's car to keep a lookout for persons and vehicles upon the track and to exercise ordinary care to discover and avoid injuring them; and that it was the duty of the plaintiff in using the street to exercise ordinary care for his own safety and the safety of others."

vants to exercise ordinary care to take all reasonable measures to avoid injuries to persons on the street who are themselves in the exercise of ordinary care for their own safety.<sup>85</sup>

(c) The conduct of the motorman and of plaintiff must be measured by exactly the same rule. To vary the rule in the least in favor of either one is to violate your oath. They both were using the street. Their rights to use the street were exactly the same.<sup>86</sup>

(d) It is the duty of a street railway company to exercise ordinary care to avoid injury to persons who may be rightfully driving on or along its tracks; and it is the duty of persons driving in front of approaching cars not to unnecessarily delay such cars, but to exercise care to get out of the way of an approaching car; and if the jury believe from the preponderance of the evidence that the plaintiff was driving along the track of the defendant and undertook to back off of said tracks to a position along the sidewalk, then whether the plaintiff, under the circumstances, exercised ordinary care or not, to get out of the way of the approaching car, is a question of fact to be determined by the jury from the preponderance of the evidence; and if the jury believe, from the preponderance of the evidence, that the plaintiff did exercise ordinary care in that regard, and that the defendant was negligent, as charged in the declaration, and the plaintiff was injured in consequence thereof, then the defendant is liable for such injury.<sup>87</sup>

85—West Ch. St. R. R. Co. v. Dougherty, 89 Ill. App. 362 (365).

"The foregoing instruction is inaccurate, and, as we think, calculated to mislead the jury. The right of way of a street railway company along its tracks is so far superior to that of the general public that a person driving on the tracks must yield the right of way to the company's cars. The cars cannot turn out. They can run only on the tracks. The convenience of the travelling public also requires that street cars shall not be unnecessarily impeded or delayed. Chi. West. Div. Ry. Co. v. Bert, 69 Ill. 388."

86—Citizens' St. R. Co. v. Howard, 102 Tenn. 414, 52 S. W. 864 (866), 46 L. R. A. 319.

"The well established rule is that street railroads have the superior though not the exclusive right of way between street crossings; and all the evidence in this case places plaintiff between the street crossings when injured."

87—Chi. C. Ry. Co. v. Mauger, 105 Ill. App. 579 (581, 582, 583).

"The instruction, as it did, having stated that certain facts were found, the defendant was liable for the injuries occasioned by the accident to the plaintiff, the instruction should have contained all the facts which would authorize the verdict, in effect, directed by the instruction. Any instruction by which the court assumes, as a matter of law, to direct a verdict for either party or to declare the liability or freedom from liability of either party in the action, must embrace all the evidence, which under the pleadings

and the evidence, is essential to a verdict. Partridge v. Cutler, 168 Ill. 504 (513); Lake Erie & W. R. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; Chi. C. Ry. Co. v. Dinsmore, 162 Ill. 44, 658 N. E. 887, 35 L. R. A. 167; McNulta v. Jenkins, 91 Ill. App. 309; Chi. M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248, 23 N. E. 1028.

\* \* \* Under the evidence in this case the question as to the exercise of ordinary care by the defendant was not merely whether he exercised ordinary care to get out of the way of the approaching car, but also whether, in getting in the way of appellant's car, he was exercising ordinary care. \* \* \* The place where the injury occurred was not a street crossing; and as appellant's cars can not leave the fixed track upon which they run, it was the duty of appellee to exercise ordinary care not to be in the way thereof, and so hinder and delay cars in proceeding at such rate of speed as they are authorized to do by the ordinances of the city. The interests of the public required that appellant's cars should not be unreasonably delayed by the conduct of appellee. For this purpose and to this extent the general right of appellant over that portion of the street where the injury occurred was superior to that of appellee. No. Chi. El. Ry. Co. v. Peuser, 190 Ill. 67, 60 N. E. 78. The instruction is also objectionable as giving the jury to understand that whether the plaintiff, in what he did, exercised ordinary care, is a question solely of fact. To be sure the word solely is not used, but the statement that it is a ques-



(e) You cannot find that the motorman was guilty of willful or intentional misconduct unless you believe from the evidence that the motorman actually intended that the car should run into and collide with the buggy.<sup>88</sup>

(f) The court instructs the jury that street cars have a right of way superior to that of all other persons at all places along their lines except at street crossings, and that at street crossings the rights of street cars and the traveling public are equal. And if the jury believe, from the evidence, that the plaintiff was struck by one of defendant's cars at some place along its line other than at a street crossing, then the court further instructs the jury that in determining whether or not the said defendant was in the exercise of due care, you should take into consideration the fact that the said defendant had a right of way superior to that of all other persons at all places along its line except at street crossings, together with all other facts and circumstances in evidence.<sup>89</sup>

(g) The court charges the jury that if they are not reasonably satisfied from the evidence that the motorman in charge of the defendant's car knew, while he was about 100 feet away from the horse and buggy in question, that by proceeding with his car he would strike or collide with the buggy in which plaintiff was riding, then your verdict should be for defendant.

(h) The court charges the jury that before you can find for the plaintiff in this case you must be reasonably satisfied from the evidence that the motorman in charge of the car which collided with the buggy in which plaintiff was riding knew, when he was about 100 feet away from the said buggy that if he proceeded with his car a collision would happen.

(i) The court charges the jury that if they believe from the evidence that the speed of the car was checked after defendant's motorman saw the horse and buggy of plaintiff backing towards the track, and before he struck the buggy, then your verdict should be for the defendant.

tion of fact had a tendency to leave in the minds of the jury the impression that it was one purely of fact. Such an instruction is condemned by Mr. Justice Cartwright in *Chi. B. & Q. R. R. Co. v. Greenfield*, 53 Ill. App. 424.

The instruction is also objectionable, in hypothetically directing, as it does, a verdict for the plaintiff, in that especial attention is called to the theory and evidence of the plaintiff as to the extent, without mention of, or reference to the evidence and theory of the defendant."

88—*Birmingham Ry. & El. Co. v. Pinkard*, 124 Ala. 372, 26 So. 880 (881).

"The motorman could have been guilty of willful or intentional misconduct without having the actual intent to collide with plaintiff's buggy. The willful failure to apply the brakes to check the speed of the car, or to stop the car after discovering the peril, coupled with indifference as to consequences, might have been willful misconduct, and yet the motorman might not have

had the actual intent to collide with the buggy."

89—*No. Chi. St. Ry. Co. v. Smadraff*, 189 Ill. 155, aff'g, 89 Ill. App. 411, 59 N. E. 527.

"In the state of the evidence, we think the refusal of foregoing instruction was not error. In the first place, the major proposition is too broadly stated. Although street cars have a superior right of way to the general traveler on streets at places other than crossings, to the extent that those traveling by other means must get off the tracks and give the right of way to moving cars—for the reason that they can get off the track, whereas the cars cannot—still the general public have a right to use and travel upon the entire street, including that portion of it on which the car tracks are laid, and are in no sense to be treated as trespassers for so doing. It is, therefore, not true that street cars have, 'at all times and under all circumstances a superior right of way along their lines except at street crossings.'"

(j) The court charges the jury that if they believe from the evidence that the plaintiff could have, by the use of reasonable care and diligence, driven or urged said horse off of said track of defendant or prevented his backing thereon, then your verdict should be for the defendant.

(k) The court charges the jury that if they are reasonably satisfied from the evidence that had the plaintiff used the whip upon said horse, or clucked to him, or struck him with the lines, she could have caused him to move off the track of defendant, or kept him from backing the buggy thereon then defendant is not liable in this action.

(l) The court charges the jury that the burden is upon the plaintiff to reasonably satisfy you by a preponderance of the evidence that the horse attached to the buggy in which plaintiff was riding began to back said buggy in the direction of defendant's car track when the car in question was about 125 feet distant from where said buggy was standing, and that the plaintiff did all she was capable of doing to control the movements of said horse; that the motorman in charge of said car knew when he was about 100 feet away from said buggy, that by proceeding along the track he would bring about the collision; and that the motorman did not stop or check the speed of said car before the collision occurred; and if after looking at all the evidence in the case you are not reasonably satisfied by a preponderance of the evidence of all these facts then your verdict should be for the defendant.

(m) The court charges the jury that it was the duty of the plaintiff when she discovered the car approaching to use all reasonable efforts to keep said horse off the defendant's track, and if she failed in this particular, then the defendant is not liable in this action.

(n) The court charges the jury that if they are reasonably satisfied from the evidence that the plaintiff by the use of the lines attached to the horse could have quieted or controlled him in such way as to have prevented the buggy from backing upon the track, the law charged her with the duty to do this, and if she failed to do it and could have done it, their verdict should be for the defendant.

(o) The court charges the jury that unless they believe from the evidence that the plaintiff made all the effort she was capable of, and did all she could to control the movements of said horse, and was unable to do so, then they must find their verdict for the defendant.

(p) The court charges the jury that if they believe from the evidence that all Mrs. S. did to control the horse which was attached to the buggy was to say to the horse "Whoa, Beauty!" then they must find their verdict for the defendant.

(q) If the jury believe that Mrs. S. could have used the whip on said horse, and thereby have made said horse go forward and avoided the accident, then they must find their verdict for the defendant.

(r) If the jury believe from the evidence that there was a whip in the whip stand in the buggy, in convenient reach of Mrs. S.,

and that she did not use the whip on the horse to make it go forward, and did not cluck or use any other command to the horse to go forward, then they must find that verdict for the defendant.

(s) If the jury believe from the evidence that Mrs. S. could have urged the horse forward by commanding it to go forward, or clucking to it, or using the whip on it, then they must find their verdict for the defendant.

(t) The court charges the jury that, before the plaintiff can recover in this case, the jury must be reasonably satisfied from the evidence that the plaintiff was on or about the 17th day of November, 1900, sitting in a buggy on Mildred street in front of the house known as No. 227 Mildred street in the city of Montgomery and that attached to the buggy was a horse, and that the horse and buggy were in the sole charge and under the control of the plaintiff, and that said horse and buggy were far enough from the line of defendant's street railway track to enable a car passing thereon either east or west, to pass said horse and buggy without colliding with or injuring said horse and buggy or the plaintiff; and that while said plaintiff was so standing in said position a certain car in charge of the officers or agents of the defendant approached the point, coming toward the east and towards the point where plaintiff was sitting in said buggy, and that the names of said officers or agents are unknown to the plaintiff; and that when said car arrived at a point about 125 feet distant from where said buggy was standing, said horse became restive and began to back said buggy in the direction of defendant's railway; that plaintiff made all the effort she was capable of and did all she could to control the movements of said horse, but was unable to do so, and said horse continued to back said buggy in which the plaintiff was sitting until it backed onto the track of the railway and into a position that a car running east on said track would inevitably collide with said buggy and horse and produce probable damage to them; that the motorman in charge of said car, when he was a long way off from plaintiff—more than 100 feet—observed or could have observed said fact that said horse was beyond the control of plaintiff and that said buggy was being backed on or so near the track over which this car was to pass as to bring about a collision between them if the car attempted to pass; that said motorman did not stop said car nor check the speed thereof, but on the contrary continued on his course with said car without either stopping or checking said car, and that said car continued to move, and that the collision occurred between it and the buggy; that the car came in collision with the plaintiff's person; that a portion of the car struck her on the arm and head.<sup>90</sup>

90—Montgomery St. Ry. Co. v. Shanks, 139 Ala. 489, 37 So. 166 (168).

In its opinion, the Supreme Court of Alabama said:

"Whether the motorman was guilty of negligence proximately causing the injury, as well as whether the plaintiff was chargeable with such negligence, were questions which under the evidence were proper for the jury's determination and charges. Charges 4 and 5 (g and

h) each improperly purport to hinge the motorman's duty in respect of stopping the car upon his certain knowledge that his failure to stop would result in a collision with the buggy. Charges 7, 8, 12, 17, 21, 22, 23, 24 and 25 (j, k, m, n, o, p, q, r and s), each, upon the facts hypothesized improperly assumes either that defendant was not chargeable with negligence, or that plaintiff was guilty of contributory negligence thereby invading the province of the



§ 4170. **Street Crossings—Pedestrians.** (a) If the motorman did all he could, after the peril of the plaintiff became manifest to the motorman, to prevent injuring the plaintiff, and you so find from the evidence, your verdict must be for the defendant.

(b) If the motorman did all a prudent and careful and skillful motorman could have done, under the circumstances of the situation, after he discovered the plaintiff's peril, and you so find from the evidence, your verdict must be for the defendant.

(c) The undisputed evidence shows that after the plaintiff last looked at the street car, and before he went upon the street car track, there was injected into the situation, then manifest to him, an element of danger, in this: that before he attempted to get upon the street car track the street car was started or put in motion, and was running towards the place where he went upon the track; and the undisputed evidence shows that before the collision the plaintiff was unaware of this new element of danger, and that before going upon the track he exercised no care or diligence to discover this new element of danger; and I charge you the plaintiff's failure to exercise such care and diligence which proximately contributed to the injury to the plaintiff, and because of such contributory negligence the plaintiff cannot recover on the first and second counts of the complaint.

(d) You cannot find that the motorman was guilty of willful or intentional wrong unless you believe from the evidence that the motorman intended to injure the plaintiff.

(e) The court charges the jury that it was the duty of the plaintiff, when he approached the street car track for the purpose of going upon it, to look for such cars upon such track, and the omission of this duty of the plaintiff while he was proceeding ten or fifteen feet towards the track, which the undisputed evidence shows is, as a matter of law, negligence on the part of the plaintiff, so contributing to the injury of the plaintiff as to defeat his action counting on the injury as having been produced by the simple negligence of the defendant or its motorman, and you cannot find for plaintiff on either the first or second counts of the complaint.

(f) The court charges the jury that if the jury believe the evidence the jury must find that after the motorman discovered the plaintiff's peril he was guilty of no negligence which proximately contributed to the plaintiff's injury.

(g) The undisputed evidence shows that after the motorman discovered the plaintiff's peril he did all he could to avert his injury.

(h) If from the evidence you believe that the last time the plaintiff looked for approaching cars he was ten or fifteen feet distant from the track upon which the car which struck him was running; that without looking again for the approaching cars he stepped on the track upon which the car which struck him was running; that as soon as he stepped upon said track the motorman immediately applied the brake on the car, and did all he could to stop the

jury. Charges 9 and 26 (l and t) were bad in assuming that plaintiff was under the burden of proving immaterial as well as material averments of the complaint."

car—I charge you that you must render your verdict in favor of the defendant.

(i) I charge you, gentlemen of the jury, if you believe from the evidence, that the plaintiff was guilty of negligence that proximately contributed to his injury, then you must find for the defendant, unless you believe from the evidence that when the peril of the plaintiff became manifest to the motorman he consciously failed to use preventive effort to save the plaintiff from harm, when by the exercise of such preventive effort he could have saved him from harm.<sup>91</sup>

§ 4171. **Street Crossings—Vehicles Crossing Tracks.** (a) It was the duty of the motorman, S., in approaching the street-car crossing on the M. road, to have his car under reasonable control, and to be on the lookout ahead, and to see whatever an ordinarily careful, prudent motorman would see, as to persons, animals, or vehicles, upon the crossing on the M. road, or near enough to the track to be struck by the car in passing. If no one was in the range of his vision, or if no one was near enough to and approaching the crossing to make the danger of collision probable, he had the right to proceed on his way across the M. road, and to assume that, if any one was approaching the crossing, they would have their vehicles under proper control, and would exercise ordinary care to avoid a collision; and no mistake that S. made in regard to these two rightful assumptions, as to how W., or anyone else, would act in approaching the railroad crossing, could be charged to him as negligence.<sup>92</sup>

(b) The jury are instructed that under the law of this state those

91—*Birmingham Ry. & El. Co. v. Jackson*, 138 Ala. 594, 34 So. 994 (1905).

The rulings of the court in refusing the above charges "requested by defendant are assigned as erroneous, and these assignments are insisted upon in appellant's brief. On the issues of fact presented by the pleadings, and upon which there was evidence pro and con, we are of opinion that the trial court committed no error in any of these rulings. Those issues were, first, whether the motorman was guilty of negligence in respect of efforts to avert the disaster after he became aware of the peril of the plaintiff; second, whether the motorman consciously failed, after he became aware of plaintiff's peril, to use all means in his power to avoid running over him; and, third, whether the motorman, though not aware of plaintiff's peril in time to have avoided injuring him, was guilty of reckless and wanton or willful misconduct in running his car onto that crossing in the manner and under the circumstances some of the evidence tends to show. The crossing appears to be just such a one as is referred to in *Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 262 (271), 9 So. 230; and it was open to the jury to find, on the evidence, that the motorman was guilty of wantonness, in running his car across there at the time and under the circumstances at and under which he at-

tempted to run it, though he may not have been at fault after he discovered the position of plaintiff and realized the peril of it. Further than is involved in what we have said, we deem it unnecessary to discuss the charges referred to."

92—*Wilson v. Memphis St. Ry. Co.*, 105 Tenn. 74, 58 S. W. 334 (336).

"The court ignored in this instruction the question of speed at which the car was traveling. The motorman himself testified that when he was within 50 feet of this crossing, seeing the crossing was clear, he loosened his brake, and thereby increased the speed of his car. He further testified that he saw the plaintiff driving towards the crossing at a distance of 15 feet. It was therefore an erroneous instruction to charge the jury, upon these uncontradicted facts, that the motorman had a right to proceed on his way across the Macon road, and to assume that, if any one was approaching the crossing, he would have his vehicle under proper control, and would exercise ordinary care to avoid a collision. The charge should have been qualified, so as to read, 'Unless the motorman was traveling at an immoderate rate of speed in view of the proximity of the crossing, and had thereby disabled himself to control the car when the danger of a collision became imminent.'"

in charge of the operation of street cars upon the public highway are not required to stop their cars, or slacken their speed, merely because they observe others upon the streets approaching the tracks upon or over which their car or cars are then being operated, and such person or persons are at the time out of the way of being injured thereby. And in this case, even though you may believe from the evidence that the motorman in charge of the car that produced the injury and damage complained of in this case saw the person having charge of the plaintiff's team driving off from E. street to A. street in the direction of the tracks the defendant's car was then running on, and at such time such person and team in his charge was then out of the way of injury and damage by such car while running along defendant's tracks, then such motorman was not required to stop his car, or slacken its usual speed, in expectation of the person having charge of plaintiff's team and property putting plaintiff's property in the position of danger or injury by said car of defendant.<sup>93</sup>

(c) The jury are instructed that if you believe from the evidence that plaintiff, driving a wagon and team of horses, drove on the track of the defendant in front of an electric car provided with brakes and appliances for stopping such car, then being run by defendant at a speed of twelve miles per hour, and that plaintiff and said wagon and team being so on said track were crossing the same at a slow walk and were then and there in a place of great danger, and were then and there seen by defendant's motorman then and there operating said car to be so on said track and so crossing the same while the said car was at such a distance from plaintiff and from said wagon and team that by the ordinary use of the brakes and other appliances for stopping said car said car might have been stopped and the striking of said wagon by said car might have been avoided; and that said motorman, so seeing plaintiff, and being aware of his situation, continued to run said car toward plaintiff without attempting to stop said car until it was so close upon plaintiff and said wagon that it could not be stopped in time to avoid striking said wagon and injuring plaintiff, and that by reason thereof said car struck said wagon and injured plaintiff as alleged in plaintiff's petition—then such failure to attempt to stop such car under such circumstances, and in the absence of explanation or excuse, would be negligence chargeable to the defendant, and if the jury

93—*Cole v. Central Ry. Co.*, 103 Ill. App. 160 (162).

"This proposition is not in our opinion, true, as a matter of law, when applied to the intersection of streets. It does apply in cases where vehicles are proceeding parallel with the tracks between the streets, as it can not be anticipated by those in charge of a street car that the driver of vehicles so proceeding would turn suddenly across the track. But where a driver of a vehicle is approaching a car track at a street crossing, as though about to cross the same, it is a question of

fact for the jury whether or not the driver is using due care in attempting to cross and whether the persons in charge of the car, in case of a collision and consequent injury, are guilty of negligence. At street intersections neither vehicle nor street car has the absolute right of way to the exclusion of the other. Their rights are reciprocal and each must respect those of the other. *Chicago General Ry. Co. v. Carroll*, 91 Ill. App. 356, aff'd, 189 Ill. 273, 59 N. E. 551; *North Chicago Street R. Co. v. Smadraff*, 189 Ill. 155, 59 N. E. 527."



find the facts to be as aforesaid they should find the issues for the plaintiff.<sup>94</sup>

§ 4172. **Collision With Persons On or Near Track.** (a) If the jury believe from the evidence that at the time S. got on the south track of defendant company, while crossing B. street at T. street, the motorman of car No. — saw, or could, by the exercise of ordinary care, have seen him in time to stop the car so as to avoid striking him, and he failed, in the exercise of such care, to do so, they are instructed they must find for the plaintiff.<sup>95</sup>

(b) Although plaintiff might not have exercised ordinary care in turning upon the track, still if the motorman saw he was so in danger, and unconscious of peril, and thereupon failed to exercise ordinary care to avoid a collision, and such want of ordinary care was the proximate cause of the injury, plaintiff should recover.<sup>96</sup>

(c) The court instructs the jury that though they may believe from the evidence that plaintiffs were guilty of negligence in permitting H. to be upon the street unattended at the time of the accident, yet, if you further believe and find from the evidence that defendant's servant in charge of said gripear was guilty of negligence in the management of said car, as defined in these instructions, and that such negligence was the immediate cause of the death of deceased, and that by the exercise of ordinary care and precaution on the part of said servant or gripman the death of said child might have been avoided, then you will find a verdict for the plaintiffs.<sup>97</sup>

94—*Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323, 73 S. W. 820 (821).

"Defendant had interposed the defense of contributory negligence, and plaintiff's denial in his reply presented such issue, and defendant had the right to have such question submitted to the jury, and in the form in which the jury were instructed the stricture of this instruction was well-founded, and it is fatally defective."

95—*Richmond Passenger & Power Co. v. Steger*, 101 Va. 319, 43 S. E. 612 (613).

"The objection made to the instruction is that, since it concludes with the direction to find for the plaintiff, it must therefore contain within itself every fact necessary for that conclusion, and yet it nowhere provides that the plaintiff must be free from contributory negligence."

96—*Little v. Superior Rapid Transit Ry. Co.*, 88 Wis. 402, 60 N. W. 705 (706).

"If the motorman so saw the plaintiff in such danger, and unconscious of her peril, and might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence, but failed to do so, then such failure was something more than a want of ordinary care on his part, and amounted to wanton or reckless conduct, as indicated in the portion of the charge following the part quoted. *Inland & S. Coasting Co. v. Tolson*, 120 U. S. 551, 558, 11 Sup. Ct. 653;

*Valin v. Railway Co.*, 82 Wis. 16, 51 N. W. 1084, 33 Am. St. 17. Certainly a plaintiff cannot recover where both parties are equally guilty of a mere want of ordinary care; otherwise contributory negligence would not be a defense."

97—*Hogan v. Citizens' Ry. Co.*, 150 Mo. 473, 51 S. W. 473 (476).

"It does not correctly state the law in this: that it fails to express the idea that the gripman could have prevented the injury 'after discovery of the danger in which the injured party stood, or failed to discover the danger through its own recklessness, when the exercise of ordinary care would have discovered it and averted the calamity.' *Fletcher v. Ry. Co.*, 107 Mo. loc. cit. 652, 18 S. W. 849, citing *Dunkman v. Ry. Co.*, 95 Mo. 232, 4 S. W. 670, and *Williams v. R. R. Co.*, 96 Mo. 275, 9 S. W. 573; *Czezewska v. Ry. Co.*, 121 Mo. loc. cit. 215, 25 S. W. 914; *Lloyd v. Railway Co.*, 128 Mo. loc. cit. 601, 29 S. W. 154, 31 S. W. 110. As drawn, this instruction asserts the proposition that where both parties have been guilty of negligence, the jury must find for the plaintiff, if the defendant's negligence was the immediate cause of the injury; for so much of the instruction as says that the defendant is liable if, by the exercise of ordinary care and precaution, it could have avoided the injury, is only another form of saying that the defendant is liable if it has been guilty of negligence, without regard to any contributory negligence by the plaintiff. This is not a

§ 4173. **Bicyclist Falling Under Fender of Car—Duty of Motorman.** If the defendant's motorman in charge of the car complained of knew of the plaintiff's peril, and that plaintiff was beneath said car and helpless, and that said servant knew that he could stop said car in time to prevent the infliction upon the plaintiff of any of the injury he received, if he received any, and the servant with such knowledge did not stop the car, then the defendant is liable to the plaintiff for all the injury received by him, if any, after the car could have been stopped but was not.<sup>98</sup>

§ 4174. **Failure of Motorman to Stop Car, or Check Speed, When Possible to Avoid Injury.** After carefully considering these facts, if they be facts, and all other facts and circumstances proved on the trial, if you believe from the preponderance of the evidence that the motorman by the use of the means at his command could have stopped the car, or checked the speed thereof, in time to have avoided the accident, and that he failed to do so, that would be negligence on his part; and his negligence, if he was so negligent, would be the negligence of the defendant, and your verdict would be for the plaintiff unless you find the deceased was negligent, and that his own negligence contributed to his injury in any degree, in which case you would find for the defendant.<sup>99</sup>

correct enunciation of the law. Where both parties have been guilty of negligence which directly contributed to cause the injury, there can be no recovery; for the courts never undertake to sever, apportion and discriminate between two directly negligent acts, so as to decide which act caused the injury. There is no comparative negligence in this state. *Welch v. McAllister*, 13 Mo. App. 89; 1 *Shear. & R. Neg.* (5th Ed.) par. 96. The rule that the negligence of the plaintiffs which contributes directly to the cause of the injury will prevent a recovery is without exception or qualification. *Dunkman v. Ry. Co.*, 16 Mo. App. 548; *Id.* 95 Mo. 232, 4 S. W. 670; *Craig v. City of Sedalia*, 63 Mo. 417; *Barton v. Railroad Co.*, 52 Mo. 253. Where the negligence of plaintiff directly contributed with that of the defendant to produce the injury, there can be no recovery. *Murray v. Ry. Co.*, 101 Mo. 236, 13 S. W. 817; *Kellny v. Ry. Co.*, 101 Mo. 67, 13 S. W. 806. So, if the negligence which produced the injury is mutual, the plaintiff cannot recover. *Packet Co. v. Vandergrift*, 34 Mo. 55; *Callahan v. Warne*, 40 Mo. 131; *Corcoran v. Railway Co.*, 105 Mo. 399, 16 S. W. 411, 24 Am. St. 394; *Dougherty v. Railroad Co.*, 97 Mo. 647, 8 S. W. 900, and 11 S. W. 251; 7 Am. & Eng. Enc. Law (2d Ed.) p. 371 et seq. (p. 478)."

98—*Indianapolis St. Ry. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456.

"The instruction in effect declared that appellee was entitled to recover for the injuries received after the car could have been stopped even though the conduct of the motorman was not such that an intent to inflict the injury could be inferred therefrom, under the rule stated in

*Gregory v. R. R. Co.*, 112 Ind. 385 (387), 14 N. E. 228.

It was said 'As a rule of evidence, the presumption that every person intends the natural and probable consequences of his wrongful and unlawful acts applies as well in civil as in criminal cases; hence the unlawful intent may be shown by direct evidence or it may be inferred from conduct which shows a reckless disregard of consequences and a willingness to inflict injury by purposely and voluntarily doing an act with knowledge that someone is unconsciously or unavoidably in a situation to be injured thereby. An act which in itself might be lawful becomes unlawful when done in a manner or under circumstances which charge the actor with knowledge that it will result in injury to someone. *Palmer v. R. R. Co.*, 112 Ind. 250, 14 N. E. 70; *L. N. A. & C. R. R. Co. v. Ader*, 110 Ind. 376, 11 N. E. 437; *L. N. A. & C. R. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Belt R. R. & Stock Yards Co. v. Mann*, 107 Ind. 89, 7 N. E. 893; *Penn. Co. v. Smith*, 98 Ind. 42. It follows that if the conduct of the motorman after he became aware of the plaintiff's dangerous and helpless condition was not such that an intent to inflict the injury upon appellee might properly be inferred therefrom, the same was not willful. (*Gregory v. R. R. Co.* supra), and appellant was not liable therefor. . . . Upon the facts stated in said instruction, it is evident that it cannot be said as a matter of law that appellant was guilty of purposely and intentionally injuring appellee after he fell under the fender."

99—*McBride v. Des Moines City*

§ 4175. **Horses of Street Railway Company Running Away and Injuring Person Through Negligence of Company's Servant.** (a) The jury are instructed, as a matter of law, that if they find from the evidence, that A. B. was the defendant's servant, and that changing the horses by driving them with nothing but a harness on in a slippery street, where the snow had just fallen, and in all of said acts he was doing as permitted by the defendant, and in so doing in fact exercised ordinary care, yet if the jury find from the evidence that A. B. slapped the off horse with the lines without any cause, which act caused the team to run away, and A. B. to slip and fall so that the team ran away, and said A. B., then using ordinary care, lost his hold of the lines, and did in every respect use ordinary care, except slapping the off horse with the lines, and by such act causing the team to run away; yet the jury must find for the plaintiff.

(b) The court instructs the jury, as a matter of law, that if they find from the evidence that when a team ran away, it was the custom of defendant at its barn to mismate or break up the runaway team by putting each runaway horse with another horse, and so make new teams, and if the jury finds from the evidence that the team in question had run away in — previous, and had not been separated as was the custom with runaway teams, and if the jury further find that the neglecting to observe this custom caused the team to run away upon the occasion in question, the jury will find the defendant guilty.

(c) The court instructs the jury, as a matter of law, that if they find from the evidence that A. B. could, with ordinary efforts, have raised a hue and cry, which would have attracted the attention of C. D., that a runaway team was in the street, and if the jury further find from the evidence that if he had done so it would probably have prevented the injury, and that he neglected any hue and cry whatever, the jury will find the defendant guilty.

(d) The court instructs the jury, as a matter of law, that without regard to what fact may have caused the horses to run away, if they find from the evidence that after the horses did run away, that A. B. did not use ordinary care to stop them, and if the jury find from the evidence that it was for the want of ordinary care on the part of A. B. that the horses became loose, and if the jury further find that if A. B. had kept hold of the lines, he would by the use of or-

Ry. Co., — Ia. —, 109 N. W. 618 (620).

"The first objection urged to this instruction as a whole is that therein the court called to the attention of the jury the facts which the evidence tended to establish favorable to the plaintiff's recovery, and omitted special reference to those relating to defendant's theory of the accident. This objection we think was well taken. An instruction was asked on behalf of defendant, calling attention to other circumstances which the evidence tended to establish, which should have been considered as bearing on the motor-man's negligence, and which were favorable to defendant's contentions

in the case. It was clearly improper for the court to thus emphasize the circumstances from which negligence might be inferred, and omit any reference to circumstances tending to support the opposite inference. Perhaps the court might properly have omitted to catalogue the circumstances which the testimony tended to establish bearing on the question of negligence, and simply have referred in a general way to the facts and circumstances proved on trial. But in suggesting to the jury that they should take into consideration some of the circumstances which were favorable to the plaintiff, and omitting reference to others favorable to defendant, he put the case unfairly to the jury."



dinary care have prevented the injury to C. D., deceased, then the jury will find for the plaintiff.

(e) The court instructs the jury, as a matter of law, that if from all the evidence in the case, they are in doubt as to what caused the team to run away, and if they find from the evidence that A. B. did not use ordinary care in driving teams generally, which fact was known to the defendant, and if they further find that the team ran away through want of ordinary care by A. B., the jury will find for the plaintiff.<sup>100</sup>

§ 4176. **Duty to Avoid Injury to Dogs on Track.** (a) The jury are instructed that the defendant's servants are bound to make such efforts to stop the car when animals are upon the track as they can do by the exercise of ordinary care with the appliances at hand and with safety to the car and passengers. If you find from the evidence that the motorman saw the dog, or could have seen the dog, if he had used ordinary precaution, or could, by the exercise of ordinary care have frightened the dog away or stopped the car in time to have avoided killing said dog, but failed to do so, then the defendant is liable for the killing of said dog and for such damages as may result to plaintiff by reason of said killing.<sup>1</sup>

(b) The jury are instructed that in law a dog is considered and regarded as personal property the same as any other property that

100—Chicago City Ry. Co. v. Smith, 54 Ill. App. 415.

"The appellant excepted, and judgment being entered against it, appealed, and now assigns as error those instructions.

It must be borne in mind that a court knows no more judicially about managing horses, refractory or otherwise, than it does of navigating a steamship in a storm upon the Atlantic; also that negligence is a question of fact for a jury. Not only are the specific acts which are alleged to be negligent to be proved to the jury, but whether, if proved, they were negligent, is for the jury and not the court to determine. Chicago & N. W. Ry. v. Bouck, 33 Ill. App. 123; same v. Traves, Ibid. 307.

We might be tempted to affirm the judgment notwithstanding the error committed by the judge in telling the jury how to manage horses, and we mean not to impugn his skill, on the ground that justice was done, were it not for the case, North Chicago St. R. R. v. Louis, 138 Ill. 9, 27 N. E. 451, where our effort in that direction in the same case, 35 Ill. App. 477, was defeated for an error less serious."

1—Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281 (282).

"This instruction is erroneous for the reason it assumes the dog was on the track some time before he was run over. It is also erroneous in that it does not state the proper measure of damages which is the actual value of the dog. We think the instruction is also erroneous for the reason it declares that it was the duty of the motorman to keep a watch for dogs on the track. We

are unwilling to give our assent to this doctrine. In this state, a steam railroad company, in running its cars at places where its tracks are not fenced and where cattle are liable to stray upon its track, is under the duty to keep a reasonable lookout for such animals and to use reasonable care to avoid injuring them. Hill v. Ry., 49 Mo. App. 520, affirmed in 121 Mo. 477, 26 S. W. 576, but dogs, while declared to be personal property by statute, and are, in a sense, domestic animals (Wilcox v. State, 101 Ga. 563, 28 S. E. 981, 39 L. R. A. 709; Hurley v. State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. 916) are, in their nature and habits, not at all like cattle running on the range. Dogs when at large, are always on the watch for their own safety. They are quick in motion, active and swift, and so alert that they ordinarily avoid contact with running trains and cars, hence there is no reason to apprehend that a dog, seen at some distance, on a railroad track in front of a car would remain on it and be run over, and unless there is something about the dog's actions and movements, or his inaction, to indicate to the motorman that he is either unable to get off the track or oblivious to the approach of the car, the motorman is under no duty to stop the car to avoid injuring him. On the other hand, if the motorman has good reason to believe that the dog will not or cannot, for any reason, get off the track in time to avoid being run over, he is under the duty to use ordinary care to frighten the dog off, or check or stop the car to avoid injuring him."

one might own, and that if the plaintiff had secured a license for said dog, which it was admitted he had secured, that the dog if found on a public highway had a right to be there.<sup>2</sup>

§ 4177. **Contributory Negligence of Persons Other Than Passengers or Employees—In General.** (a) The court instructs the jury that it is not negligence in and of itself for a person to cross in front of an approaching street car, but that they have the right to take into consideration all the circumstances surrounding the case.

(b) The court instructs the jury that the deceased was just as much in duty bound to look out for the defendant's approaching car and to avoid colliding with the same at the time and place in question as the motorman in charge of the defendant's car was to look out for and to avoid colliding with the deceased. One was not held in law to any higher degree of care than the other.<sup>3</sup>

(c) The court instructs you that if you believe from the evidence in the case that before the plaintiff started to cross defendant's street car tracks, he saw the defendant's car coming from the east at a high rate of speed, and that he knew he could not cross the tracks without being struck by the car unless it should be stopped or slackened in speed, and so knowing he deliberately took the chances of getting across said tracks in safety, then as a matter of law he cannot recover in this case, and under such circumstances if shown by the evidence in the case you should find the defendant not guilty.<sup>4</sup>

(d) The court instructs the jury that if they believe, from the evidence, that the plaintiff was suddenly and unexpectedly placed in a position of danger, then in order to charge the defendant with a duty to avoid injuring the plaintiff, plaintiff must show by a preponderance of the evidence that the circumstances were such that the servant or servants of the defendant had an opportunity to become conscious of the facts giving rise to such duty and a reasonable opportunity to perform it; and, if the jury further believe from the evidence, that the circumstances as shown by the evidence did not charge the said defendant with a duty as thus defined, or if the jury

2—Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281 (282).

"We do not think that because the dog wore a collar, showing that his master had paid a license tax on his head, that the dog was thereby entitled to the freedom of the city. His collar conferred upon him no greater privileges than are enjoyed by other dogs not thus decorated, except to exempt him from the raids of the dog catcher, and the instruction that plaintiff's dog was licensed to roam at will upon the streets, alleys, and vacant lots of the city was misleading, if not erroneous."

3—West Chicago Street Ry. Co. v. Callow, 102 Ill. App. 323 (325).

"We do not regard the refusal of the court to give this instruction as error. It might, if given, have misled. While motorman and pedestrian are each bound to exercise ordinary care, it does not follow that conduct amounting to reasonable care in one trundling a baby carriage is for an-

other having control of an electric car weighing six tons and moved by a power capable of propelling it at eighteen miles an hour."

4—Chicago Union Traction Co. v. Jacobson, 118 Ill. App. 383 (386), aff'd 217 Ill. 404, 75 N. E. 508.

"It was not error to refuse this instruction. It is misleading as applied to the undisputed facts of this case. It invades the province of the jury by telling them that certain facts constitute negligence on the part of appellee, when that was a question of fact for the jury. However that may be, the instruction was properly refused because the substance of it was embodied in instructions numbered 26 and 27. West C. St. R. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718; Henry v. People, 198 Ill. 162, 65 N. E. 120; Chicago City Ry. Co. v. Fennimore, 199 Ill. 9, 64 N. E. 985; Whitney & S. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242."

believe, from the evidence, that the defendant did not have a reasonable opportunity to perform such duty, as thus defined, then they should find the defendant not guilty.<sup>5</sup>

(e) If, under all the evidence, and the foregoing instructions, you find that the plaintiff was negligent, still the defendant cannot avoid liability if you find from the evidence that plaintiff, at the time in question, was in a perilous position, and that defendant's employe in charge of said car saw plaintiff, and knew in fact that he was in peril, or might have so known by the use of ordinary care, and thereafter failed to use ordinary care to stop the car and prevent injury to plaintiff; and if you further so find that, by the use of ordinary care, defendant's said employe in charge of said car, under such circumstances, could have avoided any injury which you so find plaintiff may have sustained, then the plaintiff will be entitled to recover, and you will find for plaintiff. If you fail to so find, then, upon this part of the case you will find for the defendant.<sup>6</sup>

(f) It was the duty of the plaintiff to look and listen, and to have his horses under reasonable control as he approached the cars, etc.

(g) With these general principles of law you will proceed to consider the facts, and apply the same to the law as given you above, and find such verdict as you believe warranted. Otherwise, if you find that the plaintiff, upon the night in question, undertook to cross the track of defendant at the intersection of C. and F. streets, that he failed to observe the precautions required of him, as explained to you above, and that by reason of his own negligence, and in failing to observe those precautions, he drove upon the track of defendant companies, and that his own negligence was the proximate and controlling cause of the accident or collision, the cause without which the accident would not have occurred, then, in that event, you should find for the defendant.

(h) Again, if you should find that the plaintiff's own negligence and want of care and precaution contributed to the accident, but was not the proximate and controlling cause of same, this would not deprive the plaintiff of his right to a recovery, but should be taken by you into account in mitigation of damages that you otherwise would allow.<sup>7</sup>

5—N. C. St. R. R. Co. v. Smadraff, 89 Ill. App. 411 (416). Aff'd 189 Ill. 155, 59 N. E. 527.

"This instruction is erroneous in the omission of an important element, viz.: that the plaintiff might have been suddenly and unexpectedly placed in a position of danger by the defendant's fault, in which case the law would not be stated in the instruction."

6—Orr v. Cedar Rapids & M. C. Ry. Co., 94 Ia. 423, 62 N. W. 851 (852).

"It is strenuously insisted that this is erroneous. It first becomes necessary to analyze the paragraph. The words 'or might have known by the use of ordinary care' are the ones complained of, and we enquire to what do they refer? If they refer to the word 'saw,' then there is

little doubt in our minds but that the instruction is erroneous. But if they refer to 'peril' then a much different question is presented. We think a careful reading of the instruction clearly indicates that they refer to the latter word, and that the latter part of the phrase should be read thus: 'And that defendant's employe in charge of the car saw plaintiff and knew of the fact that he was in peril, or might have known he was in peril after he saw him, by the use of ordinary care, and thereafter failed to use ordinary care to stop the car and prevent injury to plaintiff,' etc. With this interpretation, is the instruction erroneous?"

7—Nashville Ry. Co. v. Norman, 108 Tenn. 324, 67 S. W. 479 (481).

"The court in his general charge



(i) It is not for you to determine in this case which party, and by that I mean the plaintiff, the defendant S. or the defendant the T. Ry. & P. Co. was guilty of the greater degree of negligence. Some one must have been negligent or the accident would not have happened as it did. If you find from the evidence that the accident was caused by the concurring negligence of both the plaintiff and either of the defendants your verdict should be for the defendant.<sup>8</sup>

(j) You are instructed that even though you should find upon the evidence herein, under the instructions given by the court, that the persons operating the street car were in fact guilty of negligence, nevertheless such negligence would be no excuse for any negligence on the part of the plaintiff. It was his duty to approach the track circumspectly; that is, to observe his surroundings, to employ the faculties by which men are endowed for their self preservation, and

only covered the proposition of remote contributory negligence, which is to be considered in mitigation of damages, but wholly ignored the doctrine of proximate contributory negligence, which defeats the action. In *Whirley v. Whiteman*, 1 Head. 617, it was held that, if a party, by his own gross negligence, brings an injury upon himself, or contributed to such injury, he cannot recover; for if, by ordinary care and prudence, he might have avoided it, he must be regarded as the author of his misfortune, etc. It is likewise equally true that in case of mutual negligence, where the parties are equally blamable, there can be no recovery. The court reaffirmed in that case the general principle that a person shall not recover for an injury brought upon himself by his own want of reasonable care and prudence, or which his want of ordinary care contributed to produce, or where the parties must be viewed as equally culpable. Again in *Southern Railroad Co. v. Pugh*, 97 Tenn. 624, 37 S. W. 555, it was stated, viz.: 'The rule at common law and in this state still is that any contribution to an injury which directly produced it would bar the action in any case where statutory provisions to the contrary do not apply,' etc. Proximate contributory negligence is further explained in the following language: 'If the injury was caused by the plaintiff's conduct, or was the immediate result of the plaintiff's conduct, to which the wrong of the defendant did or did not contribute as an immediate cause, the plaintiff cannot recover, but must bear the result of his own negligence or conduct.' See, also, *Dush v. Fitzhugh*, 2 Lea. 307. In *E. F. V. & G. Ry. Co. v. Hull*, 88 Tenn. 32, 12 S. W. 419, the court said, viz.: 'The jury were nowhere told that the negligence of the plaintiff which might and ought to be considered in mitigation of damages should be such as contributed remotely, and not directly, to the injury, and that, if the negligence of the plaintiff contributed directly to the in-

jury as the proximate cause thereof, instead of remotely, such negligence would be a complete bar to any recovery. Contributory negligence is, when it proximately contributes to the infliction of the injury, a bar to an action, because a person cannot be permitted to rush upon an apparent danger, and then, because an injury ensues, saddle the other party with the pecuniary consequences of an injury which his own want of care brought upon him.' In *Saunders v. R. R. Co.*, 99 Tenn. 135, 41 S. W. 1031, the court said, viz.: 'The (trial) court rightly charged the jury, in effect, that any negligence on the part of the plaintiff that contributed to the injury as a proximate cause would bar his action, and that any negligence on his part that contributed to the injury as a remote cause should be considered in mitigation of damages otherwise allowable.' In *Barr v. R. R. Co.*, 105 Tenn. 547, 58 S. W. 849, the court in considering the application of this principle to the facts, said, viz.: 'The defendant's negligence in obstructing the plaintiff's rightful passage upon the highway did not justify her negligence in attempting to pass over the train. They were both in fault, and the fault of one concurred directly and proximately with that of the other in producing the injury. It is not a case of proximate negligence on the part of the defendant and remote negligence on the part of the plaintiff, in which the latter's fault goes merely in mitigation of damages, but it is a case of proximate negligence on the part of both, in which the latter's fault absolutely bars her action.' The circuit judge was therefore in error in not submitting to the jury this supplemental instruction."

<sup>8</sup>—*Atherton v. Tacoma Ry. & Power Co. et al.*, 30 Wash. 395, 71 Pac. 39 (43).

"This instruction seems to assume as a matter of law that there was negligence in the happening of the accident. This was a question appropriately for the jury."

not drive carelessly into a place of possible danger; and if you believe from the evidence that the plaintiff did not observe this ordinary caution your verdict should be for the defendant.

(k) In this case you have two questions to pass upon: First, whether or not the defendants were negligent; second, whether or not the plaintiff was careless and negligent in his conduct, and whether by the use of proper or any precaution, he could have avoided the accident. If you find that the defendants were negligent in the manner that the plaintiff has alleged in his complaint, and that the accident did not occur by reason of the careless and negligent conduct of the plaintiff, then you can go further and inquire into the question of damages. First, you must find that the negligence, if your verdict be against the defendant, did occur through the wrongful acts of the defendants, before you can inquire into the question of damages. If you find that the plaintiff was also negligent, as alleged in the defendant's answer, then you need go no further and your verdict should be for the defendants.<sup>9</sup>

(l) The jury are instructed, as a matter of law, that the burden of proof in this case is upon the plaintiff, and if you believe from the evidence in this case that the negligence of the plaintiff and de-

9—*Atherton v. Tacoma Ry. & Power Co.*, 30 Wash. 395, 71 Pac. 39 (43).

The first of these two latter instructions taken in connection with the second given by the court, where it is said the second inquiry is "whether 'the plaintiff was careless and negligent in conduct, and whether by the use of proper or any precaution he could have avoided the accident' seems to convey the idea that slight negligence will prevent a recovery by plaintiff. This is not the rule that has been announced in this state. In *Spurrier v. Ry. Co.*, 3 Wash. 659, 29 Pac. 346, the refusal of the trial court to give the following portion of an instruction: 'I further instruct you that if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for the defendant'—was approved. It was observed: 'The latter part of the instruction is too broad. The person charged with the contributory negligence cannot be held to any greater degree of care than the company is. But the defendant asks the court to charge the jury that the defendant cannot recover if she is guilty of any negligence whatever' while in demand 8 he asks the court to charge the jury that the railroad company is only held to 'exercise ordinary care and caution.' The doctrine of contributory negligence has been carried to a considerable extent by some of the courts—but we think never quite to this extent. Due and reasonable care and caution were imposed upon both the plaintiff and the defendant by

the instructions of the court, and while many courts have undertaken to elaborate these expressions, and have occupied many pages in defining them, it is doubtful if any instruction however elaborate could convey to the jury a better understanding of the law, and of the rights of the parties under the law than is conveyed by the instructions of the court in this case. 'Due and reasonable care and caution' said the court 'means that degree of care and caution which might reasonably be expected of a reasonably prudent person under the circumstances surrounding him or her at the time in question.' This definition, we think, is terse, comprehensive and correct. In *Cowle v. City of Seattle*, 22 Wash. 659, 62 Pac. 121 the following instruction was held erroneous: 'You are further instructed that if you find from a preponderance of the evidence that the plaintiff, W. H. Cowle, was himself guilty of any negligence, and that such negligence was itself a cause of his injury, then you have no right to take into consideration the question whether the plaintiff W. H. C. or the defendant was more or less negligent in the premises; and if you find that said W. H. C. was so guilty of negligence which directly caused such injury, then it is your duty to find for the defendant, and it would make no difference in such case whether any defect in the sidewalk assisted in causing such injury.' The court observed of this instruction: 'The seventh instruction which was given to the jury at respondent's request is also erroneous, and is contrary to the doctrines announced by this court in *Spurrier v. Ry Co.*, 3 Wash. 659, 29 Pac. 346. In that case the defendant asked the court

defendant was equal, or nearly so, then your verdict should be for the defendant.<sup>10</sup>

§ 4178. **Rule As to Contributory Negligence in Tennessee.** You are likewise instructed that if you find that both plaintiff and defendant were guilty of negligence, but that defendant's negligence was the proximate or contributing cause of the accident, and you find for the plaintiff, you may, in that event, consider plaintiff's negligence in mitigation of damages.<sup>11</sup>

§ 4179. **Same Subject—Burden of Proof.** (a) The burden of proof in this case is upon the defendant to prove that the plaintiff was negligent, and that his negligence directly contributed to the injury complained of, and it must establish such fact by a preponderance of the evidence.<sup>12</sup>

to instruct the jury that 'if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant if any, in producing it, then your verdict must be for defendant.' And we there held that the instruction was properly refused, on the ground that it imposed a greater degree of care on the plaintiff than the law required. The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence which is not the standard by which his negligence is measured. All the law requires of the plaintiff, in such cases, is the exercise of ordinary care, under the circumstances surrounding him, and this he may do, although he may be guilty of some slight negligence, in the broadest sense of that term.' In *Redford v. Ry. Co.*, 15 Wash. 419, 46 Pac. 650, it was said that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause, or a mere condition of it, the defendant is still liable."

10—*N. C. S. R. R. Co. v. Eldridge* 151 Ill. 542 (548), 38 N. E. 246.

"The proposition embodied in this instruction doubtless finds support in some of the earlier decisions of this court involving what was known as the doctrine of comparative negligence, but by more recent decisions that doctrine has been greatly modified, if not wholly repudiated. The rule to which the court is now committed by repeated decisions is, that a plaintiff, before he can recover on the ground of mere negligence, must show that the injury of which he complains was caused by the negligence of the defendant, and that he, himself, at the time, was in the exercise of ordinary care. Where the party injured, at the time of the injury, is in the exercise of ordinary care, no contributory negligence is legally attributable to him, although he may

not have been in the exercise of the highest degree of care."

11—*Memphis St. Ry. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (379).

"The well-settled rule of law in this state is that, where the plaintiff's negligence is the direct and proximate cause of the accident, it will bar a recovery, but, if it be remote, it must mitigate or lessen the damages; it being held that where the plaintiff is negligent he should not recover in the same degree as if he were free from fault.

The circuit judge should charge the jury that it is their duty to reduce the plaintiff's damages in case they find that he has been guilty of contributory negligence. In the case of *R. R. v. Nowlin* (no opinion filed), the instruction contained in the charge which was held to be error was as follows:

"The negligence of the person in all cases can be looked to in mitigation of the damages or the amount of recovery."

For this error the judgment was reversed. The court said upon this subject: 'If the law be as we do declare—that contributory negligence upon the part of the plaintiff entitled the defendant, as a matter of right, to have such considered by the jury in reduction of damages—then it was the duty of the circuit judge to say to the jury, after first explaining what conduct upon the part of the plaintiff constituted contributory negligence, that, if they found the plaintiff was guilty of such negligence at the time of the accident, then it was their duty to look to it in assessing the damages, according as they find his negligence to be slight or gross.'

This assignment of error must, therefore, be sustained; the court having, in substance, instructed the jury, as appears from the above excerpt, that it was in their discretion whether they would reduce the damages for the contributory negligence of the plaintiff below, instead of instructing them according to the rule laid down in *R. R. v. Nowlin*, supra."

12—*Burns v. Metropolitan St. Ry. Co.*, 66 Kan. 188, 71 Pac. 244 (245).



(b) If it affirmatively appears from the evidence that the plaintiff did not use due care to discover the approach of cars upon defendant's track before he attempted to cross the same, he cannot recover for any alleged negligence of the defendant. But the burden of proving contributory negligence on the part of the plaintiff rests on the defendant.<sup>13</sup>

§ 4180. **Same Subject—Rule to Stop, Look and Listen.** (a) The court instructs the jury that even though they believe from the evidence that the pavement on W. street at and about the place where the collision occurred between the defendant's car and the wagon and horse driven by the deceased was paved with vitrified brick, and that by reason of that character of pavement the horse and wagon driven by the deceased made such a noise when passing over the same that the deceased was unable to hear an approaching car while his horse and wagon were in motion, yet the jury are further instructed that it was then the duty, under such circumstances, of the deceased, before entering upon defendant's track, to stop his horse and wagon so as to be able to hear the noise of the same, if the jury believe from the evidence that the car in question made a noise that would enable him to hear it if the deceased had stopped and listened for the same; and if the jury further believed from the evidence that by stopping his horse and wagon he could have heard the approaching car before going upon the defendant's track, and in time to avoid a collision, but that he failed to do so, but, upon the contrary, went upon the track without stopping his horse and wagon for the purpose of listening for an approaching car, then in that case the jury are

"The instruction tendered leaves out of consideration any negligent act of B. appearing in the evidence introduced to support his side of the case. It is misleading in that it tends to minimize the effect of any negligent conduct of his which might have defeated the action had the railway company introduced no evidence. If the plaintiff below, in establishing his case had shown that his own negligence contributed directly to the injury, he failed to make out a prima facie right of recovery. U. P. Ry. Co. v. Adams, 33 Kan. 427, 6 Pac. 529. In such case the giving of the instruction asked would lead the jury to believe that some affirmative proof introduced on the part of the railway company tending to show such contributory negligence as the plaintiff had already shown was necessary to defeat a recovery. In St. L. & S. F. R. R. Co. v. Burrows, 62 Kas. 89, 61 Pac. 439, an instruction in a personal injury case which told the jury that before the defendant could avail itself of the plea of contributory negligence of the plaintiff, it must establish by the fair weight of the evidence the facts in such case was held to be misleading. See also Mo. K. & T. Ry. Co. v. Merrill, 61 Kan. 671, 60 Pac. 819.

The instruction under consideration does not differ in substance from those criticised in the two cases cited. The fault to be found

in it lies in the omission of the qualifying condition that the burden of proof is not thrown on the defendant to show contributory negligence of the plaintiff if the latter has himself made it appear."

13—Indianapolis St. Ry. Co. v. Taylor, 158 Ind. 274, 63 N. E. 456 (457).

"We have held the act of 1899 (Acts 1899, chap. 58, Section 359 Burns' Rev. St. 1901), which provides that contributory negligence in actions for personal injuries 'shall be a matter of defense, and may be proved under the answer of general denial,' constitutional (Indianapolis St. R. R. Co. v. Robinson, 157 Ind. 232, 61 N. E. 197.), and adhere to that rule. While under said act the burden of proving contributory negligence is upon the defendant, yet if such negligence is shown by the evidence given on behalf of the plaintiff, it is as effective as if proven by the defendant, and there can be no recovery in such case. This being true, if it affirmatively appeared from the evidence that appellee was guilty of contributory negligence, it was not material who had the burden of proof; and the instruction was calculated at least to mislead the jury, and cause them to believe that plaintiff's contributory negligence could only be proven by witnesses who testified on behalf of appellant."

instructed that such conduct on the part of the deceased was negligent, and the verdict of the jury should be for the defendant.<sup>14</sup>

(b) If the jury believe from the evidence that ordinary care on the part of the plaintiff for his own safety, under all the facts and circumstances in evidence, required him, before driving upon or attempting to cross defendant's tracks, if the jury believe from the evidence that he did drive upon or attempt to cross the same, to look out and ascertain whether the track was clear and whether or not a car was approaching, and if the jury further believe from the evidence that the plaintiff did not so look and ascertain whether the track was clear and whether or not a car was approaching, and that the plaintiff was injured in consequence of his failure to so look and ascertain, then the court instructs the jury to find the defendant not guilty. Provided the jury find from all the evidence that immediately before and at the time of the accident the plaintiff was not in the exercise of ordinary care for his own safety.<sup>15</sup>

(c) It was the duty of the plaintiff to take notice of the tracks of the defendant when approaching them and to anticipate that cars were operated thereon, and that they were liable to pass and cross said S. street at any time, and it was his duty to make a vigilant use of his senses of sight and hearing to ascertain if there was a present danger in crossing the track, and it was his duty to look both to the west and to the east for approaching cars. In failing to do so he was guilty of negligence, and cannot recover any damages from the defendant, unless, after the plaintiff had passed the coal office, which was situated about ——— feet north of the track on which the car in question was approaching, and before he reached said track, it was apparent to the motorman who was in charge of said car, or would have been apparent to him, by the exercise of ordinary care, that the plaintiff did not know said car was approaching him and that he intended to attempt to cross the

14—Campbell v. St. Louis & Suburban Ry. Co., 175 Mo. 161, 75 S. W. 86 (92). See also Sanitary Dairy Co. of Missouri v. St. Louis Transit Co., 98 Mo. App. 20, 71 S. W. 726.

"The question whether or not ordinary care required a person about to cross a railroad track to stop, the better to see and hear, is like the question whether or not the plaintiff in a given case was guilty of contributory negligence. It is sometimes a question of law and sometimes a question of fact. Sometimes there can be no two reasonable opinions about it. Then it is the duty of the court to decide it as a matter of law. But sometimes it is doubtful. Then it should be left to the jury. There is no doubt but that prudence required one in the condition of this boy to stop, and, if he had stopped, the probabilities are that he would have at least heard the car. But the question is, what degree of prudence required him to stop? The standard that he is to be judged by is that degree of prudence that is reasonably to be expected of

a 16 year old boy, and in this case the question of whether there was or was not a headlight to warn him was to be considered in determining whether he did or did not exercise that degree of prudence when he failed to stop. Whether, therefore, the degree of prudence with which he was chargeable demanded that the boy in this case should have stopped to look and listen, was a question of sufficient doubt to be left to the jury; and the court therefore did not err in refusing the instruction which declared it to be his duty, as a matter of law, to do so, and negligence if he did not."

15—Chi. U. T. Co. v. Dybvig, 107 Ill. App. 644 (648).

"As modified it was equivalent to a statement by the court that though the jury might believe that the plaintiff had done and omitted to do all mentioned in the instruction, such conduct did not amount to a failure to exercise ordinary care. As given, the instruction was such an error that under the evidence in the case, the judgment of the court below must be reversed."

track in front of said car, and would not stop and wait for it to pass for a sufficient distance from said track to have enabled the motorman to have stopped said car or slackened its speed, so as to have avoided striking the plaintiff's buggy and causing the injuries complained of, by a diligent use of the appliances in use on said car for stopping it, and that said motorman did not make diligent use of such appliances, then in such case the plaintiff will be entitled to a verdict.<sup>16</sup>

(d) The court instructs the jury that where the evidence establishes the fact that W. did not look or listen for a coming car, and that, if he had done so, he could have seen, the car in time to stop, etc., he cannot recover. What would an ordinarily careful, prudent person do, who was driving a horse and wagon along a road at night, approaching and about to cross a railroad track? The law says what he must do. He must look and listen for an approaching car, etc. It was the duty of plaintiff, W., on approaching the street-car crossing on the M. road, to look and listen for an approaching car, etc.<sup>17</sup>

16—Honick v. Metropolitan St. Ry. Co., 66 Kas. 124, 71 Pac. 265 (266).

"The objection to this is that the court pointed out certain specific acts which it conceived to be the duty of a traveler to observe in attempting to drive across a street car track in a populous city where electric street cars pass every few minutes and told the jury that a neglect or omission on the part of the traveler to observe or perform such acts was, as matter of law, negligence. This practice should not be indulged. It does not appear however, in this instance that the court includes any act among those enumerated that would not be required of a man in the exercise of ordinary care. Can a traveler in a vehicle in the exercise of ordinary care, undertaking to cross at such place acquit himself of this duty short of anticipating that cars are liable to pass at any moment, or without looking in both directions from which cars may approach, or without making a vigilant use of his senses of sight and hearing to ascertain if there is a present danger? Such acts are nothing more than the exercise of ordinary care. Mr. Thompson in his work on Negligence states the law as follows: (Volume 2, §1444). 'The sum of the decisions under this head is that a traveler approaching a street railway track and intending to enter upon it whether at a street crossing or elsewhere, is bound to make a fair use of his faculties by looking and listening in the direction from which a car may be expected to approach, in order to avoid being run over, and that a failure to do so will be contributory negligence preventing him from recovering damages in case he is hurt, or preventing damages from being recovered for his death in case he is killed.'"

17—Wilson v. Memphis St. Ry.

Co., 105 Tenn. 74, 58 S. W. 334 (336).

"The court was in error in charging that the law imposed upon plaintiff an absolute duty to look and listen, and in not leaving it to the jury to say, in view of the proof, whether plaintiff was guilty of contributory negligence in failing to look and listen. The law on this subject is well settled. Patton v. R. R. Co., 89 Tenn. 378, 15 S. W. 919, 12 L. R. A. 184; Iron Mt. R. R. Co. v. Dies, 98 Tenn. 655, 41 S. W. 860; Grand Trunk R. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Cin. N. O. & T. P. R. R. Co. v. Farra, 13 C. C. A. 602, 66 Fed. 496; 2 Wood, Ry. Law, p. 328; McGee v. White, 13 C. C. A. 608, 66 Fed. 504; Ill. Cent. R. R. Co. v. Jones, 37 C. C. A. 106, 95 Fed. 370; Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403.

"As said by this court in Railroad Co. v. Dies, supra, viz.: 'The duty of a person about to cross a railroad track to stop, look and listen is not absolute and universal. This requirement must receive a reasonable construction, and failure to observe it does not always constitute negligence.' Mr. Wood says: 'Where a man is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the necessity for looking and listening for the approach of the train, he cannot, as a matter of law, be said to be guilty of negligence per se for neglecting to do so.' 2 Wood, Ry. Law, p. 1328. The case of Patton v. Railroad, 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. is especially in point. 'That was a case where Patton stepped out of the way to allow an approaching train to pass. After it had passed, he stepped upon the track without looking and listening, walking in the direction that the passing train had taken. He did not look back, from time to time, to see



§ 4181. **Same Subject—Crossing in Front of Approaching Car.** The court instructs the jury that it is not negligence in and of itself for a person to cross in front of an approaching street car, but that they have a right to take into consideration all the circumstances surrounding the case.<sup>18</sup>

§ 4182. **Same Subject—Failure of Driver of Vehicle Passing Along or Near Track to Use Reasonable Care.** The court instructs the jury that it is the duty of a person driving along a railroad track to exercise ordinary care to avoid collisions with cars operated thereon. If you believe from the evidence that the plaintiff saw or knew of the approach of the car which collided with him, or by the exercise of ordinary care might have known of its approach in time to have driven off the track and have averted the injury, then he was guilty of negligence and cannot recover in this action, unless you believe that the motorman of the defendant knew, or by the exercise of ordinary care might have known, of plaintiff's danger in time to have averted the collision, and, after such knowledge or opportunity for such knowledge, negligently failed to use such means as were at his command to avoid the collision.<sup>19</sup>

whether a train was coming. He was run down and killed by a detached portion of the train which had passed.' Judge Lurton, who delivered the opinion in the case, said: 'The peculiar circumstances under which this intestate went upon the track, and the fact, stated to account for his failure to observe this train, that he was crossing a bridge under which there was a waterfall, the noise of which probably prevented him from hearing, alone prevents the negligence of the deceased from barring any recovery whatever.' He further says: 'The case stated in the declaration makes an exceptional one, and one which should go to the jury.' He quotes from Mr. Wood on Railway Law, wherein he says that there are exceptions to the rule of look and listen."

18—West Chicago Street Ry. Co. v. Callow, 102 Ill. 323 (334).

"In Lindberg v. Chicago City Ry. Co., 83 Ill. App. 433, an instruction to the effect that an attempt 'to board' a street car 'while the car was in motion' did not 'necessarily charge the plaintiff with contributory negligence as a matter of law,' was condemned and the judgment therein reversed because thereof. In-

structions telling the jury that a certain act did or did not constitute negligence have been frequently declared erroneous. Myers v. I. & St. L. Ry. Co., 113 Ill. 386 (389), 1 N. E. 899; Pennsylvania Co. v. Frana, 112 Ill. 398 (404); North Chicago Street R. R. Co. v. Williams, 140 Ill. 275 (281), 29 N. E. 672; East St. Louis & St. L. St. Ry. Co. v. Wachtel, Amdr. 63 Ill. App. 181; Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658 (660), 44 N. E. 887, 35 L. R. A. 167; Illinois Central R. R. Co. v. Griffin, 184 Ill. (9), 56 N. E. 337."

19—Kimble v. St. Louis & S. Ry. Co., 108 Mo. 78, 82 S. W. 1096 (1098).

"This instruction is clearly erroneous in this: It told the jury that if plaintiff saw the car in time to drive off the track, but did not do so, he was nevertheless entitled to recover if the motorman saw him, or would have seen him had he kept a sharp lookout, in time to have stopped the car and averted the injury. If plaintiff saw or heard the car in time to have driven off the track and himself avoided the collision, then he was guilty of negligence that directly contributed to his injury, and cannot recover. Davies v. Railway Co., 159 Mo. 1, 59 S. W. 982."

## CHAPTER CLIV.

### NEGLIGENCE—TELEGRAPH COMPANIES.

See Approved Instructions, Chapter LXXI, Vol. II.

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| <p>§ 4183. Duty of telegraph company to make prompt delivery of telegram.</p> <p>§ 4184. Incorrect or insufficient address given plaintiff to defendant a good defense in actions for non-delivery.</p> | <p>§ 4185. Nature of knowledge of agents of telegraph company as to purpose of telegram.</p> <p>§ 4186. Knowledge of telegraph company's agents as to importance of message.</p> |
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§ 4183. **Duty of Telegraph Company to Make Prompt Delivery of Telegram.** (a) If you find that the said telegrams were sent, as alleged, and that the defendant exercised such care and diligence in delivering or attempting to deliver the same as a man of reasonable and ordinary care and prudence would have used under the same or similar circumstances, then, if you so find, you will find for the defendant, and so say by your verdict, and you need not consider the other matters stated herein; and in this connection you are charged that if defendant, through its employes, upon the receipt of said telegram from El Reno, searched for plaintiff, and, failing to find him, then took the usual and ordinary precautions that a man of ordinary care would have taken to inform plaintiff of said telegram, you will find for the defendant.<sup>1</sup>

(b) If the message was received by the defendant at its office in B. in time to have been delivered, by reasonable care and diligence, in time for plaintiff's uncle, A. B., to have sent her money to complete her journey to B. without delay, for all of the time she was delayed, within the time in which she should have reasonably received a reply to her message to him, if it had been delivered within a reasonable time, and the time in which she should have reasonably received a reply thereto after it had been actually delivered to her, and not later than the time she received the message of July 3d, announcing that a ticket had been sent her, (and for no other time) and if he would have sent her the money in time to prevent delay (if any), but was not so delivered, it devolves on the defendant to show such facts and circumstances, if any, by the evidence, as would excuse the failure to so deliver it; yet, before the defendant is required to show such facts or circumstances in excuse, the plaintiff

1—Reed v. Western U. Tel. Co., 31 Tex. Civ. App. 116, 71 S. W. 389 (390).

"This instruction is complained of as constituting a charge on the weight of testimony, and the complaint is well founded. It was the duty of the telegraph company to exercise ordinary and reasonable diligence to find the plaintiff and

deliver the message to him. Search may have been made at some places, and not at others, and a person of ordinary prudence and care might have searched at such other places; and therefore it was error for the court to assume, as it did in the charge quoted, that any character of search would acquit the company of negligence in that respect."

must first have shown, by a preponderance of the evidence, that the delivery could have been made by the exercise of reasonable care and diligence, and, if not so shown by the evidence, you find for defendant.<sup>2</sup>

§ 4184. **Incorrect or Insufficient Address Given by Plaintiff to Defendant a Good Defense in Actions for Non-Delivery.** (a) The defendant company was entitled to a complete and definite address upon the message, and if you believe it endeavored to get such address and failed to do so, and believe the address simply "Houston, Texas," without street or number, contributed to cause the delay in delivery, or failure to deliver, then you will find for defendant on its plea of contributory negligence.

(b) If you believe that the address simply "Houston, Texas," without any street or number, contributed to the non-delivery of the message, the plaintiff cannot recover, even though you may believe defendant was negligent as alleged.<sup>3</sup>

§ 4185. **Nature of Knowledge of Agents of Telegraph Company as to Purpose of Telegram.** No statement made or action taken by defendant's agent and operator, B., before its office opened for business, and when said operator was at home, or not in the service of the company or engaged in the functions of his position, was binding upon the defendant, nor can the defendant be held liable therefor, as the responsibility of the company began when the message was filed with it for transmission.<sup>4</sup>

2—Western U. Tel. Co. v. Burgess, — Tex. Civ. App. —, 60 S. W. 1023 (1024).

"We think the language of this paragraph of the court's charge is so indefinite and confusing as to make it impossible for the jury to have determined from said paragraph during what time appellee's alleged sufferings were chargeable to the alleged negligence of the appellant. In our opinion rendered in this case upon last appeal (56 S. W. 240), we say that the petition in this case shows a cause of action in favor of the appellee for her mental suffering between the time when she should reasonably have received a reply to her message, if it had been promptly delivered, and the time when she should have reasonably received a reply thereto after it had actually been delivered, and not later than the receipt by her of the message of July 3d announcing that a ticket had been sent her. Appellee under the pleadings and evidence in this case, would only be entitled to recover for her mental sufferings during the time above specified, and the trial court so instructed the jury, in clear and explicit language, in paragraphs 26 and 27 of this charge."

3—Western U. Tel. Co. v. Bowen, — Tex. Civ. App. —, 76 S. W. 613 (615).

"The court rightly refused to give the above charges to the jury. There is more than one valid objection to each of them. In the

first place they assume that the failure to furnish a more definite address was negligence on the part of the sender, when as a matter of fact it may be doubted if the issue of contributory negligence was presented by the evidence. It is a fair inference from the record that deceased's presence at Nederland was temporary, that he was but slightly known, and that Hammon knew no more definite address. Else why did he send a letter to plaintiff to be delivered by the Salvation Army? The law requires the sender to give a definite address if he knows one. If he knows a certain address, and fails to furnish it, he may be held guilty of contributory negligence. If he gives the fullest address he can reasonably obtain, he has done his duty, and the company must then exercise reasonable care with reference to the address furnished; the care exercised to be measured by the nature of the address given, and the other facts which the company may know or afterwards acquire. The charges in question assume that the failure to give a better address was negligence in the case, and for that reason were clearly on the weight of evidence. Another answer to the assignments is that the court correctly submitted the issue of contributory negligence in his main charge."

4—Hargrave v. Western U. Tel. Co., — Tex. Civ. App. —, 60 S. W. 687 (690).



**§ 4186. Knowledge of Telegraph Company's Agents as to Importance of Message.** (a) In this connection, you are instructed that you may consider the evidence as to H.'s being known in the city of B. in determining whether he could have been found by the exercise of reasonable care and diligence by defendant's agents and servants.

(b) But the fact (if it be a fact) that he was known in B., and known to the witnesses who testified that they knew him, is not conclusive that he was known to defendant's agents and servants, and you will determine from all the evidence before you whether he could have been found by them by the exercise of reasonable care, skill and diligence.<sup>5</sup>

"If the testimony of M. was true, he communicated the information to the agent on the way from the agent's home to the office from which he sent the message, and had barely finished telling him when they entered the door of the office. The information was acquired in the transaction of the business of the appellee, and the agent must have been mindful of the fact at the time the message was sent. *Tex. Loan Agency v. Taylor*, 88 Tex. 49, 29 S. W. 1057. The charge was erroneous, but was without prejudice, because from the verdict the

jury must have found that the appellee was not negligent in its undertaking to deliver the telegram."

5—*Western U. Tel. Co. v. Burgess*, — Tex. Civ. App. —, 56 S. W. 237 (240).

"This instruction, complained of as error under the twelfth assignment, should not have been given. The importance of the message should have been left to the jury in connection with the evidence in the case. It required a knowledge on the part of appellant's operator of the situation of the appellee to make its importance material."

## CHAPTER CLV.

### NEGLIGENCE—MISCELLANEOUS.

See Approved Instructions, Chapter LXXII, Vol. II.

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| <p>§ 4187. Liability for injuries from defective tram cars to persons invited on premises.</p> <p>§ 4188. Duty of auctioneer to exercise due care as to the safety of place in which sale is held.</p> <p>§ 4189. Degree of care due by electric company to avoid injuries to citizens.</p> | <p>§ 4190. Evidence of injury by cable or guy wire.</p> <p>§ 4191. Statutory duty of care in mines.</p> <p>§ 4192. Collision of ships—Should not charge juries with respect to matters of fact.</p> |
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**§ 4187. Liability for Injuries From Defective Tram Cars to Person Invited on Premises.** (a) If you believe from the evidence that the plaintiff was at the place where he was injured by invitation of the defendant, you cannot find a verdict in his favor, unless you also believe from the evidence that the defendant knew of the defect in the tram car, if from the evidence you believe there was such a defect.

(b) If you believe from the evidence that the defendant did not know that the tram cars which broke loose and ran down the slope were in a defective condition you must render your verdict in favor of the defendant, although from the evidence you may believe that there was a defect in one or more of the cars.

(c) If you believe from the evidence that the plaintiff was at the place where he was injured by invitation of the defendant, and if you believe from the evidence that the defendant did not know that the tram cars which broke loose and ran down the slope were in a defective condition you must render a verdict in favor of the defendant although from the evidence you may believe there was a defect in one or more of the tram cars.

(d) If from the evidence you believe that the plaintiff was at the place where he was injured by invitation of the defendant, I charge you that you cannot render a verdict in his favor under the fourth count of the complaint, unless you also believe from the evidence that the defendant actually knew that there was some defective condition about the cars which ran down the slope which would probably cause them to break loose and run down the slope.<sup>1</sup>

**§ 4188. Duty of Auctioneer to Exercise Due Care as to Safety of Place in Which Sale is Held.** The court instructs the jury that, if

<sup>1</sup>—Sloss Iron & Steel Co. v. Tilson, 137 Ala. 427, 37 So. 427 (429).

"These charges instruct a finding for defendant unless the jury believe from the evidence that the company knew of the defect in the tram cars, if such defect

existed. They ignore the exercise of reasonable care to have ascertained the defect, the law being that one inviting another on his premises on his own business owes the duty to the one so invited of exercising reasonable care for his safety."

you find from the evidence and under the instructions of the court that the defendant held a public auction sale of the building in question, as charged in the plaintiff's declaration, then it was the duty of the defendant to exercise due care to see that the place where such sale was held was in a reasonably safe and secure condition for persons attending such sale in the exercise of ordinary care.<sup>2</sup>

2—Zipkie v. Chicago, 117 Ill. App. 418, (423-425).

"One objection to this instruction, which seems to us patent, is a vagueness or want of precision, which might make it misleading as applied to the pleadings and facts in this case. The duty of the city to exercise due care to see that 'the place where such sale was held was in a reasonably safe and secure condition for persons attending such sale' is conditioned upon a finding by the jury that the city held a certain public auction sale of a building 'as charged in the plaintiff's declaration.' The charge of the declaration is that the city 'advertised that it would sell at public auction a certain house or houses located on the east side of H. street between said T. and U. streets, and that said defendant did solicit and invite the public to attend said sale on said date; that said plaintiff, pursuant to such invitation, attended said public sale at the time and place aforesaid, which was held by the said defendant on said sidewalk on the said H. street in front of the said houses.' We may suppose, therefore, that when, in this proposed instruction, plaintiff's counsel used the words, 'if the defendant held a public auction, etc., as charged in the declaration' he meant if the defendant held a public auction of the houses in question 'on the sidewalk on H. street in front of said buildings,' and that by the words, 'then it was the duty of the defendant to exercise due care to see that the place where such sale was held was in a reasonably safe and secure condition for persons attending such sale in the exercise of ordinary care,' he meant, 'then it was the duty of the defendant to exercise due care to see that said sidewalk on H. street in front of said buildings was in a reasonably safe and secure condition for persons attending such sale in the exercise of ordinary care, to stand upon in such numbers and positions as might be reasonably expected at such a sale.' This, or something very like it, is the meaning which is placed upon the proposed and refused instruction by both plaintiff and defendant in error in their arguments. Therefore we may assume that this was its meaning, although it certainly might have been much more clearly, definitely and precisely expressed. At all events, unless such a paraphrase as we have given states correctly the law applicable to this case, the

instruction as offered was properly refused, for if it was intended to mean something implying a less obligation on the city than is above stated, it was misleading in that it would naturally have led the jury to suppose that the city was held to the liability which we have above set forth. The question on this instruction may therefore be considered to be, was the city, under the circumstances disclosed by the record in this case, liable for an accident resulting from the condition of the sidewalk in question, if said sidewalk was reasonably safe for ordinary travel, but was not reasonably safe for a gathering of from forty to seventy-five people to stand on packed together, as they would be likely to be at an auction sale? In this aspect the question is an interesting one, but we think the answer must be adverse to the contention of plaintiff in error. In the first place, there is nothing in the record which shows that the city did, by its advertisement or otherwise, invite the people who attended said sale to stand upon this particular sidewalk. The advertisement does not appear at all in the record. It is presumably declared the place of sale to be 'on the premises.' At all events it cannot be presumed that it designated the sidewalk particularly. Nor does it even appear that the condemnation clerk or officer who, for the city, conducted the sale, gave any other invitation or direction for persons attending the sale to stand on the sidewalk, than might be implied from his taking his own position as auctioneer on the sidewalk nearer the house than the street. It does not appear that persons who were prudent enough to desire to avoid a crowd on a raised platform, like this sidewalk, might not have stood in the street below and heard and been heard by the auctioneer. But even if the action of the 'condemnation clerk' in the choice of his position as auctioneer is to be construed as an invitation to the people to throng near him on a sidewalk not sufficiently strong to bear their weight, it would not follow that the city's duty as to that sidewalk was changed. In his capacity as a public officer to carry out a governmental and municipal duty for the city, he could not make the city liable in tort by rashly choosing an improper place and method for doing that act, while others were open to him. Such an officer might, to put an extreme case, by such



§ 4189. **Degree of Care Due by Electric Light Company to Avoid Injuries to Citizens.** You are instructed that it is the duty of every person, firm, or corporation owning and operating an electric light system in a city to exercise proper care and diligence to construct their lines and keep them in repair in such manner that the operation thereof will not result in injury to the citizens from the electricity generated by it. By "proper care and diligence," as used herein, is meant such care and diligence, as a person of ordinary prudence and diligence, and well skilled in that particular business, would commonly exercise under like circumstances, and the degree of care and diligence required by law is always proportionate to the danger that might reasonably be apprehended from a failure to exercise care and diligence in the particular matter requiring care and diligence. The failure to exercise proper care and diligence, as the same is hereinbefore defined and explained, is "negligence," as the term "negligence" is used in this charge.<sup>3</sup>

§ 4190. **Evidence of Injury by Cable or Guy Wire.** I charge you that you have a right to look to the size and shape of the evidence of injury on the plaintiff's shoulder, if you believe there was such evidence of injury on her shoulder, in determining whether she was struck by the cable or guy wire.<sup>4</sup>

§ 4191. **Statutory Duty of Care in Mines.** The jury are instructed that the statutes of this state require that in case the galleries, roadways or entries of any mine are so dry that the air becomes charged with dust, the operator of such mine must have such roadway regularly and thoroughly sprayed, sprinkled or cleaned, and it shall be the duty of the inspector to see that all possible precautions are taken against the occurrence of explosions which may be occasioned or aggravated by the presence of dust.<sup>5</sup>

an invitation ask the people who attended a sale of this kind to stand before him on the tracks of an electric or steam railway. Certainly in such a case the city would not be liable for a resultant accident."

3—Honey Grove v. Lamaster, — Tex. Civ. App. —, 50 S. W. 1053 (1054).

"It will be seen from this charge that the simple standard of ordinary care was not given as the guide to the jury. Charges of this character have received the express condemnation of our supreme court. See *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 Tex. 399, 43 S. W. 877; *Gulf, C. & S. F. Ry. Co. v. Smith*, 87 Tex. 355, 28 S. W. 520."

4—*So. Bell Tel. & Tel. Co. v. Mayo*, 134 Ala. 641, 33 So. 16 (17).

"This charge requested by defendant and refused was faulty in calling special attention to and unduly emphasizing one phase of the evidence; and in being confused in that it instructed the jury they might 'look to the size and shape of the evidence of injury on the plaintiff's shoulder.' Evidence is to be measured by its weight and not by its 'size and shape.'"

5—*Chicago-Virden Coal Co.*, 116 Ill. App. 425 (427).

"This instruction is a copy of paragraph 'G' of section 20 of chapter 93 of the statutes in relation to coal mines. It is a mere abstract statement of law. No application is made of it in this or any instruction. Such instructions are generally vicious. In some cases where they are given, the judgment is allowed to stand notwithstanding, because, as is said, it can be seen that no injury thereby arose. We cannot so say in this case. The particular vice of the instruction is contained in the last sentence, beginning with the words, 'and it shall be the duty of the inspector.' No instruction tells the jury whose officer or agent the inspector is; the jury are left to form their own conclusion on that subject as best they may; the natural inference to be drawn from a reading of the instruction is that he is the agent, the employee, of the defendant, for whose neglect of duty the defendant would be liable; whereas, in fact he is an officer of the state, certified by the state, paid by the state, and in no sense, whatever, an agent of the defendant. The jury are told that it is the duty of the inspector to see that all possible precautions are taken

§ 4192. **Collision of Ships—Should Not Charge Juries With Respect to Matters of Fact.** (a) If you believe from the evidence that the officers of the City of Chester knew where she was with reference to the set off to the tide from Fort Point, and that the Oceanic, from the signals given and exchanged, supposed that the City of Chester would pass to the left going out, the signal of the Chester that it would adopt this rule of navigation must be held to have been presumably given in view of all the contingencies which affected the City of Chester, including its steam power and its ability to mind its helm, the condition of its propeller, and the knowledge of its officers of the condition of the tide. Such matters were properly within the knowledge of the officers of the City of Chester, and were not matters which the officers of the Oceanic are presumed to know.<sup>6</sup>

(b) If you believe from the evidence that the Oceanic arrived off the port of San Francisco on a voyage from Japan and China on the morning of August 22, 1888, and that the weather was foggy, and that, as the Oceanic entered the harbor, the officers of the ship were at their proper station, and an efficient lookout was kept and proper discipline maintained; that the steam whistle was kept going at intervals of less than a minute, and that for a reasonable time prior to the accident the steamship was proceeding dead slow; that somewhere between Point Bonita and Point Diablo the master and pilot of the Oceanic heard the fog whistle of an outgoing steamship, and if you believe from the evidence that after passing Point Diablo she was still going slow, and that the master and pilot of the Oceanic were looking carefully on the starboard bow, from which direction the fog signal was coming, and saw the hull of a vessel coming through the fog, which proved to be that of the Chester, and that she was from two to three points on the starboard bow of the Oceanic and about half a mile distant; and that two blasts were then blown on the whistle of the Oceanic and that the helm of the Oceanic was at the same time put hard astarboard; that the signal meant "We are going to port," and that it was understood by, and answered by two similar signals, from the Chester, signifying that she also would go to port; that, had the City of Chester acted on her starboard helm, as thus signaled, the two ships would have passed in safety; and that after the second signal to go to port was given by the Oceanic and answered and accepted by the Chester, if the City of Chester had answered her helm, there would have been no collision between the two steamships; and that as soon as the failure of the

against the occurrence of explosions; that is, that it is the duty of the defendant to take all possible precautions so to prevent. It is difficult to see how a more vicious instruction could be devised for this case. No instruction given cures the mischief contained in this. It is altogether possible that the verdict would have been rendered if that instruction had not been given, but we cannot in this case so determine."

<sup>6</sup>—Hampton v. Occidental & O. S. S. Co., 139 Cal. 706, 73 Pac. 579 (581).

"The instruction is not only

against the facts in the case as established by the testimony, but took from the jury the right to find upon those facts whether the Oceanic knew as well as the Chester the matters stated. The Constitution is imperative—"judges shall not charge juries with respect to matters of fact"—and its mandate must be obeyed. In the foregoing instructions the trial judge did instruct the jury with respect to matters of fact, and that, too, in a material matter; and it is fair to presume that, but for such erroneous instructions, the result of the trial would have been different."

Chester to answer her helm or to do what she had agreed to do in steering, if she did thus fail, was noticed, the captain of the *Oceanic* rang the telegraph, "Full speed astern," and that his order was promptly obeyed, and that at the time of the collision of the steamships the backwash of the *Oceanic's* propeller was coming up between the funnel and the bridge of that steamer; that the *Oceanic* was backing at full speed astern—then I charge you that the *Oceanic* was fully complying with the rules and regulations governing her proper action in entering the harbor.<sup>7</sup>

7—*Hampton v. Occidental & O. S. S. Co.*, supra.

In commenting upon this instruction the court said: "After an enumeration of certain facts, it concludes: 'Then I charge you that the *Oceanic* was fully complying with the rules and regulations governing her proper action in entering the harbor.' This was instructing the jury as to the ultimate fact in the case. This action is founded upon the alleged negligence of the defendant, and negligence is the ultimate fact to be inferred from the many probative facts. It is for the jury

to find the ultimate fact, even if these probative facts were undisputed. When different conclusions as to negligence can reasonably be drawn from the admitted facts, it is not for the court to instruct the jury which is to be adopted by them. *Hennessy v. Bingham*, 125 Cal. 627, 58 Pac. 200. Even if the probative facts had been as recited by the court, under the evidence and circumstances of the case, the jury might have been justified, for other reasons, in finding the ultimate fact that the defendants were negligent."



## CHAPTER CLVI.

### NEGOTIABLE INSTRUMENTS.

See Approved Instructions, Chapter LXXIII, Vol. II.

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| <p>§ 4193. Prima facie case—Proof of execution.</p> <p>§ 4194. Execution of a promissory note by a corporation for previous indebtedness is not incurring liability for new indebtedness—Liability of directors discussed.</p> <p>§ 4195. Authority of president of corporation—Release of liability.</p> <p>§ 4196. Partnership note—Dissolution of firm—Knowledge of by payee.</p> <p>§ 4197. Varying written contract by parol — Must ratify all agent's transactions or none.</p> <p>§ 4198. Inference of fact for jury—Failure to put revenue stamp on note.</p> <p>§ 4199. Acceptance of order to pay money—Admissions.</p> <p>§ 4200. Check given in payment of note—Verdict based on single fact.</p> <p>§ 4201. Execution or payment upon mistake of fact.</p> <p>§ 4202. Financial standing — Argumentative.</p> <p>§ 4203. Memorandum note — Construction of writing.</p> <p>§ 4204. Usury—Comment on weight of evidence.</p> | <p>§ 4205. Agreement as to security—Secret understanding.</p> <p>§ 4206. Construing contract as legal rather than illegal—What to consider.</p> <p>§ 4207. Genuineness of note—Forgery—Who must prove.</p> <p>§ 4208. Genuineness of signature—Delay in payment.</p> <p>§ 4209. Purchasing notes at discount.</p> <p>§ 4210. Conversion of note—Excuse for immediate delivery upon demand made.</p> <p>§ 4211. Burden of proof of settlement.</p> <p>§ 4212. Ratification — Waiver of fraud.</p> <p>§ 4213. Duress—Burden of proof—Preponderance.</p> <p>§ 4214. Knowledge of defects or want of consideration.</p> <p>§ 4215. Illegal consideration—Intent—Degree of proof required.</p> <p>§ 4216. Consideration—Notice to put on guard—Bound to make inquiry.</p> <p>§ 4217. Purchaser in good faith not bound to see to application of funds.</p> <p>§ 4218. What is sufficient to amount to notice.</p> <p>§ 4219. Bona fide purchaser—Filling of blank—Appearance of note irregular.</p> <p>§ 4220. Alteration—Burden of proof.</p> |
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§ 4193. **Prima Facie Case—Proof of Execution.** The court instructs the jury that the plaintiff, by the introduction of the note read in evidence, made out a prima facie case entitling it to a verdict for the amount of said note, principal and interest, according to the tenor and effect thereof; and you should so find, unless the defendants have shown by a preponderance of the evidence that said note, as originally executed and delivered by them to the plaintiff, bore no interest and has been altered in this respect.<sup>1</sup>

§ 4194. **Execution of a Promissory Note by a Corporation for Previous Indebtedness is Not Incurring Liability for New Indebtedness—Liability of Directors Discussed.** The court instructs the jury

<sup>1</sup>—Yost v. Minneapolis Harvester Works, 41 Ill. App. 556 (559, 560).  
 "Before the statute went into effect dispensing with the proof of the

execution of instruments sued on, proof of the signature was prima facie evidence of its execution. But that rule does not apply in this case."

that if they find, from the evidence, that at the time when the note was given, it was given in settlement of a book account of the ——— Co., with the plaintiff, such fact will not impeach the consideration of said note; but if the jury further find that the note was issued in the ordinary course of business of said corporation, and find from the evidence that the charter of said company has never been recorded in the recorder's office of ——— county; and if the jury further find from the evidence that at the time when said note was executed the defendants ——— ——— and ——— ——— were directors, then they will find against the defendants and in favor of the plaintiff.<sup>2</sup>

**§ 4195. Authority of President of Corporation—Release of Liability.** The court instructs the jury that if you believe from the evidence that the president of the S. Company agreed with T. to release him from liability on the notes set up by defendant as counter-claims, upon the consideration that the said T. would continue in the

2—Hoyt v. Hasse, 80 Ill. App. 187 (200).

"This instruction assumes that, if the note was executed in the ordinary course of business, even though it may have been so executed in consideration of prior indebtedness binding on the company, and without any agreement that it should operate as payment, its execution would be illegal, and if appellants were directors at the time of its execution, the mere fact that they were such without proof that either of them participated in any way in making or creating the indebtedness for which the note was given would make them liable. Such is not the law. To execute a note for indebtedness previously incurred is not to make a debt or liability within the meaning of section 18 of the statute. (§ 18 of chapter 32 R. S.) The language of the section is 'then they shall be jointly and severally liable for all debts and liabilities made by them.' Appellee's counsel contend that the section is purely remedial, and it must be so construed, but the Supreme Court has held that § 16 of the act, which makes directors assenting to indebtedness of the corporation in excess of the amount of its capital stock liable for such excess, should be construed strictly. (Lewis v. Montgomery, 145 Ill. 30, 33 N. E. 880.) And the Supreme Court of the United States in Huntington v. Attsill, 146 U. S. 657, 13 S. C. L. 224, while holding a similar statute not strictly penal, say, 'As the statute imposes a burdensome liability on the officers for their wrongful acts, it may well be considered penal in the sense that it should be strictly construed.' Ib. 676. In the last case (p. 667) and also in Diversey v. Smith, 103 Ill. 378 (390), 42 Am. Dec. 14, it is held that a penal law may also be remedial. The reasoning by which the conclusion is reached that § 16 should be construed strictly is

equally applicable to § 18, and applying that construction to the law of the section, 'the words implied should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute.' Lewis v. Montgomery, supra. By the terms of the statute, liability is imposed on those only by whom the debts or liabilities were made. We think it too clear to require argument, that the execution by a corporation of a promissory note for indebtedness long previously incurred is not the making of or incurring liability for the indebtedness evidenced by the note. The giving of the note is merely a recognition and a promise to do that which the corporation is legally bound to do; namely, pay it. In Lewis v. Montgomery, supra, it was held in respect to § 16 that to make the directors liable it must appear that they assented to the creation of indebtedness in excess of the amount of capital stock, and the court, after so holding, said: 'Manifestly a recognition of the indebtedness by the directors, after it has been so contracted as binding upon the corporation, should not have the effect of charging them with this statutory liability. After the indebtedness has been created by such agents and in such manner as to constitute it a valid obligation of the corporation, it becomes the duty of the directors to recognize its validity, and so far as in their power to provide for its payment.' This language is equally applicable to § 18. This instruction is also erroneous in assuming that appellants would be liable for the wrongful act of any officer or agent of the corporation solely on the ground that they were directors at the time the act was performed. This view was expressly repudiated in Lewis v. Montgomery, supra."

service of the said company, and that said T. did so, you will find for the plaintiff, T., on said counterclaims.<sup>3</sup>

**§ 4196. Partnership Note—Dissolution of Firm—Knowledge of by Payee.** (a) If you find from the evidence that at or after the dissolution of the firm of S. D. & P. the defendant, S., authorized D. to sign the defendant's name to notes for the firm debts, and that said D. in pursuance of said authority signed the notes dated ————, ————; if you believe from the evidence that the bank, through its officers, did not know, and could not, by the exercise of reasonable business diligence have known, that said firm was dissolved at the time of taking said notes of ————, ————, then you will find for the plaintiff on the notes of ————, ————.

(b) You are instructed that the burden of proof is on the bank, and it must establish its case by a preponderance of the evidence, and every material point on which the evidence does not preponderate in favor of the bank must be decided in favor of the defendant. In determining where the preponderance is, you will consider all the facts and circumstances proven.<sup>4</sup>

**§ 4197. Varying Written Contract by Parol—Must Ratify All Agent's Transactions or None.** I charge you that if you believe that

3—*Stripling v. Maguire*, 108 Mo. 594, 84 S. W. 164 (1866).

"The testimony introduced, consisting of the statements of the president and general manager, if accepted by the jury, demonstrated that the directors consented to the execution of the agreement with respondent prolonging his relations with the corporation, one condition of which was his discharge from further obligation on the notes. The president of a corporation, as its chief executive, is intrusted with broad and liberal power and authority in the general conduct and management of its affairs. It had been held that, in an act performed by him as the legal head of the corporate body, the presumption should be indulged that such act is legally performed, and binding on the corporation. *Jones v. Williams*, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. 436. But without precise determination of the scope and limitations of his authority, the proposition is fully warranted that the president of a business corporation may bind the corporation by contracts on its behalf, in the matters presented in ordinary course of business, without express authority from the board of directors. *Sparks v. Dispatch Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. 351. This instruction, however, assumes that a president of a corporation, *virtute officii*, has the power to release claimant from liability upon the notes involved. While the range of the authority of a president also general manager of a business corporation, as stated, is necessarily liberal, and embraces general authority to perform all acts usual and essential in

the ordinary transaction of the daily business of the corporation, his authority to discharge claimant, as well as such discharge, were both facts in issue, and should both have been passed upon by the jury, and the instruction is fatally defective in assuming, in lieu of submitting, such issue."

4—*Dixon National Bank v. Spielman*, 35 Ill. App. 184 (187).

"The first of these instructions requires the jury to find affirmatively, from the evidence, that the bank did not know, and could not by diligence have known of the dissolution of the firm. It was either given in utter obliviousness of the difference between an affirmative and a negative, or it was intended that the jury should understand that the plaintiff had the *onus* on that question; and the last tells the jury in terms that every material point on which the evidence does not preponderate in favor of the bank, must be decided in favor of the defendant. It would be difficult to draw instructions which would more completely reverse the attitude of the parties in relation to the principal issue which they were litigating, or more effectually lift the burden from the one who had rightfully assumed it and impose it upon the other, upon whom it could not be laid without subverting well settled principles of jurisprudence governing the trial of suits at law. Such instructions were clearly erroneous and very likely misled the jury to the injury of appellant. *Brown v. People*, 4 Gilm. 439; *Galena & Chi. U. R. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *People v. Price et al.*, 3 Ill. App. 16; *Williams v. Shup*, 12 Ill. App. 454; *P. D. & E. R. R. Co. v. Foltz*, 13 Ill. App. 535."



W. acting in behalf of the plaintiff, took from the defendant the note sued on as is set up in the defendant's plea, I charge you that, though W. may not have (had) any authority to make the contract referred to, yet, if he did make it, the plaintiff could not accept a note, and ratify W.'s act in taking it, without ratifying his whole contract. One cannot ratify the act of his agent in part and repudiate it in part. He must ratify all or none of the transaction. I charge you that (if it was) agreed at the time of the note sued on was executed that the defendant, D., should keep the machines until W. notified him to what place to ship them, and if the defendant gave to W. a note payable to the company, and that W. was to hold the note, as collateral security for the machines that D. had in his possession, and if it was agreed when D. shipped the machines the note was to be canceled and returned to D., and if W. or the company had never notified D. where to ship the machines, and if he has them on hand now to be delivered to the company at any time, or shipped to such place as they may designate, then I charge you the plaintiff is not entitled to recover in this case and you should find a verdict in favor of the defendant.<sup>5</sup>

**§ 4198. Inference of Fact for Jury—Failure to Put Revenue Stamp on Note.** (a) The jury are instructed that, if the note in suit is a perfect note on its face, this is a strong inference that the party signing the same did so as principal, and not otherwise.<sup>6</sup>

(b) The court further instructs the jury that if they believe, from the evidence, the note offered in evidence and purporting to be dated ————, ————, was delivered to one A. signed in blank during the month of ————, ————, and the same was and is unstamped with proper revenue stamps, then the jury must disregard said note, and not take the same into consideration in arriving at the verdict in this case.<sup>7</sup>

**§ 4199. Acceptance of Order to Pay Money—Admissions.** The court instructs the jury that even though you may believe from the evidence that the defendant may have stated to some witnesses on the part of plaintiff, that he had accepted the order in controversy, still the court instructs you, the law is, that defendant cannot be held to pay said order solely on account of such statements; that unless you further believe from the evidence, defendant accepted said order or promised the plaintiffs to pay the same, he can not be held

<sup>5</sup>—*American Harrow Co. v. Dolvin*, 119 Ga. 186, 45 S. E. 983 (1903).

"It is insisted that this charge was erroneous, for the reason that it, in effect, allowed the defendant to set up a verbal contract which varied the terms of the written contract by adding to the same. For the reasons given, and upon the authorities hereinbefore cited in considering the refusal of the court to exclude illegal evidence, we think this charge was erroneous."

<sup>6</sup>—*Fassnacht v. Emsing Cagen Co.*, 18 Ind. App. 80, 46 N. E. 45 (1897), 63 Am. St. 322.

"This instruction was erroneous. It invaded the province of the jury, inasmuch as it is for the jury, and not for the judge, to draw infer-

ences of fact from the evidence, and to pass upon the weight or strength of evidence from which inferences of fact are to be drawn. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63; *Wood v. Deutchman*, 75 Ind. 148; *Huffman v. Cauble*, 86 Ind. 591; *Louisville, N. A. & C. Ry. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Pancake v. State*, 81 Ind. 93; *Storv v. State*, 99 Ind. 413; *Home Ins. Co. v. Marple*, 1 Ind. App. 411, 27 N. E. 633."

<sup>7</sup>—*Masterofsky v. Hellman*, 99 Ill. App. 214.

"This was error. Congress has no power to determine what shall be law in the courts of the State. The *U. S. Express Co. v. Haines*, 48 Ill. 248."

by any statement to others, that he had accepted or promised to pay said order.<sup>8</sup>

**§ 4200. Check Given in Payment of Note—Verdict Based on Single Fact.** The court instructs the jury that the question of whether the \$—— check was given in payment of the note sued on, or was given to G. in pursuance of some other arrangement previously entered into between him and his father, is a question for the jury to determine from all the evidence in the case. And if the jury find from the evidence that said \$—— check was not given in payment of said note, then the jury should find for the plaintiff A., administratrix of the estate of said G., deceased.<sup>9</sup>

**§ 4201. Execution or Payment Upon Mistake of Fact.** If you believe from the evidence that plaintiff executed any notes or paid any money upon the mistake of fact that the defendant had complied with the written contract sued on, and that notes were executed or said money paid by the plaintiff upon the mistaken belief that he was indebted to defendants herein, and, in truth and in fact, plaintiff owed defendants nothing, then and in that event you will find for plaintiff for such money so paid and said notes so executed.<sup>10</sup>

**§ 4202. Financial Standing—Argumentative.** The jury are further instructed that in passing upon the question whether or not A., at the time of his death, was indebted to B., they have a right to consider the financial condition of the two named persons at or about the time such supposed indebtedness was incurred, if the same has been shown by the evidence, and also whether or not said A. was a person prompt to pay his debts, prudent, careful, and not desirous of being in debt, if the same has been shown in the evidence.<sup>11</sup>

8—Crumb & Co. v. Phettiplace, 53 Ill. App. 337 (341).

"The evidence of an acceptance consisted, in part of the testimony of several witnesses that defendant had stated to them that he accepted and agreed to pay the order, and this instruction practically denied to plaintiff all benefit of such evidence of admissions. That evidence tended to prove the fact of acceptance, and yet the jury were told that although the admissions of such fact were made by the defendant they must further believe from the evidence that he accepted the order, or else he could not be held by it."

9—Gedney v. Gedney, 61 Ill. App. 511 (513).

"This instruction directed a verdict on the single fact, as to the check, to be found for the plaintiff, whereas that was not the only fact essential to such a verdict as the jury were told to find. It was also necessary to decide an issue of fact made under the plea of the statute of limitations. There were correct instructions for defendant on that issue, but they did not cure this instruction, since the jury might obey this one and find for plaintiff merely because they concluded that the plea of payment was not sustained."

10—Finks v. Hollis, — Tex. Civ. App. —, 85 S. W. 463.

"The charge complained of authorized a verdict for the plaintiff if the notes were executed by him because of a mistake on his part, although the mistake may not have been caused by conduct of the defendants. This was error, and the error was not cured by giving another special charge which correctly stated the law and conflicted with the one complained of. San A. & A. P. Ry. Co. v. Robinson, 73 Tex. 277, 11 S. W. 327; Baker v. Ashe, 80 Tex. 356, 16 S. W. 36."

11—Chicago T. & T. Co. v. Ward, 113 Ill. App. 331.

"In support of his contention counsel cites Thorp v. Goewey, Admr., 85 Ill. 611, which holds that where a claim on a note is made against an estate it is, under certain circumstances, proper to show the financial condition of the payee and holder. Such proof was received in the case at bar; but the case cited is no authority for the giving of the refused instruction. On the contrary it is in accord with many others decided by the Supreme Court when they say (p. 615), what is strikingly true of the instruction before us, that it is 'more in the nature of an argument to the jury, giving prominence to the facts upon which appellee relied, than a statement of a principle of law applicable to the facts of the case.'"

§ 4203. **Memorandum Note—Construction of Writing.** (a) If you find from the evidence that the defendants gave the note sued on simply as a memorandum note, at the suggestion of the plaintiff's duly authorized agent, as claimed by defendants, and not as settlement in full for said machines, then defendants would be liable to plaintiff on said note only for such sum as you find is the value of the goods sold, after giving said note, if any such have been sold, and not settled for.

(b) You are instructed that if you find that the defendants were selling the goods of the plaintiff on commission, and did not own them, and that they have sold any of said goods, and have not settled for all the goods sold, then your verdict should be for the plaintiff for the value of the goods you find from the evidence have been sold, and not settled for, including mowers, rakes, and repairs, less such sum as you find the defendants entitled to for freight paid or for storing said machinery, if you find they are entitled to anything.<sup>12</sup>

§ 4204. **Usury—Comment on Weight of Evidence.** If you find from a preponderance of the evidence that the note sued on was drawn for and expresses a greater sum of money than was actually paid for and delivered to the defendant, H., by the plaintiff, then you are charged that the note sued on would be a usurious contract, and you should so find. As to whether such note is a usurious contract, is a question of fact to be decided by you, looking to all the evidence before you, and applying it to the charge given.<sup>13</sup>

§ 4205. **Agreement as to Security—Secret Understanding.** If in February last, K. being insolvent, her stock of goods having been destroyed by fire, the M. Bank, to whom she owed a \$— note, with R.'s security, and also certain other notes, unsecured, and an attachment upon the insurance owing to her on her stock of goods so destroyed, which was sufficient to cover both the secured and unsecured indebtedness, and that K. proposed to the bank to release a part of the insurance, and to take an assignment of the balance, to be collected by it and applied to her indebtedness, and that the bank, recognizing that the amount proposed to be assigned would be sufficient to pay the unsecured debt and that the name of R. furnished sufficient security for the \$— note, and that the bank in view of said fact acceded to the request, then the jury are told that, after such proposition was agreed to and acted upon by the bank K. could not thereafter refuse to comply with such agreement.<sup>14</sup>

12—*Western Mfg. Co. v. Rogers*, 54 Neb. 456, 74 N. W. 849 (850).

13—"The giving of these instructions constituted grounds for reversal. They left it for the jury to construe the agreement of the parties. The contract was ambiguous, and required no extrinsic facts to aid in ascertaining its true meaning; therefore it was the province of the court to have interpreted it. *Simms v. Summers*, 39 Neb. 781, 58 N. W. 431; *Ricketts v. Rogers*, 53 Neb. 477, 73 N. W. 946."

14—*Halsey v. Bell*, — Tex. Civ. App. —, 62 S. W. 1088 (1089).

"We think this charge is upon the weight of the evidence, in that it assumes that money was actually

paid or delivered to the defendant by the plaintiff. As appears from the foregoing statement, the issue in the case was whether or not any money was actually paid or delivered to the defendant, and, as this charge is framed, the jury might have inferred that, in the opinion of the court, the plaintiff had delivered money to the defendant. That a charge so framed that the jury may infer from it the opinion of the court on a material issue of fact is erroneous when the evidence on such issue is conflicting, is well settled. *Altgelt v. Brister*, 57 Tex. 432; *Andrews v. Marshall*, 26 Tex. 215."

14—*Rosenbaum v. Meridian Nat. Bk.*, 73 Miss. 267, 18 So. 549.



§ 4206. **Construing Contract as Legal Rather Than Illegal—What to Consider.** If the agreement between the plaintiff and the defendants which induced the signing of the notes sued on is equally capable of two constructions, one legal and the other criminal, the jury should rather hold to the construction making the agreement legal, than to the construction making the agreement criminal.<sup>15</sup>

§ 4207. **Genuineness of Note—Forgery—Who Must Prove.** After the note was admitted in evidence, the burden of proof was upon the defendant to establish forgery, and it must be established by a preponderance of the evidence.<sup>16</sup>

§ 4208. **Genuineness of Signature—Delay in Payment.** (a) The court further instructs the jury that in reaching a conclusion as to whether either one of said checks was signed by the defendant and is a check made by him, the jury have a right to take into consideration all the facts in evidence, relating to said checks, the circumstances and conditions surrounding the parties to the transactions, the delay in presenting the said checks for payment, together with all the other facts and circumstances proven in this case.<sup>17</sup>

"The above instruction is erroneous because it makes the secret purpose and understanding of the officers of the bank, which were not induced by or known to K., a controlling factor in the controversy. Under the instruction the right of the defendants would be measured by the thought of another; and as was quaintly said by Bryan, C. J., several hundred years ago, 'It is trite law that the thought of man is not triable, for even the Devil does not know what the thought of man is.' Pol. Cont. p. 2, note 'a.' It is a conceded fact that before the policy was realized on, K. instructed the bank to apply its proceeds, when collected, to the credit of the note sued on, and we find nothing in the record which excluded him from the right of having the payment applied according to his wishes. If it be accepted as true,—as to which the evidence is not at all clear—that the bank had attached K., and had caused garnishments to be served against insurance companies indebted to the defendant, in sums aggregating the amount due the bank, and dismissed the garnishments, as to some of these companies, in consideration of the assignment of some of the policies in other companies, it would not follow, necessarily or probably, that the agreement was made because the bank had the security of R. for a part of the debt due by K. It may be that the agreement was entered into because the bank knew it could not, or doubted its ability to, maintain its action."

15—U. S. Fid. & Guar. Co. v. Charles, 131 Ala. 658, 31 So. 558 (559), 57 L. R. A. 212.

"Above instruction requested by the plaintiff and which was refused, was likewise calculated to mislead. Besides it excluded from consideration by the jury all the evidence in the case except that of the agree-

ment between the plaintiff and the defendant. Although the agreement if taken alone should be equally capable of two constructions, one legal and the other criminal, the jury would not be bound under the law to adopt the former rather than the latter construction, if other evidence in the case tended to show illegality in said agreement."

16—First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. 276 (278).

"This instruction was properly refused. The burden was upon the plaintiff to establish the genuineness of the note by the preponderance of the evidence. This burden did not shift to the defendant after the note was introduced in evidence, but remained with the plaintiff throughout the entire trial. Donovan v. Fowler, 17 Neb. 47, 22 N. W. 424; Holmes v. Riley, 14 Kan. 131."

17—Turner v. Righter, 120 Ill. App. 131.

"The instruction in question not only assumed that there was, as a matter of fact, a delay in presenting the checks for payment, but in addition thereto, called the especial attention of the jury to such assumed fact, thus giving it undue prominence. The effect of it was to give the jury to understand that in the opinion of the court the fact of delay was of more importance than any others appearing in evidence. The fact that they were told that they had a right to consider the fact of delay together with all the other facts and circumstances proven in the case, did not render the instruction any the less misleading. It but tended to emphasize the importance of the fact of delay over all others. The rule that to single out and give undue prominence to a single fact or several facts in an instruction, is error, as calculating to mislead the jury, is so well established as not to require the citation of au-

(b) The jury are instructed that receipts are not usually given when promissory notes are paid, but that it is the duty in law, of a person paying promissory notes, to demand their production and surrender to him before he parts with his money, and where there are other and different accounts between the maker of the note and the holder of the note, a receipt on account, or in full of account, and in which receipt no specific mention is made of the note or notes, does not necessarily imply payment of the note or notes, and unless the jury believe the defendant has proven by a preponderance of all the evidence that the notes introduced in evidence have been paid, then their verdict must be for the plaintiff.<sup>18</sup>

§ 4209. **Purchasing Notes at Discount.** You are instructed by the court that, if you find from all the evidence in this case that the plaintiff purchased said notes at a discount of — per cent., then you have a right to take this fact into consideration in determining whether or not said plaintiff purchased said notes in good faith or not.<sup>19</sup>

§ 4210. **Conversion of Note—Excuse for Immediate Delivery Upon Demand Made.** The court instructs the jury that if they believe from all the evidence introduced in this case that the note in question was placed in the possession of the defendant by the plaintiff for collection, and that no time was fixed by the parties within which said note should be returned if not collected, and the jury further believes from the evidence that the plaintiff, before the commencement of this suit, either in person or by his attorneys, made a demand upon the defendant for the return of said note, or the proceeds thereof, and that the defendant failed to return said note or the proceeds thereof, and you further believe from the evidence that the plaintiff was the owner of said note, then in such case the jury may find that the defendant is guilty of a wrongful conversion of said note, and is liable in trover for the value thereof.<sup>20</sup>

thorities. The instruction is further misleading in that it authorized the jury to consider 'the circumstances and conditions surrounding the parties to the transactions.' As to which of the parties, whether the alleged drawee or assignee of the checks, is referred to, what particular circumstances or conditions are to be considered, whether those are meant which surrounded the parties at the time of the alleged execution of the checks, or those at the time the checks were assigned to plaintiff, or those existing at the time of bringing the suit, or at the trial, the jury are not advised."

18—*Connelly v. Sullivan*, 119 Ill. App. 469 (470).

"It was not error to refuse to give for plaintiff the instruction beginning with the words, 'The jury are instructed that receipts are not usually given when promissory notes are paid.' Whether receipts are usually given when promissory notes are paid is a question of fact, not one of law. The receipt in evidence was for 'all moneys which the said S. owed me up to date,' and the instruction as asked related to the effect of 'a receipt on account, or

in full of account,' and was therefore improper."

19—*Kimmel v. Nagele*, 84 Ill. App. 22 (25).

"This instruction was erroneous because it singled out and gave undue prominence to part of the evidence only, and did not tell the jury that the same should be considered together with all the other evidence in the case. It was also erroneous in this case under the peculiar circumstances, for the reason that the jury might infer from it that they were at liberty to determine the good or bad faith of the appellant from the fact alone that he purchased the notes at a discount."

20—*Sprague's Collecting Agency v. Spiegel*, 107 Ill. App. 508 (510).

"This instruction permits the jury to find for the plaintiff in an action such as this, if the note was not returned upon demand, or the proceeds thereof were not then paid over, although it further appeared in the evidence that with the consent of the plaintiff the note had been sent to a reputable attorney in a neighboring state, and was there in the process of collection. It shuts out all consideration of excuse for the

§ 4211. **Burden of Proof of Settlement.** The giving and acceptance of a promissory note, as in this case, raises a presumption of settlement of all matters pertaining to the transactions at that time under consideration. Therefore, to entitle plaintiffs to recover upon the account sued on, they must not only prove that the goods were not only in fact sold to defendant or M. & C., but they must also prove, by a preponderance of evidence, that the said balance on said account was omitted from any settlement at the time of the execution of said note.<sup>21</sup>

§ 4212. **Ratification—Waiver of Fraud.** (a) If the defendants, after signing the note in suit, afterwards learned or were informed that it was in fact a promissory note, and after such knowledge accepted the horse, and kept and used him, they ratified the contract, and your verdict must be for the plaintiff.

(b) If the defendants, or any of them, after learning that the contract signed was in fact a promissory note, agreed to pay the same, or sought and obtained an extension of the time of payment, they thereby ratified the contract, and your verdict must be for the plaintiff and against the defendants so ratifying it.

(c) If, after they knew the contract sued on was a promissory note, the defendants organized a company for the purpose of caring for the horse and paying the notes, and had officers for such purpose, and such officer or officers asked for an extension of time to pay the note, such an action was a waiver of the fraud, and your verdict must be for the plaintiff.<sup>22</sup>

§ 4213. **Duress—Burden of Proof—Preponderance.** The jury are further instructed that the burden of proof in this class of cases is always upon the party holding the affirmative. That would be upon the plaintiff in this action. And you are instructed that any matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence. If you find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and you should find in favor of the defendant.<sup>23</sup>

non-production of the note at the instant of the demand. It asserts that upon proof of the facts stated therein to the exclusion of all other facts and circumstances, the jury may find the defendant guilty of a wrongful conversion of the note. It points out an easy way to realize upon doubtful paper. You have only to put it into the hands of a responsible attorney, wait until he in good faith has sent it to a distant city, the residence of the debtor, for collection, and then demand the instant return of the paper, or in default thereof, the payment in cash of its face value with interest. If the attorney does not comply with one or the other of these demands, under this instruction you have a good cause of action in trover against him."

<sup>21</sup>—*Tootle v. Maben*, 61 Neb. 617, 33 N. W. 264 (265).

"The rule is well settled that, under a plea of payment in the answer, the burden of proof is on the de-

fendant to prove it. *No. Pa. R. Co. v. Adams*, 54 Pa. St. 94; *Gernon v. McGan*, 23 La. Ann. 84; *Knapp v. Runals*, 37 Wis. 135."

<sup>22</sup>—*First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952 (954).

"Each of these requests was properly refused. It is claimed on behalf of the defendants that the note, in legal effect, was a forgery, and could not be ratified. Such is the rule where the holder of a forged instrument is connected with the forgery, but whether the rule applied where the instrument is held by an innocent third party is an open question in this state. *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 12 Am. St. 754, 4 L. R. A. 196. The facts assumed in the requests, so far as there is any evidence in the record tending to support them, would not, as a matter of law, constitute an adoption or ratification of the note by the defendants."

<sup>23</sup>—*Bullard v. Smith*, 28 Mont. 387, 12 Pac. 761 (768).



§ 4214. **Knowledge of Defects or Want of Consideration.** Knowledge of defects or want of consideration, or of fraud in the making of a negotiable note must be such information as will call to the mind the defect or fraud when the note is offered for purchase. This is with reference to the article in the paper of ———, and other evidence of like character. If the article did not amount to such knowledge as would inform the person seeing the note of the defects of this note, or of the want of consideration, or cause such knowledge to be suggested to the mind when the note was presented, it would not amount to notice of any infirmity, even though the purchaser might have read the article.<sup>24</sup>

§ 4215. **Illegal Consideration—Intent—Degree of Proof Required.**

"The court refused these instructions requested upon the question of duress; being misled, possibly, by the language of this court in the case of *Rossiter v. Leober*, 18 Mont. 372, 45 Pac. 560. By this action we are led to believe that, in view of the court below, the burden was upon the plaintiff to show by a preponderance of evidence, in addition to the matters specified in the above instruction, or as included therein, that the note sued upon was executed without duress. In this view the court was, in our opinion, wrong, but blamelessly so, because of the somewhat careless and inaccurate language of this court used in the case of *Rossiter v. Leober*, supra. There is no doubt but that, when a suit is brought by an indorsee or assignee of a non-negotiable note, the burden of proof is upon him to show that the note was originally issued upon a valuable consideration, and that he is a bona fide holder thereof; but, in our judgment, there is no warrant in the law for holding that the burden is also upon him to show that no other defense existed to the note. This court, in *Rossiter v. Leober*, supra, said: 'Written obligations, whether for a debt due or not, made under such circumstances, will not be enforced at the instance of the person who takes them with notice of the circumstances connected with their inception, as plaintiff in this case clearly did, if the maker plead and prove such duress as a valid defense. Duress having been proved on the trial, the question of no consideration is immaterial to the further discussion of the case. Accordingly it was error in the district court to instruct that it was incumbent upon the defendant to establish his defense of duress and compulsion and want of consideration by a preponderance of the evidence, and, if he failed to do so, plaintiff should recover. He was not bound to prove both such defenses. Either, if established, would defeat a recovery by plaintiff.' Thus far no misunderstanding of what this court meant could arise, but from the following language, which was merely by way of dictum, some confusion

might, and doubtless would, arise: 'What we have heretofore laid down, namely, that the burden of proving that plaintiff was a holder in good faith was always upon him, relieved defendant of establishing the defense of duress by a preponderance of evidence. It was always upon plaintiff alone, who acquired this note subject to the defenses which might be interposed by defendant against its payment, to prove his bona fides, to entitle him to recover.' The opinion in that case, upon careful examination, does not disclose the fact that plaintiff introduced, or even offered, any evidence tending to show that he purchased the note for a valuable consideration in the regular course of business; and it does not disclose that he acquired the same with full knowledge of the duress practiced upon the defendant. So that the presumption which attaches to a holder in good faith for a valuable consideration, without notice of defenses, did not arise. Speaking generally, duress, like fraud, may be pleaded as a defense to a contract; but the burden of proving such defense by a preponderance of the evidence is upon the party alleging it, except under special circumstances, none of which appear in this case. Therefore, if the holdings announced in this opinion are in conflict with those announced in *Rossiter v. Leober*, supra, that case is overruled to the extent of such conflict."

<sup>24</sup>—*Merrill v. Hole*, 85 Ia. 66, 52 N. W. 4 (6).

"There was nothing in the case to call for such an instruction. The entire transactions had occurred within a period of 15 days. The note was executed July 25th, the newspaper publication August 2d, and the transfers of the note August 5th and 8th. There was nothing to show, and no reason to infer, that any information that had come to the purchaser concerning the note was forgotten or out of mind at the time of the purchase. The newspaper article did show that which would inform any person who read it and saw the notes, knowing that it was a Bohemian oats note, that it was void."

(a) In order to constitute a defense to the notes sued on, the defendants must show by clear proof that in consideration of the execution of the notes sued on, the plaintiff agreed to refrain from criminal proceedings against C. for the embezzlement of the funds made good by plaintiff.<sup>25</sup>

(b) If plaintiffs knew that said liquors, the consideration of the note or any part thereof, were purchased by defendant for the purpose of selling the same in violation of the statute named in defendant's third plea, and if plaintiffs with such knowledge, did any act to conceal the identity of said liquors by shipping in fake barrels or otherwise, and in that manner aided defendant in effecting the sale of said liquors in violation of the statute named in defendant's third plea, then this would be a participation on the part of plaintiffs if the sale in violation of the statute by defendant was effected and you should find for defendant.<sup>26</sup>

(c) If from the evidence you are reasonably satisfied that at the time of the sale of the liquors, or any part of them, the consideration of the note sued on, the defendant bought the same or any part thereof, for the purpose of selling the same in L. county, Ala., and that the plaintiffs knew the defendant was purchasing the same for that purpose, and if in pursuance of such purpose, defendant did sell said liquors in violation of the prohibition laws of L. county, Ala., at H., Ala., you should find for the defendant.<sup>27</sup>

(d) If the jury believe from the evidence that the plaintiff kept his doors open on Sunday for the purpose of obtaining light and air, and not for the purpose of trading, then a casual sale on Sunday would not be a violation of penal law, and an item in the account so sold would not avoid the notes.<sup>28</sup>

25—U. S. Fid. & Guar. Co. v. Charles, 131 Ala. 658, 31 So. 558 (559), 57 L. R. A. 212.

"This charge requested by the plaintiff was in its tendency misleading, in that it was calculated to impress upon the jury that a greater measure of proof was necessary than that laid down by law."

26—McWhorter v. Bluenthal, 136 Ala. 568, 33 So. 553, 96 Am. St. 43.

"This charge requested by the defendant is faulty in the failure to hypothesize an intent on the part of the plaintiffs in connection with the acts postulated in the charge as constituting a participation by the plaintiffs in subsequent illegal sales of the liquor by the defendant. If the acts postulated were done by the plaintiffs without the purpose or intent to aid the defendant in his subsequent illegal sales, such acts in themselves and alone would not constitute a participation in such subsequent illegal sales. The charge for the reason given, if for no other, was properly refused."

27—McWhorter v. Bluenthal, *supra*.

"Mere knowledge on the part of the plaintiff of the purpose of the defendant to sell the liquor in violation of the prohibition law, in L. county, and the fact that it was sold by the defendant in violation of such law, did not, as matter of law,

constitute a participation by the plaintiff in the defendant's act."

28—Wadsworth v. Dunnam, 117 Ala. 161, 23 So. 699 (701).

"The complaint declares on eight several promissory notes, and the uncontroverted fact is that these notes were given in settlement of an account for goods and merchandise sold by the plaintiffs to the defendant; and there was evidence tending to show that some of the sales were made on Sunday, and some were of Ginseng Cordial, an intoxicating drink, in violation of a law prevailing in the locality of sale rendering such sale an indictable offense. If there were items of the account closed by the notes not tainted with illegality,—unconnected with the illegal sale,—the plaintiffs could have maintained an action on the original contracts of sale, though the notes had been taken. The notes, if tainted with illegality, are utterly void,—incapable of discharging the just indebtedness of the defendant. But the plaintiffs chose to declare on the notes alone, not joining a count for goods sold. The notes are *prima facie* evidence of indebtedness, and upon the defendant was cast the burden of showing to what extent the consideration was legal, and upon the court the task of separating the sound from the unsound." Adopting

(e) If the jury believe from the evidence that the compound or cordial included in W.'s account was not reasonably susceptible of being used as an intoxicating beverage, then the sale is not prohibited by law, and the notes sued on would not be invalid on account of the sale of such bitters.<sup>29</sup>

§ 4216. **Consideration—Notice to Put on Guard—Bound to Make Inquiry.** In order to sustain defendant's claim, it is not necessary that the evidence show that plaintiff had express, actual notice that said notes were without consideration. It will be sufficient if the circumstances brought home to the plaintiff are of such a strong and pointed character as would necessarily cast a shade upon the transaction and put him upon inquiry. If the circumstances attending the transfer of the notes were such as to necessarily put the plaintiff on his guard, or if he must have known therefrom that ——— had no right to transfer said notes, then he was bound to make inquiry, and, if he did not, he took them at his peril.<sup>30</sup>

§ 4217. **Purchaser in Good Faith Not Bound to See to Application of Funds.** The court instructs the jury that, if they believe, from

the language of the court in *Widoe v. Webb*, 20 Ohio St. 431: 'If this effort should result in the plaintiffs' losing what was justly due them, we can but repeat what was said in a similar case: It is but a reasonable punishment for including with his just due that which he had no right to take.'

29—*Wadsworth v. Dunnam*, supra. "Above instruction given at the instance of the plaintiffs is in conflict with the views expressed when this case was here at a former term (*Wadsworth v. Dunnam*, 98 Ala. 610, 13 So. 597), and should have been refused. The instruction is, in fact, but a repetition of the fourth instruction given at the instance of the plaintiffs on the former trial, and which was pronounced erroneous. We will not enter into a discussion of the ingredients of properties of 'intoxicating bitters or beverages,' the words employed in the prohibitory statute. We can add nothing upon this point to what was said and decided when this case was before the court formerly, and to what was said and decided in the preceding cases (*Carson v. State*, 69 Ala. 236; *Carl v. State*, 87 Ala. 17, 6 So. 118, 4 L. R. A. 380, and authorities cited)."

30—*Lehman v. Press*, 106 Ia. 389, 76 N. W. 818 (819).

"This seems to have been taken from the opinion in *Trustees v. Hill*, 12 Ia. 474, with the important limitation contained in this sense omitted: 'They are not to be charged with notice because of any want of diligence on their part in making inquiry, or even if they took the note under suspicious circumstances, provided they had no notice, actual or constructive, of the alleged equities subsisting between L. and H.' That case was referred to in *Lane v. Evans*, 49 Ia. 156, and an instruction similar to that given con-

demned. It was there said: 'Facts which would have put a reasonable man upon inquiry will not charge the indorsee with notice of fraud in inception of the note.' As stated in *Lake v. Reed*, 29 Ia. 258: 'The distinction is this to-wit: The rule of law requires proof, direct or by circumstances, that the holder had notice of the defect of equities, whereas the rule as stated in the instruction only requires proof that the holder was in such a situation as that he might have had notice if he had been diligent in making inquiries which his situation offered and invited him to make.' Because of the commercial character of negotiable paper, and the need of sustaining its negotiable quality, it can not be impeached in the hands of a holder for value before maturity, unless acquired under circumstances such as indicate actual fraud by the party taking it. The fact that he was merely put on suspicion, or was careless in not making inquiry, is not sufficient. He must be shown, by direct or circumstantial evidence, to have taken the paper with knowledge or notice of its infirmities, or the circumstance must be such as indicate willful neglect to inquire, or such gross carelessness in failing to do so, when inquiry would have led to knowledge, as shall establish bad faith. This rule has been adopted in this state, and is in harmony with that of England and the great weight of authorities in this country. *Richards v. Monroe*, 85 Ia. 359, 52 N. W. 339, 39 Am. St. 301; *Cook v. Wierman*, 51 Ia. 561, 2 N. W. 386; *Gage v. Sharp*, 24 Ia. 15; *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901; *Natl' Bk. of Republic v. Young*, 41 N. J. 531, 7 Atl. 488; *Murray v. Lardner*, 2 Wall. 110; *Goodman v. Harvey*, 4 Adol. & E. 870, 4 Am. & Eng. Encyc. of Law, § 299."



the evidence in this case, that the defendant executed and delivered the note in question to X. and Y. named in the evidence, or one of them, to be negotiated and sold, and the proceeds to be got for use of the defendant and not to go as pay to said X. and for money alleged to have been advanced by said Y., and that said X. and Y. diverted the note to other uses than those, if any shown by the evidence, was agreed to by the defendant and said X. and Y., and that the defendant did not assent to or ratify such diversion of the note, if any shown, then said note was executed and delivered without consideration.<sup>31</sup>

§ 4218. **What Is Insufficient to Amount to Notice.** If you find from the evidence that plaintiff obtained said note before due, for value, without notice of defendants' alleged defense of failure of consideration and fraud,—and what is meant by “notice” is that plaintiff did not have such knowledge or information as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter alleged,—for unless such notice is shown the presumption arises that plaintiff purchased said note in good faith, if it shall appear that the alleged purchase was made in the ordinary course of business.<sup>32</sup>

§ 4219. **Bona Fide Purchaser—Filling of Blank—Appearance of Note Irregular.** (a) This is an action by the plaintiff, the B. Bank, against the defendant, upon a note, a copy of which is set out in the plaintiff's complaint. The only defense which the defendant pleads to this note is his sworn statement that he did not execute the note. The court instructs you that, if a fair preponderance of the evidence satisfies your minds that the defendant did execute the note sued upon, then you should find for the plaintiff in the sum of the principal and interest of said note, with a reasonable attorney's fee for the plaintiff's attorney.<sup>33</sup>

31—Yeomans v. Lane, 101 Ill. App. 228 (233).

“It is a reasonable rule that one who puts his note or bill in the hands of another to be negotiated after it is done will not be permitted to answer the holder who has taken it in good faith for value that he does not owe the note or bill. Miller v. Larned, 103 Ill. 562. Such purchaser in good faith for value would not be required to see to the application of the purchase money, and no misappropriation of it to which he was not a party could affect his rights. The above instruction is erroneous and should not have been given.”

32—Richards v. Monroe, 85 Ia. 359, 52 N. W. 339 (341), 39 Am. St. 301.

“This charge, we think, must be construed as laying down the rule that when a purchaser of a negotiable promissory note for value, before due, has such knowledge or information of infirmities in the note as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter, he will be held to have notice. Such certainly is not the rule in this state.”

33—Pope v. Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835 (836).

“The defendant answered by a plea of non est factum. This answer raised the question of the alteration of the note. Wiltfong v. Schafer, 121 Ind. 264, 23 N. E. 91. Two material questions were in issue: (1) Was there a material alteration? (2) Was appellee a bona fide purchaser? The evidence shows that there was a material alteration, after the execution of the note, without the knowledge or consent of appellant. There was therefore no execution of the note as sued upon. The burden then rested upon the appellee to show that it was a bona fide holder for value. Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Bank v. Ruhl, 122 Ind. 279, 23 N. E. 766; Schmeuckle v. Waters, 125 Ind. 265, 25 N. E. 281; Kain v. Bare, 4 Ind. App. 440, 31 N. E. 205; Bunting v. Mick, 5 Ind. App. 289, 31 N. E. 378, 1055. The evidence shows that the blank was fraudulently filled by Jones after the execution of the note, and against the express agree-

(b) The court further instructs you that, notwithstanding the fact that the defendant and J., the payee of the note, agreed that said note should not be payable at any bank, yet, if the defendant signed the note, leaving the space in front of the word "Bank" vacant, and in violation of said agreement, said J., before he sold said note, wrote in the words "First National" before the word "Bank," and if the note, in this condition, came into the hands of the plaintiffs in the usual course of their business, in good faith, for a valuable consideration, and before its maturity, they having bought it from X., one of the indorsees upon the back of said note, without any knowledge of the agreement between said defendant and said J., then you should find for the plaintiff, because the note was regular upon its face when they bought it, and they had a right to buy it in good faith as commercial paper, and the defendant, P., cannot defend against the plaintiff by reason of the fact that the words "First National" were written in said note in violation of the agreement between him and the said J. and without his knowledge and consent; and under such circumstances the defendant would be bound and your verdict would be for the plaintiff.<sup>34</sup>

(c) The defendant claims that the note sued upon has been changed, by someone having inserted the words "First National" before the word "Bank" in said note. In other words, his claim is that the note when signed by him read "Negotiable and payable at — Bank, Elkhart, Indiana;" that a space about two inches wide before the word "Bank" had no writing in it at the time he signed the note, and that the words "First National" have been inserted in said space after he signed it and delivered it to J. The court instructs you that if the defendant signed the note while the space in front of the word "Bank" was vacant, and that the note at the time he signed it read "Negotiable and payable at — Bank, Elkhart, Indiana," then the payee of the note J., or any indorsee

ment of the parties. The only question raised by this instruction was whether appellee could recover notwithstanding the alteration. The question as to the good faith of appellee was taken from the consideration of the jury. It was a material question, and its omission from the instruction was erroneous, and was harmful to appellant."

34—*Pope v. Branch County Sav. Bank*, 23 Ind. App. 210, 54 N. E. 835 (837).

"This instruction is open to the objection that it tells the jury that the note was regular upon its face. Whether the note was regular upon its face was a question for the jury. Whether there was anything in its appearance sufficient to excite the suspicion of a reasonably cautious person was a question to be determined by the jury. It is subject to the further objection that it tells the jury that, unless appellee had actual knowledge of the agreement between the maker and payee that

the note should not be made payable in bank, the alteration claimed would not render the note invalid as to it. The law, as announced by the supreme court, and this court in this state, with reference to the purchase of negotiable paper before maturity, is that, if there is anything about the paper itself, or the circumstances attending its presentation for discount, calculated to excite suspicion in the mind of a reasonably cautious person, it is the duty of the purchaser to make inquiry as to its genuineness; otherwise not. *Tescher v. Mereau*, 118 Ind. 586, 21 N. E. 316; *Bank v. Leonhart*, 126 Ind. 206, 25 N. E. 1099; *Hankey v. Downey*, 3 Ind. App. 331, 29 N. E. 606; *Bank v. Berry*, 21 Ind. App. 261, 52 N. E. 104. We are intimating no opinion as to the significance of the fact that the note in question was in three different handwritings, or that it was negotiated at some distance from the place where payable. These were facts for the consideration of the jury."

of the note, had a right to insert in said blank the name of any bank in Elkhart, Indiana.<sup>35</sup>

§ 4220. **Alteration—Burden of Proof.** (a) And in this case the burden of proof is upon the defendant to show that the plaintiff did not purchase the note in evidence in good faith, and unless the defendant has shown, by the greater weight of all the evidence, that the plaintiff did not buy the note in good faith, then you will find that the plaintiff acted in good faith in the transaction.<sup>36</sup>

(b) If the jury believe, from the evidence, that the words "with seven (7) per cent. interest per annum" were written into the note without M.'s knowledge, authority or consent that the note was to bear interest at seven per cent. per annum, after he and S. had signed it, then you will find the issues for the defendant, M.<sup>37</sup>

35—*Pope v. Branch County Sav. Bank*, 23 Ind. App. 210, 54 N. E. 835 (836).

"This instruction takes from the consideration of the jury the question of good faith of the appellee. The undisputed evidence shows that after the execution of the note, and contrary to the express understanding of the parties, the blank was filled. A payee or indorsee having notice of the agreement of the parties cannot materially alter a note contrary to the express agreement of the parties thereto."

36—*Merritt v. Dewey*, 218 Ill. 599 (602), 75 N. E. 1066.

"The plaintiff's instructions in reference to the burden of proof, as given by the court, were erroneous. The first to the effect, without qualification, that the burden of proving any alteration not apparent on the face of the note in evidence is upon the defendant, *Merritt*. Upon the whole case, the burden of proof was upon the plaintiff to show such a state of facts as would authorize him to recover. (Opinion of Mr. Justice Boggs, *Conkling v. Olmstead*, 63 Ill. App. 649.) After the note was admitted in evidence, no alteration appearing from an inspection thereof, the burden of proof was upon *Merritt* to show a material alteration. (*Lowman v. Aubrey*, 72 Ill. 619.) We think, however, that an instruction stating that the burden of proof was upon the defendant to show a material alteration where no alteration is apparent on the face of the note, should have been coupled with a clause stating that this burden rested on the defendant after plaintiff had made his case in chief, so that the fact would not be obscured that the burden of

establishing his cause upon the whole rested upon the plaintiff. This was error. When the defendant had introduced evidence showing a material alteration the burden of proof then shifted to the plaintiff, and it was for him then (where he did not meet such evidence by denial) to show that such alteration had been made under circumstances rendering it lawful or under circumstances which would not preclude a recovery by him. 2 Cyc. 234; *Shroeder v. Webster*, 88 Ia. 627, 55 N. W. 569; *Maguire v. Eichmeier*, 109 Ia. 301, 80 N. W. 395; *Winter v. Pool*, 100 Ala. 503, 14 So. 411; *Glover v. Gentry*, 104 Ala. 222, 16 So. 38, 39 L. R. A. 204; *Nat. Ulster Co. Bank v. Mad-den*, 114 N. Y. 280, 21 N. E. 408; *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210; *Capital Bank v. Armstrong*, 62 Mo. 59; *Dewees v. Bluntzer*, 70 Tex. 406, 7 S. W. 820."

37—*Merritt v. Dewey*, *supra*.

"This instruction was given on the theory that if the makers of the note had intended, at the time the note was signed, that it should draw interest at seven per cent, S. might thereafter without the consent of M., insert the interest clause, and that this would not constitute a material alteration, for the reason that it but made the instrument speak as the parties intended it should at the time it was signed. Whether an alteration of a written instrument, after its execution, without the consent of the maker, made for the purpose of making the instrument conform to the actual contract made by the parties, will vitiate the instrument, is a question with reference to which the authorities outside of this State are not unanimous."



## CHAPTER CLVII.

### PARTNERSHIP.

See Approved Instructions, Chapter LXXV, Vol. II.

§ 4221. Liability as partners on account of conduct.	§ 4226. Acts of one partner without consent of co-partner.
§ 4222. Giving of firm note for personal indebtedness.	§ 4227. Sale of partnership interest—Misrepresentation—Intent.
§ 4223. Third person not bound by limitations in articles of agreement without notice.	§ 4228. Disposing of firm property by partner without the knowledge or consent of the other.
§ 4224. Dealing with firm after dissolution but without notice.	§ 4229. Presenting of account of partnership—Failure to object—Settlement.
§ 4225. Notice of dissolution—Means of learning of and neglect to use same.	§ 4230. Limited partnership.

**§ 4221. Liability as Partners on Account of Conduct.** The court instructs the jury that parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists between themselves. The public are authorized to judge from appearances, and are not bound to know the real facts. Persons may be co-partners as to third persons and brought within all the liabilities of partners as to third persons who are not partners between themselves, and they will be so regarded as to third persons if the evidence shows they voluntarily and intentionally conducted themselves as to reasonably justify the public or persons dealing with them in believing that they are partners. And if you further find that the plaintiffs did so deal with the defendants, and that from all the facts shown in evidence you find that a reasonable and prudent man had cause to believe said defendants were in fact partners, you may find for the plaintiffs.<sup>1</sup>

**§ 4222. Giving of Firm Note for Personal Indebtedness.** The court instructs the jury that, although they may believe, from the evidence, that the plaintiff loaned to the amount of the notes offered in evidence, and took such notes therefor; and if the jury further believe, from the evidence, that such money was in fact borrowed for the use of L., and not of the firm, and that plaintiff knew such fact, if it be a fact, or if the jury believe that the plaintiff knew or had notice that L. had no power so to bind the firm, or that the money, if any, was not in good faith loaned to the firm, then in either of such cases the jury should find the issues for the defendant, unless the

<sup>1</sup>—Fisher v. A. Y. McDonald Co., 85 Ill. App. 653 (655).

The court said that "it is a mistake to base the question of the liability of the plaintiff in error upon what a reasonable and prudent man 'may have had cause to believe.' The question is whether defendant

in error, from the facts and circumstances which had come to its knowledge, or which in the exercise of proper care it would have known, had a right to and did believe that plaintiff in error was a member of the firm to which credit was extended."

plaintiff has proved by preponderance of the evidence that the firm of F. and L. did in fact receive and use the money of the plaintiff.<sup>2</sup>

§ 4223. **Third Persons Not Bound by Limitations in Articles of Agreement Without Notice.** You are instructed that while in the partnership relation there is an implied authority given to each member of the firm, and an implied assent from each member that each may act for all the members of the partnership as the agent of the partnership, yet this authority and assent applies only to the partnership business which is authorized by the articles of partnership, or that within the apparent scope of the business actually warranted by the partnership, and any act beyond this scope will not be binding upon the member of the firm who did not authorize such act or did not ratify it.<sup>3</sup>

§ 4224. **Dealing With Firm After Dissolution but Without Notice.** When a partnership is formed for an indefinite period, it is supposed to continue, as to persons having dealings with such partnership, until they have legal or actual notice of its dissolution. If you find that the defendants, prior to the execution of the note in suit, were partners under the firm name of ———, and that the plaintiff, prior to that time, had dealings with them, with notice that they were partners; and if you find that the plaintiff, not having notice of the dissolution of such partnership, entered into the business of merchandising with the defendant X., believing at the time that he was entering into the business of said partnership, and continued in the business for the period of about seven or eight months, at which time, not having notice of a dissolution, he sold out his interest in said business to said X., believing at the time that he was dealing with said firm,—the defendants both would be liable to plaintiff for such interest so sold; and if, in settlement of said interest so sold, the defendant X. executed the note in suit, and signed said firm name to it, then both said defendants would be bound, and you should find for the plaintiff, if the purchase of the interest of said plaintiff in said business was in the line of business carried on by said firm.<sup>4</sup>

2—Funk v. Babbitt, 156 Ill. 408, aff'g 55 Ill. App. 124, 41 N. E. 166.

The court said: "This instruction did not correctly state the law. One partner has power to borrow money for partnership purposes, and give the notes of the firm therefor. (Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75), but he cannot bind the firm of which he is a member by giving the firm note in satisfaction for or as security for his personal indebtedness. Witttram v. Van Wormer, 44 Ill. 525; Wright v. Brosseau, 73 Ill. 381. And in Watt v. Kirby, 15 Ill. 200, this court said that where the credit is originally given to one partner the creditor cannot hold the partners liable, although they may receive the benefit of the transaction; that the deed, being separate in its inception, does not become joint by the subsequent application of the funds to the purposes of the partnership."

3—Crane Co. v. Tierney, 175 Ill. 79 (83), 51 N. E. 715.

The court, in holding this er-

roneous, said that "if a partner professes to act for the firm in the business actually carried on by it, third parties with whom he deals are not bound by limitations contained in the articles between the partners of which they have no notice."

4—Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973 (974).

The court said that "an instruction substantially like the above was held to be a correct statement of the law in Iddings v. Pierson, 100 Ind. 418. As applied to the undisputed evidence, as well as upon the theory on which the plaintiff's case proceeded, this charge was plainly erroneous in nearly every proposition it enumerated. The instruction assumes that the purchase by one of three partners of the interest of one of the others in the firm business is such a transaction as authorizes the purchaser to bind the third partner without his knowledge or consent. This assumption was completely erroneous. Such a transaction has no relation to the conduct

**§ 4225. Notice of Dissolution—Means of Learning of and Neglect to Use Same.** The jury are instructed that no means of knowing or learning of the dissolution of the firm of A. B. & Co. was sufficient to be regarded as actual notice to the plaintiff as a dealer with the firm before such dissolution, unless the plaintiff knew that he had in his possession the means of ascertaining or knowing and neglected to make use of it.<sup>5</sup>

**§ 4226. Acts of One Partner Without Consent of Co-partner.** The jury are instructed that one partner is in no case bound by the acts of his co-partner done without his assent, and, although this assent may be implied from their partnership relation in regard to all acts within the scope of their partnership transactions, it cannot be in reference to one co-partner pledging co-partnership credit for purchase made on his own individual account or for another firm in which he was interested. In such case, there must be extraneous evidence to prove such assent, and in the absence of such evidence, it will be held immaterial whether the one dealing with the individual partner knew it was a misappropriation of the partnership funds or credit, for the very nature of the transaction ought to put him on inquiry, and however bona fide his conduct may be, it is a case of negligence on his part, and the burden of proof is on him to repel every presumption of fraud, collusion or negligence as against him.<sup>6</sup>

**§ 4227. Sale of Partnership Interest—Misrepresentation—Intent.** The court charges the jury that whether the representations set up by defendant were made—whether they were intended by Whitaker as the affirmation of a fact or the expression only of his opinion or belief—are questions solely for the jury to find from the evidence, and if they find he made the representation complained of by defendant, but that it was an opinion or belief, this would not authorize you to find for defendant, but on this matter you would find for plaintiff.<sup>7</sup>

**§ 4228. Disposing of Firm Property by Partner Without Knowledge or Consent of the Other.** (a) The court instructs the jury, that if you believe from the evidence that the defendant B. was not

of the business of the firm. Partners are not agents for each other in transactions which relate to the formation of dissolution of the firm, or concerning the disposition of the firm property to each other. *Williams v. Lewis*, 115 Ind. 46, 17 N. E. 262, 7 Am. St. 403; *Blaker v. Sands*, 29 Kan. 551. The purchase by one partner of the interest of another in the firm property is not a partnership transaction. *Love v. Payne*, 73 Ind. 80, 38 Am. Rep. 111; *Graves v. Kellenberger*, 51 Ind. 66. The execution of the note not having been denied under oath, it was essential to the plaintiff's right of recovery that he should prove that it was given in a transaction within the scope of the partnership business. *Lucas v. Baldwin*, 97 Ind. 471."

<sup>5</sup>—*Arnold v. Burgdorf*, 85 Ill. App. 537 (539).

"An instruction like this was condemned in *Arnold v. Cannon*, 76 Ill.

App. 323. The issues in this case were in substance like those involved in the *Cannon* case, and we adopt the reasons given in the latter case as applicable here. We add to what is there said that the instruction is difficult to understand and likely to mislead the jury."

<sup>6</sup>—*Crane Co. v. Tierney*, 175 Ill. 81 (84), 51 N. E. 715.

"This instruction is abstract in form, and, although it is not error to give an instruction in that form if the rule of law stated is correct, it is not an approved method of instructing a jury. This instruction is also argumentative and wrong in principle."

<sup>7</sup>—*Hooper v. Whitaker*, 130 Ala. 324, 30 So. 355 (356).

"Bad for predicated a determination of the character or nature of the representations alone upon the intention of the plaintiff, without regard to their form, or how defendant may have understood them."



a partner with G. at the time of the sale by said B. to the plaintiff, then the law is, that the plaintiff cannot claim the property under such sale.

(b) The court instructs the jury that even though you may believe from the evidence that the defendant G. was in the habit of signing notes under the name and style of G. & B., still, if you further believe from the evidence that the said B. was not a partner with the said G. at the time the sale was made, then the law is, that the said B. had no right to make any transfer of the property, and plaintiff under such circumstances would take no title to the property under the bill of sale made by him.

(c) The court instructs the jury that while it is true that one partner can dispose of the partnership property without the knowledge or consent of the other partner, still the law is, that the partner making the sale must be shown to have been the actual partner at the time the sale was made, and it must further appear from the evidence that the person purchasing of such partner acted in good faith and without knowledge that the other partner objected to such sale.<sup>8</sup>

**§ 4229. Presenting of Account of Partnership—Failure to Object—Settlement.** If the plaintiff presented his trial balance and all the books of account of the partnership to defendant, and gave him an opportunity to object to any item or items, and defendant made no objection to the same, you may find that it constituted a settlement, even if the meeting of the parties occurred in a public hotel.<sup>9</sup>

**§ 4230. Limited Partnership.** The court instructs the jury that if you find from all the evidence in the case that the plaintiff actually loaned the sum of \$—— to A. & Co., and if you further find from all the evidence in the case that at the time said loan was made (if you so find that said loan was made) the plaintiff, L., had no notice or knowledge of the limitations imposed upon each of the partners comprising the firm of A. & Co. to borrow money or give evidences

8—More v. Dixon, 59 Ill. App. 167 (169, 170).

"There was no dispute of the fact that B. was not an actual partner with G. and these instructions amounted to a direction to find for defendant, as the fact could not be found otherwise. G., having held B. out as his partner, if the bank had no notice to the contrary and dealt with him as such, it had a right to regard him as having all the powers of a partner, and such power of disposition of the firm assets in payment of firm indebtedness as arose out of that relation. Under those circumstances G. would not be permitted to mislead the bank to its injury, and would be estopped from disputing, as against it, the existence of the partnership which he caused it to suppose existed. The rights of the bank would not depend upon the question whether B. was an actual partner, but upon the distinct ground that he had been held out to be such by G. Whether the bank had notice of the true relation

of the parties was a disputed question. We think that the instructions recited were wrong. Wiley v. Thompson, 23 Ill. App. 199; Williams v. Fletcher, 129 Ill. 356, 21 N. E. 783; Michoff v. Dudley, 40 Ill. 406."

9—Rose v. Bradley, 91 Wis. 619, 65 N. W. 509 (510), 51 Am. St. 925.

"If the court meant by this that the fact that the occurrence took place in a public place will not necessarily preclude a finding of the fact of settlement, at least we might say that defendant cannot be prejudiced thereby. If the court meant to be understood, and was understood, by the jury as saying that if the trial balance was presented to defendant with the books of account, and no objection was made, the mere fact of silence at that time raised an inference of acquiescence sufficient to warrant a finding that there was a settlement in fact, then the instruction cannot be upheld. Mere silence when accounts are presented is not sufficient to warrant a finding of settlement."

of security therefor, as is set forth in their articles of co-partnership in evidence in this cause, and if you further find from all the evidence in the case that no part of said loan has been paid, then you are instructed that you should find the issues for the plaintiff. Provided you further find from the evidence that the defendants were associated together as partners and were engaged, among other things, in buying and selling real estate on their own account.<sup>10</sup>

10—Adams v. Long, 114 Ill. 282.

"We think this instruction is erroneous in that it predicates the liability of appellant solely upon the lack of notice to appellee of the limitations imposed upon each of the partners in borrowing money or giving evidences of security therefor, as provided in the partnership articles, where, under the law, while appellant would not be liable under the hypothesis stated in the instruction, yet, if appellee knew that the proceeds of the note were to be used

by E. individually, and not for partnership purposes of A. & Co., appellant would not be liable. Story on Partnership, § 126; Parsons on Partnership (3rd ed.), pp. 133, 199, note, and cases cited; 1 Collier on Partnership (6th ed.), § 793, and cases cited; Wright v. Brosseau, 73 Ill. 381; King v. Faber, 22 Pa. St. 21 (25); Teed v. Parsons, 202 Ill. 455 (460), 66 N. E. 1044, and cases cited. Since the instruction allows a recovery by appellee upon the hypothesis stated, we think it is clearly erroneous."

## CHAPTER CLVIII.

### REAL ESTATE—MISCELLANEOUS.

See Approved Instructions, Chapter LXXVI, Vol. II.

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| <p>§ 4231. Sale of real estate—Recital of consideration — Circumstances.</p> <p>§ 4232. Vendor and vendee—Ground for non-performance.</p> <p>§ 4233. Building on public highway —Assessment of taxes on road by city—Adverse possession, equitable estoppel.</p> <p>§ 4234. Taxation of ditch on land already taxed.</p> | <p>§ 4235. Homestead—Use for business purposes — Abandonment—Intending to use part of homestead for different purpose.</p> <p>§ 4236. Selling homestead during temporary absence — Purchaser of school lands—Abandonment by reason of fear of death.</p> |
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§ 4231. **Sale of Real Estate—Recital of Consideration—Circumstances.** While the deed recites a consideration of \$—, yet that recital in the deed is not conclusive evidence of the amount to be paid, and in ascertaining what was the consideration to be paid the jury will carefully consider the circumstances of the case. The jury, in weighing and considering the evidence and arriving at a conclusion, should use their common sense and judgment and experience, and should arrive at a conclusion, from all the circumstances, such as will be approved by the conscience of a fair and reasonable man.<sup>1</sup>

§ 4232. **Vendor and Vendee—Ground for Non-performance.** The court instructs you, that if one party to an executory contract induces the other to believe, by his acts and proceedings subsequent to the execution of the contract, that he does not intend to perform the contract, the other party has the right to consider the contract at an end; and in this case, if the jury believe, from the evidence, that the plaintiff in this case, by his acts and proceedings, so induced the defendant to believe that he, plaintiff, did not intend to perform his part of the contract, then, and in that case, he cannot recover in this case.<sup>2</sup>

§ 4233. **Building on Public Highway—Assessment of Taxes on Road by City—Adverse Possession, Equitable Estoppel.** (a) The court further declares the law to be that, notwithstanding it may

1—Larkinsville Min. Co. v. Flipppo, 130 Ala. 361, 30 So. 358 (359).

"The charges refused to defendant were misleading in the use of the word 'circumstances' instead of 'facts and circumstances,' as shown by the evidence."

2—Thompson v. Alkire, 52 Ill. App. 61 (61).

"The mere fact that the vendor was induced to believe the vendee would not perform, was no reason for non-performance by the vendor. Had the vendee so acted as to induce a belief in the mind of a reasonable

person that the contract would be broken, and had the vendor changed his position upon the strength of such belief, so reasonably induced, another question would arise, and in a court of equity upon a bill for specific performance by the vendee, such a state of facts might be the desired relief, and possibly in a court of law there might be a defense on the ground of estoppel. This we need not determine. The hypothesis of the instruction was clearly insufficient, and the court properly refused it."



believe and find from the evidence in this case that the land in controversy was, at the time plaintiff took possession and made the improvements of the same, a part of the land within the limits of what had formerly been the state road, yet if it finds and believes from the evidence that at the time plaintiff took possession and made the improvements, and that he did make the improvements by building a hotel on said lands, and did not know that said lands were a part of any road or street, and that the defendant city has, ever since it has been incorporated, assessed said lands to the plaintiff, and collected and received taxes from plaintiff on the same, and has not claimed said lands as being any part of the street, then it is estopped from now setting up or claiming title to said lands, and the finding should be for the plaintiff.<sup>3</sup>

(b) If the jury believe from the evidence that the road through where M. cut the wire has been used by the public for more than ten years, and that this use by the public has been under claim of right to use it, and not used by the permission of the owner of the land, then you should find a verdict for the defendant.<sup>4</sup>

3—*Wright v. City of Doniphan*, 169 Mo. 601, 70 S. W. 146 (149).

"In *City of St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586, Judge Scott, with the concurrence of the whole court, ruled that the city was not estopped by the action of its officers in assessing the city's property to third persons; and such has been the general course of judicial opinion elsewhere. Judge Elliott, in his work on *Roads and Streets* (2d Ed.), ¶ 884, says: 'It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of estoppel is absent.' That L. knew this was a highway 60 feet wide when he assumed to appropriate 20 feet of it to his own private use is beyond all speculation. His offer to let M., the adjoining proprietor, take 10 feet of this road, removes every doubt on this point. The plaintiff, W., was at that time a resident on D. and owned one of the lots—16—immediately abutting on L.'s acre. He knew of L.'s appropriation, and of the existence of the highway, as the recitals in his chain of title disclosed; and, as Judge Elliott says, he was bound, as a matter of law, to know that the highway was there, and to know of its width. As said by the Supreme Court of Alabama in *Webb v. City of Demopolis*, 95 Ala., loc. cit. 134, 13 So. 295, 13 L. R. A. 62, 'Neither the statute of limitations nor the rule which carries title to adverse possession, nor the doc-

trines of staleness, equitable estoppel or prescription can be invoked or applied against the right of the city and of the public to have this street opened from end to end and from side to side.' 'The city never had any alienable title to or right in the street.' Neither did the failure of the city authorities to prosecute plaintiff for nuisance for obstructing the highway constitute any estoppel. Judge Dillon, in his work on *Municipal Corporations* (§ 669) quotes with approval from an opinion of Mr. Justice Sergeant in *Com. v. Alburger*, 1 Whart. 488, as follows: 'These principles, indeed, pervade the laws of the most enlightened nations, as well as our own Code, and are essential to the protection of public rights, which would be gradually frittered away if the want of complaint or prosecution gave the party a right.' 'Individuals may reasonably be held to a limited period to enforce their right against adverse occupants, because they have sufficient interest to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates, even, a manifest encroachment than seeks a dispute to set it right.' In view of these almost universal principles of law, the declaration of law given by the court as above set out must be held reversible error."

4—*Burnley v. Mullins*, 86 Miss. 441, 38 So. 635.

"This instruction granted for appellee was erroneous, because there was no competent evidence on which to base it. There was no proof that the use of the road by those who traveled it 'had been under claim of right to use it, and no evidence that the way, prior to its closing by appellants, was not used by permission of the owner of the land.' And without proof to the satisfaction of the jury of the existence of both

**§ 4234. Taxation of Ditch Upon Land Already Taxed.** (a) The burden of proof is upon the state to prove that the defendant owned each and every mile of the twelve miles of log ditch on the first day of ——— that was subject to taxation.

If the jury believe from the evidence that the defendant has not set up any claim to be the owner of twelve miles of log ditch, and that the state has not proved such ownership, they will find for the defendant.<sup>5</sup>

(b) If the jury believe the defendant has been assessed for taxation on lands owned by him on the first day of ———, on which the log ditch is located, then the jury will find for the defendant as to that part of the ditch.<sup>6</sup>

**§ 4235. Homestead—Use for Business Purposes—Abandonment—Intending to Use Part of Homestead for Different Purpose.** (a) The use of a building partly or even chiefly for business purposes or the renting of a part of it does not deprive the owner of the benefit of his exemption of the building as a homestead, if the building is or continues to be the bona fide residence of the claimant and his family.<sup>7</sup>

(b) The husband, or the head of the family, may abandon a part of the property used as a homestead, but in such case he must intend to permanently use the portion abandoned for other and different purposes than that of homestead purposes.<sup>8</sup>

**§ 4236. Selling Homestead During Temporary Absence—Purchaser of School Lands—Abandonment by Reason of Fear of Death.** (a) Any person leaving his homestead with intention to return and live on it may, during temporary absence therefrom, offer the same for sale, without forfeiting his homestead right thereto; that is to say,

these constituent elements of hostile assertion of right of passage, mere continued use was not sufficient to sustain a verdict for appellee. Under the facts here presented, appellee committed a trespass in tearing down the fences erected by appellants. On the case made appellants were at least entitled to recover actual damages."

5—Sullivan v. State, 117 Ala. 214, 23 So. 678 (679).

"Above charges were properly refused. They predicate the right of the state to an assessment, on proof that the defendant owned each and every mile of the 12 miles of the ditch. The proof tended to show without conflict, that defendant was its owner, of whatever length; and even if it had not shown that it was 12 miles long, it would not follow that the state might not assess so much of it as was shown to be defendant's property. The fact that defendant did not claim to own 12 miles of the ditch, even if shown, which was not done, was not sufficient evidence of itself to disprove his ownership of all or any part of it. He entered no disclaimer of ownership at any time to any part of it, without conflict, to show that he was its real owner."

6—Sullivan v. State, *supra*.

"Above charge was an improper

instruction," said the court. "The ditch, independent of the lands owned by defendant, had a value of its own, separate from that of such lands, and was, of itself, a proper subject of taxation, without reference to the lands through which it ran."

7—Lima v. County Bank, 142 Cal. 245, 75 Pac. 846 (847).

"Conceding, without deciding, that this instruction might be considered erroneous in a case where it was material, and also conceding, with the same qualification, that this is a case in which the parties were entitled to a jury trial as a matter of right, and that the jury should have received proper instructions, yet we are satisfied that the case should not be reversed on account of the said instruction."

8—Freeman v. Cates, 22 Tex. Civ. App. 623, 55 S. W. 524 (526).

"If the homestead, or part of it, be abandoned as homestead, it ceases to be homestead property, and becomes subject to execution without regard to any definite intention on the part of the owner to put the property to other and different uses. The abandonment may occur without any defined purpose to put the property to other uses, but it would be no less an abandonment for this reason."

one may offer his homestead for sale, and this fact will not, of itself, constitute an abandonment of the homestead. But if, prior to or at the time of such offer to sell, the intention to return and occupy the premises as a home had been abandoned, then his homestead right upon the land could be reinstated only by actually returning to and residing upon it.<sup>9</sup>

(b) The testimony in this case shows that the plaintiff, ———, abandoned his residence upon Section No. ———. You are charged that the law requires a purchaser of state school lands to reside upon the same for three years from the date of his purchase, and to improve in good faith the lands so purchased by him from the state, and if he fails so to do said lands shall be forfeited, unless such purchaser shall be compelled to temporarily yield his possession from a well-grounded fear of death or serious bodily injury; and you are further charged that the burden is upon the plaintiff to show by a preponderance of evidence that he had a well-grounded fear of death or serious bodily injury at the time he yielded temporary possession of said lands, and the absence from said lands on said account could only be temporary, and not continuous, and such well-grounded fear of death or serious bodily injury must be such as a man of ordinary prudence and courage would have and form from all the circumstances surrounding the case, and if the same was not so formed such temporary yielding shall forfeit said lands, and if you so find you will find for the defendant.<sup>10</sup>

9—White v. Epperson, 32 Tex. Civ. App. 162, 72 S. W. 851 (853).

"It is improper for the court to thus single out a fact or circumstance in evidence, and to tell the jury what effect they may or may not give to the same. The jury might have concluded under another charge that the offer of appellees to sell their homestead, together with the other facts which were undisputed, established an abandonment of the same. This was peculiarly their province."

10—Jones v. Wright, — Tex. Civ. App. —, 81 S. W. 569.

"By stating the plaintiff's absence from the land on account of a well-grounded fear of death or serious bodily injury must be temporary, and not continuous, it would have led the jury to suppose that even under such circumstances his absence from the land for a considerable time would not be excused. \* \* \* We think the charge above quoted was erroneous, also, in stating that the fear must be such as would be given way to only by a man of ordinary prudence and courage."



## CHAPTER CLIX.

### REPLEVIN.

See Approved Instructions, Chapter LXXVII, Vol. II.

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| <p>§ 4237. No demand necessary where taking of property was wrongful, otherwise if taking is not wrongful.</p> <p>§ 4238. Defendant's possession is not prima facie evidence of ownership.</p> <p>§ 4239. Debtor selling property and retaining possession—Knowledge of creditor—Exemptions.</p> <p>§ 4240. It is held error to submit to the jury the question what constitutes a wrongful taking.</p> | <p>§ 4241. Question of ownership is a question of law.</p> <p>§ 4242. The vendor need not repay the purchaser from his fraudulent vendee money paid by such purchaser for freight before he can replevin the goods sold.</p> <p>§ 4243. Mortgagor consuming mortgaged crops.</p> <p>§ 4244. Exemption given to the head of the family.</p> <p>§ 4245. Liability of officer for taking an insufficient replevin bond.</p> |
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§ 4237. **No Demand Necessary Where Taking of Property Was Wrongful, Otherwise if Taking Is Not Wrongful.** If the jury believe from the evidence in this case that the plaintiff was living in the premises ———, with her mother and stepfather, and that she, the plaintiff, permitted the property in question in this suit to be mixed and intermingled with property of her stepfather, and to be used by him and her mother in common with other household furniture, and that while said property was so being used the defendant, G., had placed in his hands an execution against F., the step-father, and if the jury find that said defendant levied upon said property under said execution, then the jury are instructed that in such case the taking of the property in question by said defendant was not wrongful, and before this suit can be maintained the plaintiff must prove a demand upon said defendant for said property.<sup>1</sup>

§ 4238. **Defendant's Possession Is Not Prima Facie Evidence of Ownership.** The jury are instructed that possession is *prima facie*

1—Greenberg v. Stevens, 114 Ill. App. 483 (486).

"This instruction it is said should have been given because, it appearing that the execution debtor was the head of the family it was to be presumed that he was the owner of the property, and therefore the levy by the constable was so far rightful as to make a demand upon him necessary before the replevin suit could be maintained; and no such demand was proven. Where an officer levies an execution on property in the possession of the defendant in the execution, he only discharges his duty, and if another party claims the goods, he must make a demand on the officer before bringing replevin. Tuttle v. Robinson, 78

Ill. 332; Hardy v. Keeler, 56 Ill. 152. But in these very cases it is held that no demand is necessary where the original taking was tortious and wrongful. Clark v. Lewis, 35 Ill. 417.

"In the case at bar the proof tended to show (what the refused instruction ignores) that the appellant constable was notified that the goods did not belong to the execution debtor, but to appellee; that he said he did not care whose property it was, but would take the law into his own hands. This proof was not denied, and it shows the constable to have been a wrong-doer. His execution ran against the stepfather, and gave him no authority to seize the goods of appellee."

evidence of ownership, and that the defendant being in possession of the property in dispute at the time of the commencement of this suit, is presumed to be the owner.<sup>2</sup>

§ 4239. **Debtor Selling Property and Retaining Possession—Knowledge of Creditor—Exemptions.** The court instructs the jury that if they shall believe from the evidence that the plaintiff bought the corn in controversy from X. [the execution debtor] in good faith and for a valuable consideration before the date of the execution in evidence before you, then the court instructs the jury that, even though there was no delivery of the corn by X. to plaintiff, still, that fact cannot render the sale fraudulent, if the jury shall further believe from the evidence that the said Y. [execution creditor] and the defendant [sheriff] had actual notice of said sale before the date of said execution.<sup>3</sup>

§ 4240. **It Is Held Error to Submit to the Jury the Question What Constitutes a Wrongful Taking.** You are instructed that this is an action of replevin brought by the plaintiff, —, against the defendant, —, to recover the possession of the property described in the affidavit, writ and declaration. The plaintiff claims he was in the lawful possession of the property, and that the defendant wrongfully took and unjustly detained the same. And the court instructs you that to entitle the plaintiff to recover in this action, it is only necessary for him to show that the property was taken wrongfully from his possession by the defendant or by some one acting for her, and if you believe from a preponderance of the evidence that it was so taken, you will find the defendant guilty.<sup>4</sup>

§ 4241. **Question of Ownership Is a Question of Law.** The jury are instructed that if they find from the evidence that at the time of the commencement of the replevin suit referred to in this case, to-wit, —, X. and Y., two of the defendants in this suit, were the

2—McElhanon v. McFerron, 36 Ill. App. 22 (23).

The court said: "This instruction is clearly wrong. It does not follow that because defendant was in possession of the property in dispute at the time suit was commenced, and after demand for and refusal to deliver possession to plaintiff, that such possession by defendant furnished, even prima facie, evidence of ownership in him, much less would it compel or require the jury to presume, as a matter of law, defendant was then the owner. The instruction was also vicious in this; by it the jury were in effect told not to consider the evidence showing the circumstances and conditions under which defendant acquired and held the possession of the property in dispute, and which evidence was material and pertinent in determining the question of ownership. \* \* \* An instruction of similar character is condemned in *Bergen v. Riggs*, 34 Ill. 170, 85 Am. Dec. 304."

3—Hewett v. Griswold, 43 Ill. App. 43 (47).

The court said that "if there was

no delivery, the sale is presumed by the rules of law to be fraudulent. That being so, it is immaterial whether the judgment creditor or the sheriff had actual notice of the sale. If they knew of the sale they also knew that the possession remained with the vendor and that therefore the sale was void. There is no difference in effect between a sale made with actual intent to defraud creditors and one fraudulent in law. Notice of either is only notice of a fraudulent transaction not binding upon a creditor. *Swift v. Thompson*, 4 Conn. 63, 10 Am. Dec. 100; *Homer v. Gersman*, 17 S. & R. 251; *Lasseter v. Bussey*, 14 La. An. 699."

4—Mathews v. Granger, 71 Ill. App. 467 (470).

"Under this instruction the jury would have the right to judge for themselves what was a wrongful taking, and inasmuch as there is no question about the fact that appellant had taken the property in dispute, the jury might, without enlightenment as to what constituted a wrongful taking, suppose that this action of appellant's amounted thereto."

owners of the lumber then on board the vessel D., and replevied by them in said proceeding, then the jury should find for the plaintiffs in this case, and assess the plaintiffs' damages at the sum of one cent, and no more, said plaintiffs under such circumstances being only entitled to nominal damages.<sup>5</sup>

§ 4242. **The Vendor Need Not Repay the Purchaser From His Fraudulent Vendee Money Paid by Such Purchaser for Freight Before He Can Replevin the Goods Sold.** If the arrangement between R. and the plaintiff was that the freight which the plaintiff was bound to pay should be paid at ——— by R. and deducted from the price of the goods, and that was done, then, until the plaintiffs had given notice of the rescission of the sale, and tendered the payment of the money that had been paid for freight for its benefit it could not replevy the goods, because the defendant would be entitled to hold them until it had been made good for the money it had advanced for the plaintiff, just the same as though it had paid plaintiff a part of the price of the goods.<sup>6</sup>

§ 4243. **Mortgagor Consuming Mortgaged Crops.** The plaintiff had the right, under the mortgage, to the possession and use of the property described in it, until some one or more of the conditions contained in it was broken. And if in any use of the property or any part of it, for which it was adapted by nature, it became consumed in its legitimate use, then the fact of its consumption is not a breach of the terms of the mortgage which entitled the defendant to take possession of the mortgaged property. And on this issue you will find for the plaintiff. But the plaintiff had no right to sell it, or any part of it.<sup>7</sup>

§ 4244. **Exemption Given to the Head of the Family.** (a) The court instructs the jury that, if you believe from the weight of the evidence that the plaintiff at the time of the date and also at the time of the levy of the execution by the defendant, A., was the head of a family residing with the same, and owned all the property levied on, and by her taken under the writ of replevin issued in this case, and that she at the dates above stated had exclusive charge of and managed and controlled the earnings and productions of the family and the financial and business interests necessary to support and

5—*Matson v. Ripley*, 70 Ill. App. 86 (88).

The court said: "Ownership is not a fact, but is a legal conclusion to be drawn by the court from the facts to be found by the jury. The jury should not have been left to determine what facts were necessary to constitute ownership, as was clearly done by the instruction, and thus leave to them the determination of a question of law. Where the conclusion is one of law, from facts to be found, the jury are to find the facts and the court to state the conclusion, or the law, and to submit mixed questions of law and fact to the jury is error. *Charles v. Leshner*, 20 Ill. App. 36; *Mitchell v. Town of Fond du Lac*, 61 Ill. 174."

6—*Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547, 48 Atl. 425 (426).

The court said that "there is no rule of law that requires the plaintiff under such circumstances to reimburse or offer to reimburse the defendant purchaser from its vendee."

7—*Mathews v. Granger*, 66 Ill. App. 121 (123).

The court said: "The safety clause of the mortgage provided that if the mortgagor, or any person or persons whatever, upon any pretense, should attempt to carry off, conceal, make way with, sell, or in any manner dispose of the mortgaged property, or any part thereof, without permission of the mortgagee in writing, the mortgagee could take possession. The clause will bear no such construction as that placed upon it by the above instruction."



keep it together, then she is entitled to the benefit of the exemption given to the head of the family.<sup>8</sup>

(b) If the jury should ascertain from the evidence that the goods involved in this suit are worth more than one thousand dollars, then the plaintiff cannot recover in this case, unless they are reasonably satisfied that C. owed plaintiff an honest and fair debt of one thousand dollars, and what it consisted of, and how it was due, and that the goods were sold at their fair and adequate value, and that C. reserved no interest in said goods.<sup>9</sup>

§ 4245. **Liability of Officer for Taking an Insufficient Replevin Bond.** The jury are instructed that it was the duty of the defendant, before executing the writ of replevin, to take a replevin bond with sufficient security in double the value of the property about to be replevied, and unless the defendant did take such security, the jury should find for the plaintiff.<sup>10</sup>

8—Arnold v. Coleman, 88 Ill. App. 608 (612).

The court said: "This instruction should not have been given for two reasons: First, it leaves the jury to decide, from the evidence, whether or not defendant in error was the head of the family without any instruction as to what in law constitutes the head of the family. Second, the facts did not warrant the instruction. 'Instructions should be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms where such terms may mislead instead of enlightening the jury.' Chicago & Alton R. R. Co. v. Utley, 38 Ill. 411."

9—Clewis v. Malone, 131 Ala. 465, 31 So. 596-8.

"This charge should not have been given for defendants. Its effect, or at least its tendency, was to deny to C. the right to dispose of the property as exempt to him if it were worth one cent more than \$1,000, or other infinitesimal and immaterial excess. The law does not weigh the value in such 'diamond scales.' And it was bad for the further reason that it requires the jury to be reasonably satisfied not only that C. owed the plaintiff an honest and fair debt of \$1,000, but also that they should be reasonably satisfied as to each item of the debt and how it was due. While there was a burden resting on plaintiff to prove in what her debt consisted, and how it was due, it is misleading to say that the jury cannot find the existence bona fide and amount of the debt without such satisfaction as to all the details of it. The charge in this respect trenches upon the province of the jury."

10—Larney v. People, 82 Ill. App. 564 (566, 567, 568).

"By Section 12 of Chapter 119, Rev. Stat., it is provided that if the officer shall return an insufficient bond he shall be held liable, etc.

"The authorities are not altogether in harmony as to the liability imposed upon the officer in this be-

half. There are authorities which hold in effect, in construing statutes like the one here in question, that the officer is answerable for the solvency and sufficiency of the surety on the bond accepted by him, and can not excuse himself from liability by any showing of diligence, if the surety accepted prove to have been in fact insufficient. Wells on Replevin, Sec. 385; Cobbey on Replevin, Sec. 679; Gibbs v. Bull, 18 Johns. 437; Oxley v. Cowperthwaite, 1 Dall. (Pa.) 349; Pearce v. Humphreys, 14 Serg. & R. 25.

"And it has been held that the officer is not only answerable for the solvency and sufficiency of the surety when the bond was accepted, but as well for the solvency and sufficiency of the same at the time when the surety is called upon to respond to his obligations. Meyers v. Clark, 3 Watts & S. 535.

"The thirteenth section of chapter 119 of our statute provides against the latter construction by enacting, in effect that if the surety is sufficient when accepted, subsequent insolvency or insufficiency shall not operate to render the officer liable.

"In this state it would seem that the officer is held not to be an insurer of the solvency and sufficiency of the surety at the time of accepting the bond. In People v. Core, 85 Ill. 248, the court, while not having under consideration the solvency of a surety, yet discusses the liability of the officer in general, and intimates that it is to be determined by the degree of care and diligence exercised by him in examining into the sufficiency of the bond.

"In two later decisions, viz., People v. Robinson, 89 Ill. 159, and Robinson v. People, 8 Ill. App. 279, both the Supreme Court and this court indicate that the officer may be excused from liability by a sufficient showing of diligence, the using of the best means of information reasonably at his command, and the then apparent sufficiency of the surety when thus examined and accepted."

## CHAPTER CLX.

### SALES.

See Approved Instructions, Chapter LXXVIII, Vol. I.

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| <p>§ 4246. Sale—Title passes, when.</p> <p>§ 4247. Fulfillment of specific conditions before the title passes.</p> <p>§ 4248. Contract to manufacturer—Change of—Additional compensation.</p> <p>§ 4249. Sale—Commission broker—Diligence required.</p> <p>§ 4250. A bill of sale is only evidence.</p> <p style="text-align: center;">WARRANTY.</p> <p>§ 4251. Implied warranty—Fit for special purpose intended—Samples.</p> | <p>§ 4252. Suit on special warranty, not on written guarantee.</p> <p>§ 4253. Expression of opinion may amount to warranty—Purchaser guilty of contributory negligence.</p> <p>§ 4254. Recovery on expressed or implied warranty.</p> <p>§ 4255. Warranty of live stock—Option to return stock or sue for damages.</p> <p>§ 4256. Assuming as true facts which the jury are to find—Instructions must be based on the evidence.</p> |
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§ 4246. **Sale—Title Passes, When.** The jury are instructed that to constitute a contract of sale of personal property the minds of the two parties must meet and agree on the articles to be sold, the price to be paid, the terms of payment, and the time, place and terms of the delivery of the property sold, so that each mind assents to all of the requirements of the other. If any one of these matters is left open for further consideration and further settlement, there is no complete contract of sale.<sup>1</sup>

§ 4247. **Fulfillment of Specific Conditions Before the Title Passes.** The court instructs you that when anything is to be done by one who sells, or by the mutual concurrence of both parties, for ascertaining the price of goods, as by weighing, testing or measuring them, or there is something indicating an intention to postpone the transfer of the property until the fulfillment of any specific conditions, the performance of such conditions is presumed to be a condition precedent to the transfer of the title to the property, and in such case the title does not pass until such conditions have been performed.<sup>2</sup>

<sup>1</sup>—*Detroit Steel & Spring Co. v. Whitney*, 57 Ill. App. 164 (166, 169), citing *Benjamin on Sales*, 633.

"Goods may be bargained and sold so that the title passes to the purchaser, and the goods made subject to process against him, though nothing was said, or even tacitly understood, about time, place or terms of delivery. If the price were paid, or credit agreed upon, the title would pass."

<sup>2</sup>—*Roberts v. McWatty*, 123 Wis. 598, 102 N. W. 18 (19).

The court criticised this instruction as amounting "to a direction that if any of the conditions enumerated in the instruction were

found to exist, then it is conclusively presumed that title did not pass until the conditions have been performed. This is not the legal effect of proof of such conditions. Proof of them is received and submitted to ascertain whether the parties intended that title should pass when the agreement to sell was made, or at some subsequent stage of the transaction. The instruction was evidently framed with a view to incorporating the rule expressed in the decision of *Smith v. Wisconsin Investment Co.*, 114 Wis. 151, 89 N. W. 829, wherein is stated: 'The performance of these conditions is presumed to be a condition precedent

§ 4248. **Contract to Manufacture—Change of Additional Compensation.** When a manufacturer has made a contract with a customer, agreeing to furnish a number of duplicate articles of a specified design or character at a specified price for cash, and the customer, after one or more of such articles have been furnished in pursuance of the contract, directs changes to be made in the design or details of the article,—its identity and general character remaining unchanged,—the contract remains binding upon the manufacturer as to the price of the article, excepting that the manufacturer is entitled to make such additional charge therefor as will reasonably compensate him for the additional labor and materials necessitated by the changes ordered, and afford him a reasonable profit thereon. He is not entitled to disregard the contract, and to charge whatever he considers the reasonable value for furnishing one of the articles under the altered design or details, unless he has refused to go on with the manufacture thereof, after the changes are ordered, on the basis of the contract, and has so notified the customer.<sup>3</sup>

§ 4249. **Sale—Commission Broker—Diligence Required.** The court instructs the jury that, if you believe, from the evidence, that plaintiffs refused to accept the flour shipped to them by defendant, or any part thereof, and that defendant consented to such refusal and ordered plaintiffs to sell the same or any part thereof for its account, and that plaintiffs did so sell said flour after reasonable and diligent effort at the highest market price for said flour at the time of said sales, then you will find for the plaintiffs in an amount equal to the difference between the amount advanced by plaintiffs on account of the draft against the rejected flour, and the net amount you find was realized by plaintiffs from the sale of such flour for the account of the defendant.<sup>4</sup>

to a transfer of the property.' These terms should not be read to declare that the existence of such conditions conclusively prove that title did not pass until they had been performed."

3—*Moran Bros. Co. v. Snoqualine Falls Power Co.*, 29 Wash. 292, 69 Pac. 759 (765).

"It is faulty in that it states, in the closing part thereof, that a manufacturer 'is not entitled to disregard the contract, and to charge whatever he considers the reasonable value for furnishing one of the articles under the altered design or details, unless he has refused to go on with the manufacture thereof after the changes are ordered on the basis of the contract, and has so notified the customer.' We think the doctrine fairly deducible from the authorities, in cases of this or like character, is that the manufacturer or builder, as the case may be, may go on with the work, and make such changes as may be required by the customer or owner, without objection, and, if the departures from the original plans are such as to result in a new or substantially new undertaking, he may, in the absence of any agreement as to compensation for such changes, recover the

reasonable value of the labor and material so furnished, and will not be limited to the price agreed upon in the original contract. *Rhodes v. Clute*, 17 Utah, 137, 53 Pac. 990, and cases cited therein; *Cook Co. v. Harms*, 103 Ill. 151. But where work is done under a special contract, and there is a deviation from the original plan, not amounting to a new undertaking, the contract price is the measure of payment, as far as the contract can be traced and applied, but no further, 'and for his extra labor the party is entitled to his quantum meruit.' *Dubois v. Canal Co.*, 4 Ind. 285. See, also, *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Norton v. Brown*, 89 Ind. 333."

4—*Craig v. Harrison Switzer Milling Co.*, 103 Ill. App. 486 (489).

"The court erred in giving this instruction. The contract was that the plaintiff should sell the flour 'for the highest obtainable price.' This contract imposed no greater duty or burden than the law imposes between a commission broker and his customer. The broker must exercise reasonable and diligent effort, and when he has done that he has done all the law requires, and if the plaintiffs in error did that in



**§ 4250. A Bill of Sale Is Only Evidence.** (a) The court instructs the jury that if you find from the evidence that the plaintiff, H., undertook to purchase a stock of drugs, or interest therein, from J., and further find that the said J. was at the time insolvent, and knew that the defendants held claims against the stock of drugs which was secured by a bill of sale upon the same, and were in possession thereof, then the plaintiff, H., could not acquire title thereto, superior to the defendants, until all the claims secured by the bill of sale were paid.

(b) One who holds a security may waive or abandon it, and if you find that E., M. & L., holding the bill of sale for the drug store, as security, know of the sale of the store by J. to H., and received a part of the purchase money, they will be held to have waived all rights under the bill of sale.

(c) You are directed to disregard all evidence tending to show that H. undertook to pay debts of J. other than those mentioned in the list, aggregating \$—, and on paying this sum H. would be entitled to take up the bill of sale. In offering to pay the \$— the law would not require H. to exhibit the money, if L. refused to receive it and did surrender the bill of sale, only on condition that H. should pay other debts not part of the \$—.<sup>5</sup>

## WARRANTY.

**§ 4251. Implied Warranty—Fit for Special Purpose Intended—Samples.** The court instructs the jury that, where chattels are to be made or supplied to the order of a purchaser, there is an implied warranty that they are fit for the especial purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given; and in this case, if you believe, from the evidence, that the plaintiff ordered certain goods and chattels from the defendant with which to build a house, and that the plaintiff told the defendant at the time he ordered said goods the purpose for which he intended to use the same, and that at the time said order was given the said goods and chattels had not been made or separated from the bulk or set apart to the plaintiff, and if you further find, from the evidence, that the goods and chattels which the defendant shipped to the plaintiff were not fit for the purpose intended by the plaintiff, then the court instructs you that the plaintiff had a right to refuse to accept said goods and chattels.<sup>6</sup>

this case they have done all that their contract requires. It means the highest price obtainable by reasonable and diligent effort; that and no more."

5—*Heard v. Ewan et al.*, 73 Ark. 513, 85 S. W. 246 (241).

The court held these instructions erroneous for treating a bill of sale as anything more than a bit of evidence.

6—*Chicago House Wrecking Co. v. Durand*, 105 Ill. App. 175 (178).

"By this instruction, the court in effect said to the jury that even though they found the goods purchased were the identical goods selected, and were in every respect

equal to the samples from which they had been purchased, still, if they were not fit for the purpose for which the defendant said at the time he ordered them he wanted to use them, that in such case the plaintiff had a right to refuse to accept them. The instruction is not proper under the evidence, and is erroneous for the further reason that it assumes to tell the jury that because appellee may have mentioned that the material he was purchasing was for a house, the jury must understand that the appellant warranted the material for such purpose. This instruction should not have been given."

§ 4252. **Suit on Special Warranty, Not on Written Guarantee.** The court instructs the jury that the plaintiff in this case was bound to give the defendant a reasonable opportunity to cure any defect in the buggy in question before she could return it and rescind the contract and sue for the price of the buggy; and even though you should believe from the evidence that the buggy was defective in any particular, contrary to the written guarantee in evidence in this case, and that the defendant remedied the defect at the first opportunity, then you must find for the defendant.<sup>7</sup>

§ 4253. **Expression of Opinion May Amount to a Warranty—Purchaser Guilty of Contributory Negligence.** (a) If the plaintiff relies on a warranty, he must prove a warranty to the satisfaction of the jury. And in order to establish a warranty it is not sufficient to show that during the negotiation, plaintiff said to defendant, "Now, if there is anything wrong with those mules, not discernible, I want you to tell me," and defendant said they were as sound as a dollar. This would be a mere expression of an opinion, and no recovery could be had of a wrong on such proof. It would be a mere expression of an opinion.<sup>8</sup>

(b) If the jury are reasonably satisfied from the evidence that the plaintiff put or permitted the mule to be put to hauling timber, under such circumstances as was likely to increase the injury to the mule's eyes, and the jury are reasonably satisfied that the diseased condition of the eyes was increased and brought about permanent disease or damage, then, by his carelessness, he contributed to the injury, and cannot recover, and their verdict should find for the defendant.

(c) When the plaintiff got the mules, if he discovered that one of them had a sore eye or eyes, and while in that condition he made such a careless and reckless use of it, by putting it to hauling lumber over a long and rough road, and such use of the mule brought about or contributed to the injury or damage to the mule, then he cannot recover, and the verdict should be for the defendant.

(d) If the jury are reasonably satisfied from the evidence that the plaintiff permitted the mule to be used in hauling lumber while its eyes were sore and inflamed, and that this use was of such a character as to cause its eyes to grow worse, and finally defective, then he contributed to the injury in such a way that it defeats his right to recovery, and their verdict should be for the defendant.

7—*Mathers v. Morris*, 95 Ill. App. 541.

The court said that "this instruction was vicious, because it limited the plaintiff's right to recover for a breach of a written guarantee given by the manufacturers of the buggy, whereas she was seeking a recovery upon a special warranty given her by appellee. She disclaimed any connection with or knowledge of the written guarantee."

8—*Riddle v. Webb*, 110 Ala. 599, 18 So. 323 (324).

"If, during the negotiation of the trade, plaintiff said to defendant, 'If there is anything wrong with these

mules, not discernible, I want you to tell me,' and defendant said they were as sound as a dollar, it cannot be affirmed as matter of law, that the statement of the defendant was the mere expression of an opinion. The defendant was not called upon to express an opinion, but he was required to state absolutely whether there was anything wrong with the mules not discernible, or not. And the defendant responded absolutely that they were as sound as a dollar. If the trade was made upon faith of this statement, it amounted to a warranty of soundness. Above charge therefore was properly refused."

(e) Notwithstanding one of the mules may have had one or both of its eyes hurt while R. had it, still, if R. doctored the eye, and got it well or apparently well, and plaintiff took it, and discovered in a few days that its eyes were not well, and while in that condition, he let E., S. or N. have it to haul lumber over a rough road, eight or nine miles, and they or either of them, took the mule and put it to this work, and hauled with it until it was blind, or in a manner so, and then sent it home, if this was an improper and negligent treatment, and the jury believe that this disease of the eyes was brought about and aggravated by this treatment as shown by the evidence, then this was such contributory negligence as would defeat plaintiff's recovery.<sup>9</sup>

(f) The court instructs the jury that where a purchaser inquires for himself, and acts upon his own opinion, he cannot say that he has been misled by a false statement of another; and if he inspects and examines the article for himself, and selects it after exercising his own judgment upon its character and quality, the vendor only warrants that the article, so far as he knows, is what it appeared to be, and what he believed it to be, at the time he sold it.<sup>10</sup>

§ 4254. **Recovery on Expressed or Implied Warranty.** (a) If, on the other hand, you find and believe from the evidence that the defendant had knowledge of the inferior character of the seed before it was sown, in event you believe the same was inferior, but, notwithstanding such knowledge, retained the same, and used it for the purpose for which it was purchased, then and in that event he could not recover on his counterclaim in this case, but would be deemed, in law, to have waived his right to rely upon the representations of the plaintiff, in event you find any were so made; and the plaintiff would be entitled to recover the full amount of the note sued on, together with interest from the date thereof.<sup>11</sup>

9—Riddle v. Webb, 110 Ala. 599, 18 So. 323 (324).

The court held that it is no defense to an action on a warranty that the purchaser of the property may have been guilty of contributory negligence so that the defect was increased after its discovery. The above instructions were therefore properly refused.

10—Smith v. Hale, 158 Mass. 177, 33 N. E. 493 (494), 35 Am. St. 485, citing Harrington v. Smith, 133 Mass. 92, 52 Am. Rep. 26.

The court held that the refusal to give the above instruction was right. The court said: "It is enough to say that a purchaser of an article may examine it for himself, and exercise his own judgment upon it, and at the same time may protect himself by taking a warranty."

11—Dunn v. Bushnell, 63 Neb. 568, 88 N. W. 693, 93 Am. St. 474.

"The next question to be determined is as to whether this instruction is correct as an abstract proposition of law. We are impressed with the idea that in giving this instruction the learned trial judge was influenced by the doctrine set forth in the syllabus of

the case of Oliver v. Hawley, 5 Neb. 439, but a careful examination of the issues determined in that case leads to the view that it is easily distinguishable in principle from the issues presented in the case at bar. In the case of Oliver v. Hawley, supra, the issues arose on a contract for the purchase of flax seed sold by sample, and no question of warranty was involved in the controversy. The answer contained a counterclaim for damages to the farm and crops on account of the growth of mustard seed intermixed with the flax seed. The evidence showed that the defendant knew that the mustard seed was mixed with the flax seed at the time he sowed it. In determining the questions in this case, the court quoted with approval the rule announced in Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753, in which the defendant had sold cabbage seed under an express warranty that it was a seed of a variety known as 'Bristol Cabbage,' which it proved not to be, and in which the damages were held to be the value of a crop such as should have been produced by the seed if



(b) No warranty or other fact can be proven by singling out one part of what was said or done, tending to show the fact and ignoring others. It must all be taken and considered together, and the determination reached from the whole evidence, and not from one or more sentences alone.<sup>12</sup>

§ 4255. **Warranty of Live Stock—Option to Return Stock or Sue for Damages.** (a) The court instructs the jury that if you believe from the evidence in this case that the terms of the guarantee upon the sale of the bull in question were that if said bull did not prove to be a breeder, that the plaintiff should return the bull to C., and if the defendants had another bull as good, satisfactory to the plaintiff, he should have said bull, and if they did not have such a bull, satisfactory to the plaintiff, that they should then return the purchase money to the plaintiff, then under such guarantee, if shown by the evidence, before the plaintiff can recover in this case, he must prove that he has complied with the terms of such guarantee, and if he has failed to make such proof, then your verdict should be for the defendant.

(b) The court instructs the jury that the law is that if these parties entered into an agreement whereby the defendants sold to the plaintiff a bull and that said agreement provided that in case the bull failed to be a breeder, then the defendants should furnish another one equally good, and one satisfactory to the plaintiff, or refund the money upon the return of the bull in question, then this contract fixed the defendant's liability in case the bull failed to be a breeder, and their liability is only to the extent of furnishing the other bull as agreed upon or refund the money upon the return of this bull; and if you believe from the evidence in this case that such was the contract between the parties, then the plaintiff was in duty

it had conformed to the warranty, deducting the expense of raising the crop and the value of the one in fact raised. The court then says: 'But I think that no case can be found in which consequential damages have been recovered where a party, as in this case, had knowledge of the inferior character of the seed before sowing the same. In such case the party furnishing the seed is not liable for damages resulting to either the crop or the land in consequence of the use of such inferior seed.' While we think that the conclusion reached in the case just quoted from was sound and logical, and fully supported by the facts then in issue, yet we think the issues in the case at bar, as tendered by the defendant's answer and his evidence, bring it within the rule of *Passinger v. Thorburn*, supra; and as there was no claim for consequential damages to the crop or the land of the defendant in the case at bar on account of noxious seeds, and because there was no evidence tending to show that the defendant had knowledge of the alleged inferior quality of the seed before he planted it, we think that

the court erred in attempting to apply the doctrine in the case of *Oliver v. Hawley*, supra, to the case at bar. Even granting that there had been testimony tending to show that the defendant discovered the inferior quality of the seed before planting it, yet if the seed had been warranted, as defendant claims it was, he would still have the right to have retained the seed, and to have recovered in damages the difference between the market price of the seed he received and the purchase price of such seed as he alleges was warranted to him."

<sup>12</sup>—*Riddle v. Webb*, 110 Ala. 599, 18 So. 323 (324), citing *Hurd v. State*, 94 Ala. 100, 10 So. 528.

In comment the court said: "It is true that it is the duty of the jury to consider all the testimony, but it is for them to determine the weight and value of the several parts thereof, and if the circumstances justify it, they may accept a part and reject the balance. It will not do, therefore, to instruct the jury that their determination of the case must be reached from the whole evidence and not from one or more sentences alone."

bound to return said bull if he was not a breeder, before he is entitled to recover.<sup>13</sup>

(c) You are instructed that if the horse was diseased in the testicles at the time B. purchased him, or if he was not an average foal getter, it was his duty to return him after a reasonable time; that is after a reasonable time to determine that question. And if O. did not ask him to keep him for a further time to determine that, then he cannot avoid payment, and your verdict must be for the plaintiff for \$—.

(d) You are to determine, gentlemen, whether the horse was diseased or not at the time it was purchased of the O. Company, or whether he failed to be an average foal getter without fault of the defendant; that is, was the swelling without regard to the disease, or was the swelling because of the disease that actually existed at the time he purchased him—that he did not get into the condition because of disease arising while in B.'s hands? Second, if defendant is free of blame for such defective condition, whether O. waived the return of the horse to C.<sup>14</sup>

**§ 4256. Assuming as True Facts Which the Jury Are to Find—Instruction Must Be Based on the Evidence.** The court instructs the jury that if you believe from the evidence that the material used in the casting furnished to the defendant was not the same as in the sample of malleable iron shown to the defendant when the castings were ordered, and that said castings did not bend to meet the angle-bar when first set in position, then you should find for the defendant on that branch of the case.<sup>15</sup>

13—Cook v. Lantz, 116 Ill. App. 472.

"The defendant gave the plaintiff the privilege of returning the bull and getting another if they could satisfy him, or if not, his money back. Without such agreement plaintiff could pursue no other course than to sue on the warranty. The contract as proven simply gave the plaintiff an option. It imposed no obligation on him to return the bull. Clearly the buyer has the option of an action on the breach for damages, or to return the bull and receive another in his stead. He selected an action at law for damages and no reason is known why he cannot maintain it."

14—Otto v. Braman, 142 Mich. 185, 105 N. W. 601 (604).

"There was no guaranty that this horse was not diseased, but only that he was serviceably sound. Again, the instruction was erroneous for another reason. The evidence shows that the defendant had the horse for more than a year. It cannot be said that he received no consideration for his note, for the horse had some value. Again, it was a question for the jury to determine what if any damage defendant had sustained growing out of the breach of the guaranty. They

might have been less or more than the amount of the note, but it was not for the court, but the jury, to determine them."

15—Forster, Waterbury & Co. v. Peer, 120 Ill. App. 199 (201).

The court said that the "question as to whether appellants warranted that it would make the nuts so that the lips thereon would meet the angle-bar without breaking, is the principal and most important one involved in the case. By assuming, as it does, that there was such a warranty, the instruction took from the jury the determination of a question solely their province to determine. An instruction should not assume, as true, facts which, under the evidence, the jury are to find. Gundlach v. Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. 348. The instruction was erroneous for the further reason that it directs the jury to find for the defendant if they find from the evidence that the material used in the casting was not the same as in the sample shown to defendant. There is no evidence tending to show that the nuts were made of different material than that of which the sample was composed. Instructions should be based upon the evidence before the jury. Webster v. Yorty, 194 Ill. 408, 62 N. E. 907."

## CHAPTER CLXI.

### SLANDER AND LIBEL.

See Approved Instructions, Chapter LXXIX, Vol. II.

§ 4257. Definition of slander.	§ 4265. Libel imputing commission of crime—Whether malice may be implied from publication—Privileged communications.
§ 4258. Libel defined — Burden of proof as to damages—Function of jury.	§ 4266. Injury caused in part by other libelous publications.
§ 4259. Libel differing from slander —Charge invading the province of the jury.	§ 4267. Libel referring to another person of a similar name.
§ 4260. Intent as an element in libel —Presumption of intent.	§ 4268. Facts admitted by withdrawing the plea of the general issue—Justification.
§ 4261. Charge of fornication.	§ 4269. Plaintiff's conduct suspicious —Mitigation of damages—Injury to trade and occupation.
§ 4262. Words imputing dishonesty in business.	
§ 4263. Action for libel by one who professes to have supernatural powers.	
§ 4264. Degree and extent of proof required.	

§ 4257. **Definition of Slander.** The court instructs the jury that slander is the defamation of a man with respect to his character, or his trade, profession or occupation, and in this case has reference only to his trade and business, by word of mouth; and if you believe from the evidence that the defendant, T., uttered any or all of the slanderous words charged in the plaintiff's declaration maliciously intending to damage the plaintiff, W., in his trade, profession or occupation, and that said W. was damaged by said slanderous utterances from T., they should find for the plaintiff.<sup>1</sup>

§ 4258. **Libel Defined—Burden of Proof as to Damages—Function of Jury.** (a) A libel is a false and malicious publication, expressed either in print or in writing, or by pictures, effigies, or other signs, tending to injure the reputation of one alive, and expose him to public

<sup>1</sup>—Ward v. Ward, 47 W. Va. 766, 35 S. E. 873 (874).

"Can we sustain the action of the court in giving to the jury this instruction? In it the court omits any reference to the question whether the utterances attributed to the defendant in the averments of the declaration were or were not privileged. A glance at the evidence shows that almost every witness who testifies to the fact that the plaintiff was broken up, or would be unable to meet his liabilities, was a creditor of the plaintiff, and was in a confidential manner consulting with the defendant, also a large creditor, in reference to the solvency of his brother, the plaintiff. Under the head of 'Libel and Slan-

der,' 13 Am. & Eng. Enc. Law, p. 429, we find the law thus stated: 'Although evidence tending to prove the truth of the words spoken is inadmissible under the plea of not guilty, yet facts which induced the mistaken belief in the mind of the defendant that the charge was well grounded are admissible to rebut malice. The judge must decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified. If he decide that the occasion was one of absolute privilege, the defendant is entitled to a judgment, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the onus lies on the plaintiff of proving actual malice.'"



hatred, contempt or ridicule. It will be observed that, in order to constitute the false and malicious publication, the print or writing need not in fact injure the reputation, nor in fact expose him to public hatred, contempt or ridicule. It is sufficient if it tends to injure the reputation of the person, and tends to expose him to public hatred, contempt or ridicule. Nor is the state required to prove, in order to prove a libel, that the false and malicious publication tends to injure the reputation of the person, and expose him to public hatred, contempt and ridicule. It is sufficient if the publication of the matter, either in print or writing, tends to injure the reputation of a person, and expose him to public hatred, or expose him to contempt, or to expose him to public ridicule.<sup>2</sup>

(b) In cases of this character the jury is to determine the law and the facts; the facts to be determined from the evidence introduced, and the law within the instructions of the court.<sup>3</sup>

§ 4259. **Libel Differing from Slander—Charge Invading the Province of the Jury.** The words of the slanderer may arouse anger, resentment and revenge to-day; but they, like all human utterances, lose their potency, their vehemence, their power of producing anger, resentment and revenge. Ere the end of the morrow they die, young and soon forgotten. Not so when those words are reduced to writing or print, and published. They live on and on, and are read by the children and children's children to the last generation of the person libeled. They arise, in all their hideous deformity, to vex, sap and destroy the happiness, the peace, the good names of the living and beloved memory of the dead, while time lasts, because the ink that prints a published libel never fades, never dies.<sup>4</sup>

§ 4260. **Intent as an Element in Libel—Presumption of Intent.** The intent with which a publication is made, rather than its truth or falsity, is the correct criterion by which a jury is to determine whether such a publication is a libel. The intention is a matter of inference,

2—*Raker v. State*, 50 Neb. 202, 69 N. W. 749 (750).

The court said: "It was for the state to prove that the publication tended to injure the complaining witness, or to expose him to public hatred or contempt, which fact, if it be a fact, was the province of the jury to determine, from all the evidence in the case, under proper instructions. It was not for the defendant to show that the article was not libelous, but the burden was upon the state to establish every element of the offense."

3—*Sands v. Marquardt & Sons*, 113 Mo. App. 490, 87 S. W. 1011 (1012).

"In thus instructing the jury palpable error was committed in two particulars: First, in declaring that it was the duty of the jury to determine the law of the whole case; and, second, in setting bounds to the exercise of its rights to decide the questions of law, the determination of which in this class of cases rests exclusively within the province of the jury.

"Prejudicial error was committed in conferring upon the jury the

right to adjudge the law of the whole case. Directing the jury to determine the law 'within the instructions of the court' was an unwarranted limitation imposed upon the exercise of a lawful right. It compelled a degree of obedience to the court's commands which deprived the jury of sovereign power, and rendered nugatory the protection accorded defendant under the law of libel. Some of the authorities sustaining the views here expressed are: *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457; *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *State v. Powell*, 66 Mo. App. 599."

4—*Raker v. State*, 50 Neb. 202, 69 N. W. 749 (751).

The court said that "argumentative instructions should not be given. Whether the language above quoted is faulty in that regard we shall not stop to decide, but pass it with the observation that it, as well as other portions of the charge, very clearly, if not quite, invaded the province of the jury."

from the nature of and the facts surrounding the publication. The law presumes that every one intends the necessary and probable consequences of his acts. The publisher of a libel is presumed to intend what the publication is likely to produce. It is therefore as much a question of whether the tendency was injurious to the person of whom published, as to whether the defendant intended to injure the person libeled.<sup>5</sup>

§ 4261. **Charge of Fornication.** (a) Even though the evidence might establish that the defendant said to certain persons each of the words charged as having been uttered, and that such words are ordinarily construed to mean that the persons they refer to have been guilty of fornication, she would not be guilty under this declaration if from a preponderance of the evidence you find that her hearers did not give her words the construction contended for and did not understand her to charge that the plaintiff had sexual relations with some man.

(b) If you find from the evidence that the defendant spoke the words charged in the declaration of and concerning the plaintiff and that they were spoken about and in relation to a known act which was known to the hearers at the time, and such words did not then and there give the hearers to understand that the defendant was thereby charging the plaintiff with unlawful sexual intercourse with a man, your verdict should be for the defendant.<sup>6</sup>

§ 4262. **Words Imputing Dishonesty in Business.** If you find the words used in the letter in evidence imputed dishonesty and unworthiness to plaintiff in his business, and that he is disreputable generally and in his trade and business, and that they were untrue, then it is presumed in law, that they were written and published of plaintiff by defendant in malice.<sup>7</sup>

5—State v. Nichols, 15 Wash. 1, 45 Pac. 647 (648).

In comment the court said that "section 17 of the Penal Code defines libel to be 'the defamation of a person made public by any words, printing, writing, sign, picture, representation or effigy tending to provoke him in wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.' It is doubtful, under this definition of the crime, whether the question of malice or of intention enters in; but, in any event, the concluding language of the court in the instruction objected to is but a logical result of the announcement made before, that 'the intention is a matter of inference from the publication,' and that 'the law presumes that every one intends the necessary and probable consequences of his acts,' which is without question the law as a general proposition."

6—Ketchum v. Gilmer, 115 Ill. App. 347 (350).

"These instructions were erroneous and highly prejudicial to the plaintiff's case, even if it be admitted that they were proper under the evidence as to all utterances

testified to except those at Mrs. A.'s. In view of the testimony on that occasion, the instructions being general as to the whole case, they were clearly erroneous. Not limiting these instructions to occasions where there was testimony tending to show that defendant used language explanatory of what might otherwise have been slanderous utterances was erroneous, and they should not have been given."

7—Sands v. G. W. Marquardt & Sons, 113 Mo. App. 490, 87 S. W. 1011 (1012).

"We are unable to conjecture any principle under which the presumption announced would follow the facts premised. To single defendant out as the author of the letter from the sole fact of the libelous character of its contents, without proof of any other facts, is too unreasonable to merit serious consideration. Nor can it be said this error was cured in other instructions given. Considered in connection with them, the rule stated in the language under consideration is contradictory to that given in instruction No. 1 and the jury had the right to use either one as a guide. The error is apparent. John Stewart & Co. v. Andes, 110 Mo. App. 243, 84 S. W. 1134."

§ 4263. **Action for Libel by One Who Professes to Have Supernatural Powers.** The court instructs the jury that if you find and believe, from all the evidence and the facts and circumstances in evidence, that the business in which plaintiffs were engaged upon ———, ———, was and is an imposition and fraud upon the general public, then your finding must be for the defendants. In this connection, however, you are further instructed that, in determining whether or not such business was an imposition and fraud upon the general public at the time aforesaid, you will consider the general character of the business as disclosed by the facts, as well as the results of their said business methods with the general public, as shown by the evidence and the facts and circumstances in evidence that their said business was and had been substantially beneficial to the general public, and their methods had substantially produced the results claimed for them by plaintiffs, then the same is not a fraud or imposition upon the general public, and you should find for the plaintiffs upon this issue.<sup>8</sup>

8—*Weltmer v. Bishop*, 171 Mo. 110, 71 S. W. 167 (1899), 65 L. R. A. 584.

The court said: "It will be seen that the court submitted to the jury to say if the plaintiff's business was legitimate, and in weighing that question they were to consider the results as disclosed by the evidence, and, on the whole, if the results had been beneficial, the business was not to be adjudged a fraud. Courts are not such slaves to the forms of procedure as to surrender their own intelligence to an array of witnesses testifying to an impossibility. They are not required to give credence to a statement that would falsify well-known laws of nature, though a cloud of witnesses swear to it. We recognize that in the realm of science much is yet undiscovered, and especially is this so in the science relating to diseases of the human system and their treatment.

"Different schools of medicine contend with each other on vital questions, and, as long as the contest continues with reason, it cannot be said that the right of either, as above the other, has been demonstrated. But if either school would convince us that it is right, or even that it is entitled to be recognized as a contestant, it must appeal to our intelligence, and discuss the subject on the basis of natural laws. If it cannot be discussed on that basis, there is nothing to discuss. If a man came into court claiming to possess supernatural powers, and bring with him witnesses who swear he has done for them that which we know is impossible, we are not required to believe such evidence. Here was a woman, who perhaps believed what she said, who testified that by a mental process of one of these plaintiffs, transmitted to her through a letter several hundred miles away, she

was entirely cured of a cancer of the breast. The fact that the plaintiff who was supposed to have transmitted the influence from Nevada was there at the time does not add to the absurdity of the statement. And the testimony of other witnesses, perhaps also sincere, to the effect that they were cured of otherwise incurable diseases by such mysterious process, can have absolutely no lodgment in our intelligence. Under the instruction above quoted, the jury were directed to heed such evidence, and if, on the whole, it showed that good had resulted to the community from the practices of the plaintiffs, the jury were to find that the business was a lawful one. It was an instruction, in effect, directing the jury to surrender their own intelligence to the preponderance of statements of witnesses, irrational though such statements were. Under the conceded facts, there was no evidence to justify the submission of the case to the jury, and the peremptory instruction for a verdict for the defendant should have been given. If there was anything in the plaintiffs' business which they call 'Magnetic Healing,' that entitled it to the protection of the law, and which was not perceptible to the uninstructed, the burden was on them to show the rationale of it; and, failing to do so, the court should close its door against them. *Richards v. Judd*, 15 Abb. Prac. (N. S.) 184.

"The law of libel is not designed to shield one in the practice of an illegal business. 18 Am. & Eng. Enc. Law (2d Ed.) 947; *Johnson v. Simonton*, 43 Colo. 242; *Perry v. Man*, 1 R. I. 263; *Starkie, Sland. & L.* (5th Ed.) 522. The business of the plaintiffs, as shown by their own evidence, is of such a character as that it is not entitled to protection under the law of libel."



§ 4264. **Degree and Extent of Proof Required.** (a) In addition to making out by a fair balance of proof his justification, he must also overcome the legal presumption of innocence. The law presumes all men and all women to be innocent of crime until the contrary is shown by legal evidence. When the act charged involves fraud, dishonesty, or crime, the legal presumption of innocence which prevails in civil or criminal causes must be overcome by evidence by the party who alleges such act. The defendant, alleging such acts on the part of the plaintiff, must overcome this presumption.<sup>9</sup>

(b) The jury are instructed that the burden of proof is upon the plaintiff to make out his case by a clear preponderance of the evidence; and that if the plaintiff in this case has failed to establish by such a preponderance of the evidence that the words charged in the declaration were used by the defendants as charged, their verdict should be for the defendant.<sup>10</sup>

(c) The court instructs the jury that, if they believe, from the evidence, that the defendant used the words toward the plaintiff charged in the declaration in this case, or substantially the words, then under the pleadings in this case they should find the defendant guilty and assess the plaintiff's damages at such sum as they may think fit.<sup>11</sup>

(d) It is essential to the existence of a proof of libel in a court of law for the evidence to show the falsity of the libel, the malice contained in the libel, the defamation tending to injure the reputation of the petitioner and exposing him to public hatred, contempt, or ridicule, and the publication of the libel itself.<sup>12</sup>

9—Currier v. Richardson, 63 Vt. 617, 22 Atl. 625 (626).

The charge was slander in stating that the prosecuting witness was a thief. The court said:

"By this instruction the jury may have understood that something more than a fair balance of proof was required and that, after the defendant had established the charge of theft by a fair balance of the proof, which included the presumption of innocence and all facts and circumstances that tended to disprove the charge of theft, he must go further and again overcome this presumption of innocence. Included in and to be weighed as a part of the plaintiff's evidence was the natural presumption of innocence, all of which, taken together, was to be overcome by a fair balance of proof. We think that the jury may have understood that more than this was required, and that in this respect there was error."

10—Schofield v. Baldwin, 102 Ill. App. 560 (561).

"The plaintiff is required to make out his case by a preponderance of the evidence; the jury should not have been instructed that the burden was upon the plaintiff to make out his case by a clear preponderance of the evidence."

11—Searcy v. Sudhoff, 84 Ill. App. 148 (151).

The supreme court said that "the

instruction given authorized the jury to find appellant guilty, although they might not believe from the evidence that he had spoken the words alleged in the declaration or enough of them to charge the appellee with larceny, provided they should find that he had spoken 'substantially the words'—equivalent words—words meaning substantially the same. \* \* \* It is vicious in another respect; it authorizes the jury to assess damages at such sum as they might think fit. In Sanford v. Gaddis, 15 Ill. 229, it is said 'The plaintiff must prove the words alleged in the declaration or so much of them as will sustain his cause of action. It is not enough to prove other words of like import and meaning—equivalent words or expressions will not suffice.' In Martin v. Johnson, 89 Ill. 537, it is said 'It was the province of the jury to determine the damages plaintiff should recover, if any, but these damages should be determined from the evidence and from that alone, and an instruction which does not restrict the jury to the evidence is improper.'"

12—Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934 (937).

The instruction is "erroneous for the reason that it placed upon the plaintiff the burden of proving that the charge contained in the alleged libelous writing was false, and that

(e) The court instructs the jury that even though they may believe from the evidence that the defendant said that they got away with the money, still that will not warrant the jury in bringing a verdict of guilty. To warrant the jury in bringing in a verdict of guilty, the jury must believe from a preponderance of the evidence, that the defendant spoke the words precisely as charged in the declaration; equivalent words or expressions are not sufficient.

(f) The jury were instructed that to entitle the plaintiff to recover in this suit, he must prove the speaking of the words alleged in the declaration or other words of the meaning, as equivalent words or expressions will not be sufficient.

(g) The court further instructs the jury that in considering this case the jury can only take into consideration the language used in the first count of the declaration; that is to say, you can only consider such language as appears in the margin of the declaration. No other count in the declaration can be considered by the jury, and in passing upon the rights of the parties to this suit your duty is to pass upon the question of whether or not the defendant used the exact language as set forth in the first count of the declaration; and if the plaintiff has failed to show by a preponderance of the evidence that the defendant used the exact language set forth in the first count in the declaration, you should find the defendant not guilty.<sup>13</sup>

§ 4265. **Libel Imputing Commission of Crime—Whether Malice May Be Implied from Publication—Privileged Communications.** (a) The jury are instructed that every publication by writing or printing which falsely charges upon or imputes to any one a crime which renders him liable to punishment or which alleges against him that which is calculated to make him infamous, odious or ridiculous in public estimation, is *prima facie* a libel, and malice is implied from the publication thereof.<sup>14</sup>

it was maliciously published. If this instruction can be so interpreted, of course it is erroneous. If a writing charges another with doing an act which is calculated to expose him to public hatred, contempt or ridicule, the law will presume that the charge was false, because persons are not, as a general rule, guilty of such acts. Especially would such a presumption arise in a case where the writing charged the commission of a crime; the presumption of innocence which arises in such cases being, in effect, a presumption that the charge was false. Men are presumed to be innocent of criminal, disreputable, or otherwise disgraceful conduct; and, when one is charged with such conduct, the law infers from the character of the charge that he who makes it is moved by malice to prefer it. It is therefore incumbent upon the plaintiff in a suit for libel to prove the publication of a writing which is susceptible of being construed to be a libel, and the law immediately raises in his behalf a presumption that he is innocent of the charge,

and that the disperser of the libel was actuated by malice."

13—Keefe v. Voight, 45 Ill. App. 620 (621, 622).

"These instructions require an extent and measure of proof greater than we understand to be necessary to justify a recovery by appellant. In action on the case for slander the plaintiff must prove so much of the language used in some one of the sets of words set out in the declaration as fully proves the charge. All the words in the sentence need not be proved if those which are proved fully establish the slander. If, however, other words not laid are proved which limit or change the meaning of those counted on, the action will not be sustained. Baker et ux. v. Young, 44 Ill. 42, 92 Am. Dec. 149; Thomas v. Discher, 75 Ill. 576; Schmisser v. Kreilich, 92 Ill. 347."

14—Ambrosius v. O'Farrell, 119 Ill. App. 265, 269, 270, 271, 272.

"In effect it was tantamount to an instruction that *prima facie* the petition was a libel and that malice and damages should be implied.

(b) If you find from the evidence that the defendant K. recklessly used language towards the plaintiff, which was uncalled for, and in excess of the occasion, then this fact is evidence of malice; and if the defendants D. and O. assisted in publishing the said language, and were indifferent as to its consequences to the plaintiff, then this is evidence of malice against the defendants D. and O.<sup>15</sup>

(c) The court instructs the jury that if they believe from the evidence that the slanderous words, or any of them, charged in the plaintiff's declaration were uttered by the defendant, toward, against and about the plaintiff, I. W., the law will presume that the said words were uttered maliciously, and with intent to injure the plaintiff, and the burden is on the defendant to show that the words were privileged; and if the jury further believe from the evidence that the defendant has failed to show that said words were privileged, then they should find for the plaintiff.<sup>16</sup>

Within the law of libel and liability for defamation of character official or private, the signing and presentation of the petition which is here alleged as the sole cause of action, was a qualified privilege, and under the facts in this case it was for the court so to instruct the jury. The defendants and other petitioners were acting within their legal right and privilege in this way to address the city council concerning the official conduct of the plaintiff, to state grievances as citizens and to ask redress. In so doing, if they act in good faith without malice or ill-will toward the person of the official complained of, and in the belief that the charges made are founded on fact, they may not be held to liability in damages even though the charge is that of a crime and may not be proved. They may not be required to justify or maintain the truth of the charges as required in the publication of defamatory writing when no privilege exists. On the other hand, the law will not permit this salutary right and privilege of citizens to petition the ruler for a redress of grievances, to be used as a pretext and screen by the malicious and evil-disposed in order to traduce and defame the character and reputation of another. Under the issues made by the pleadings in this case, the petition and its publication being under a qualified privilege, the burden was upon the plaintiff to prove actual malice in the defendants, that is, that the purpose and motive of the defendants was to injure the plaintiff. Presumably the defendants acted in good faith, without malice, for the public good. Though the petition imputes crime to the plaintiff and though the plaintiff is innocent, it must, nevertheless, be presumed in the start that the petitioners believed him guilty as recited in the petition. In a suit for libel, where the question of privilege is not involved, malice is implied if crime is charged, and there is no escape from

liability, unless the defendant can justify and prove the truth of the charge. The case is made by the plaintiff by proving publication of the defamatory words and from this malice will be implied and a cause of action established. But in this case no such implication arises, and malice, the gist of the action, must be proved."

15—Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931 (932).

The court said that the language of defendant was absolutely privileged. "The investigation was a duty of the trustees, and a right of the defendant K.; and the tribunal, the board of trustees of the college, was a proper forum for the hearing of the matters embraced in the charges against the defendant K. as president of the college, and of the other matters included in the charges. We can see no difference, and we believe none can be shown, between the position of the defendant K. on trial before the tribunal of the board of trustees upon charges against his own personal character and against his competency and fitness for the presidency of the college, and his position before a court of justice on trial for an offense against the laws of the land, or in the prosecution of defense of a civil right. In each place he would have the right to present his case thoroughly; and if, in the heat of argument, or under the impulse of anger, he should use language violent or excessive towards his adversary or to a witness, it would be, nevertheless, absolutely privileged, provided what he said was relevant and pertinent to the issue. It is settled in this state that upon a trial in a court of law a party would have complete immunity under such conditions."

16—Ward v. Ward, 47 W. Va. 766, 35 S. E. 873 (874).

This instruction "is erroneous in that it tells the jury that 'if they believe from the evidence that the defendant has failed to show that



(d) The court instructs the jury that all the plaintiff is bound to prove on his part to entitle him to recover in this case is the speaking by the defendant of enough of the slanderous words charged in the declaration to amount to a charge of perjury or a charge of subornation of perjury against the plaintiff as set forth in some one or more set of words as alleged in the declaration; and if the jury believe, from the preponderance of the evidence, that the defendant is guilty of the speaking of the slanderous words or some one or more sets of words as charged in the declaration of and concerning the plaintiff, then express malice or ill-will need not be proved.<sup>17</sup>

**§ 4266. Injury Caused in Part by Other Libelous Publications.**

(a) The jury are instructed that, although the plaintiff might have convinced them by satisfactory proof that he sustained damage in his position as school teacher by the publication of July, yet, if such injury was caused in part by other libelous publications or false charges, it would be the duty of the jury to find for the defendant.

(b) The jury are instructed that the plaintiff's cause of action for alleged damages to his business as a school-teacher, caused by the publication of an alleged libelous matter set out in the complaint on the — day of —, and that you cannot award him any damages unless such damages he may have received, if he has received any, were caused simply and only by said publication, and not otherwise; that is to say, if you should find that the plaintiff was damaged in his position and occupation as a school-teacher, but that said damage was brought about and caused partly by the publication of other libels or the statement of other false charges of

said words were privileged, then they should find for the plaintiff.' The error consists in the fact that the question as to whether the words uttered were privileged was not a question for the jury, but was one of law for the court upon the facts proven. See quotations above given from 13 Am. & Eng. Enc. Law, p. 429. The utterance in the case at bar comes within the purview of what the law considers a qualified privilege. Newell Defam. p. 389. The onus lies on the plaintiff of proving actual malice, and the court erred in telling the jury in this instruction that 'if they believed, from the evidence, that the slanderous words, or any of them, charged in plaintiff's declaration were uttered by the defendant against or about the plaintiff, the law will presume that the said words were uttered maliciously and with intent to injure the plaintiff' without at the same time telling them that said presumption would be overthrown if the circumstances showed that the utterances were privileged, and in such case the onus of proving malice would be upon the plaintiff."

<sup>17</sup>—McDavitt v. Boyer, 169 Ill. 475 (480), rev'g 67 Ill. App. 452, 48 N. E. 317.

"Under the facts of this case, this

instruction was clearly erroneous and prejudicial to the appellant. It is true as a general rule of law that, if words are themselves actionable, malicious intent in publishing them is an inference of law, and therefore needs no proof. In an action of libel or slander, where an injury is done to the reputation of the plaintiff by a false statement, whether it be malicious or not, malice need not be proved. Generally speaking, every defamation is presumed by law to be malicious. It is also laid down in the authorities, that spoken words imputing a crime punishable with imprisonment are actionable without proof of such damages. (2 Greenleaf on Evidence, 15th Ed. sec. 418 and notes. 13 Am. & Eng. Ency. of Law, pp. 296, 298, 347. Newell on Def. Slander & Libel, p. 319.) But this general rule is subject to the important qualification that where the injurious utterance is privileged, the law does not presume malice, and express malice must be proved by the plaintiff. Privileged communications constitute an exception to the general rule that the utterance of actionable words implies malice. Such privileged communications are presumed not to be malicious; in other words, the law does not imply malice when the injurious communication is privileged."

any other person, then you must find for the defendant, notwithstanding you might also find that the damage was partly caused by the publication set out in the complaint.<sup>18</sup>

**§ 4267. Libel Referring to Another Person of a Similar Name.** The court instructs you that the law only knows one name for a person; and, inasmuch as the plaintiff admits that in 1873, or thereabouts, he assumed the name of "John D. Finnegan" to distinguish him from persons of the name of "John Finnegan"; that since that time he has held office in this city under the name of "John D. Finnegan," and always, while acting officially, used that name, and otherwise held himself out to the public as the person of that name,—I charge you that he thus voluntarily assumed that name, and all persons in the community in which he lived had the right to so understand and treat him as the person possessing such name; and he has no right to complain of an injury done to him by the publication of an article which referred to some other person of a different name, and not intended to refer to him, simply for the reason that some of his neighbors were mistaken in supposing it referred to him.<sup>19</sup>

**§ 4268. Facts Admitted by Withdrawing the Plea of the General Issue—Justification.** The court further instructs the jury that it is undisputed in this case that the defendant published of and con-

18—*Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215 (219).

"The instruction was an erroneous statement of the law, and the presumption is that it was prejudicial to the plaintiff (*State v. Mason*, 24 Mont. 341, 61 Pac. 861). When a false and unprivileged publication possessing the ingredients that stamp it as libelous per se is established, injury is presumed to ensue therefrom as the direct product of such publication, and affords ground for the allowance of at least nominal damages. *Wilson v. Fitch*, 41 Cal. 386; *Mowry v. Raabe*, 89 Cal. 609, 27 Pac. 157; *Childers v. San Jose Mercury*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; 13 Am. & Eng. Enc. of Law (2d Ed.) p. 1081, and cases cited. "There is no legal measure of damages for such a wrong. The amount which the injured party ought to recover is referred to the sound discretion of the jury. \* \* \* When the publication is actionable per se, the legal presumption of damage goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what sum will afford reparation." 3 *Sutherland on Damages*, 643-647. To recognize the doctrine embodied in instruction 12 as correct law in its application to an action to recover general damage would operate, in effect, to destroy the legal presumption above referred to of presumed injury inherent in per se defamatory charges. It would create a means of defense in actions of this character never contemplated by any principle of law. As perti-

nently suggested by counsel for appellant, all that a defendant would have to do would be to publish two libels against a party, and then introduce proof to show that he was damaged by both, and plaintiff could recover in neither. It is not an answer to this to say an action could be based upon both. A plaintiff may elect to unite several causes for injuries to character (*Code Civ. Proc.* par. 672, subd. 5), but he is not required to do so. Again, the defendant might publish a libelous article, and procure one of similar import to be published by another, and the same result would follow. Such a principle if it were allowed to control in cases of that character, would seriously jeopardize the interest of a plaintiff whenever he exercised the valuable and unquestionable right to show other defamatory charges for the purpose of proving malice. The case of *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 57, and others cited by counsel for respondent in support of the correctness of the instruction under consideration, are not in point. They, in effect, decide that other libels or slanders than the one sued on, or a repetition of the one sued on, cannot be made an extra element of damage for which compensation may be awarded—a doctrine which will meet with no dissent here."

19—*Finnegan v. Detroit Free Press*, 78 Mich. 659, 44 N. W. 585 (588).

"Above request invades the province of the jury, and asks the court to assume certain facts which could only be found in this case by the jury, and for that reason was properly omitted from the charge."

cerning the plaintiff the libelous article set forth in the plaintiff's declaration, and said libelous article was intended by the defendant to mean what the plaintiff in his said declaration intended it to mean, and that all the other matters alleged in the plaintiff's declaration are true.<sup>20</sup>

§ 4269. **Plaintiff's Conduct Suspicious—Mitigation of Damages—Injury to Trade and Occupation.** (a) The court instructed the jury that if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged.<sup>21</sup>

(b) The court instructs the jury that if they believe from the evidence that the defendant, W., spoke and published the slanderous words, or any of them, charged in the plaintiff's declaration mentioned in the manner and for the purpose charged therein against him, and that said slanderous words so spoken damaged the plaintiff in his trade or occupation, then they should find for the plaintiff;

20—*Geringer v. Novak*, 117 Ill. App. 161.

"It is apparent that this instruction is broader than the law will warrant. By withdrawing the plea of the general issue appellant admitted the publication of the alleged libel; and by his plea of justification he declared it to be true. It follows that the allegations in the declaration that the published article was 'false' and was 'malicious,' were not admitted. 'And in all trials for libels, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.' Constitution 1870, art. 2, sec. 4. 'In actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case find that such defense was made with malicious intent.' R. S. ch. 126, sec. 3.

The fact that a party fails to establish the truth of his plea of justification by a preponderance of proof is not of itself conclusive evidence of malice. It is sufficient if he believed it was true. Such a defense can only be deemed proof of malice where it appears from the whole case that it was made with malicious intent; and even then it is simply proof, but not conclusive proof, of malice.' *Newell on Defamation*, etc., p. 664, sec. 79. See, also, *Hawver v. Hawver*, 78 Ill. 412, 413. In *McClure v. Williams*, 65 Ill. 390, where special pleas only were interposed, the court say: 'The sixth instruction given for appellee was calculated to mislead the jury. It told them that, by withdrawing the plea of the general issue, the defendant admitted all the material averments in the declaration, without stating what they were. Under such an instruction, any but lawyers would be liable to be misled

to believe that the sum claimed in the declaration was a very material averment. Before this instruction was given it, should have been so modified as to have informed the jury what material averments were admitted.'

It will be noted that the instruction does not confine the admission as to truthfulness to those allegations which are 'material,' but it informs the jury 'that all other matters alleged in the plaintiff's declaration are true.' This language includes matters immaterial as well as matters material. Hence the jury was bound to accept, without proof, that appellee had always carried on his business honestly, skillfully and 'to the comfortable support of himself and family and the increase of his riches,' that by reason of such publication appellee 'has also lost and been deprived of great gains and profits,' and on account thereof many of his clients 'have altogether refused and do still refuse to consult with or retain, or to deal with, or to have anything to do with the plaintiff in his profession and business aforesaid.' These allegations if true, and the instruction compelled the jury to consider them as true logically tended greatly to increase the damages suffered by appellee. They would have justified and sustained a finding in damages largely in excess of the sum the jury awarded in this case."

21—*Sickra v. Small, et al.*, 87 Maine, 493, 53 Atl. 9 (10), 47 Am. St. 344.

The court said that the "obvious objection to this instruction is that the damages in an action of slander are to be 'measured by the injury caused by the words spoken, and not by the moral culpability of the speaker.'

This instruction to the jury must therefore be held erroneous."



and the court further instructs the jury that they are the judges of the amount of damages to which the plaintiff would be entitled under the evidence.<sup>22</sup>

22—Ward v. Ward, 47 W. Va. 766, 35 S. E. 873 (874).

Above "instruction is erroneous in that it fails to inform the jury as to the result if the words charged in the declaration to have been uttered were privileged. Whenever in answering an inquiry, the defendant is acting bona fide in the discharge of any legal, moral or social duty, his answer will be privileged. The defendant may under the general issue show that the alleged defamation consisted in a communication on matters of business made by or to persons interested in the

subject-matter of the communications, although they affect the character or credit of the plaintiff. Greenleaf on Evidence (vol. 2, § 421) under 'Defense under the General Issue' says: 'So if a person having information materially affecting the interests of another honestly communicates it privately to such other party in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the matter and though no inquiry has been made of him and though the danger to the other party, is not imminent.'"

## CHAPTER CLXII.

### TRESPASS.

See Approved Instructions, Chapter LXXX, Vol. II.

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| <p>§ 4270. Possession alone sufficient to maintain the action.</p> <p>§ 4271. Possession of lands defined.</p> <p>§ 4272. "Evident disregard of plaintiff's rights"—Exemplary damages.</p> <p>§ 4273. Pasturing cattle on inclosed lands of another.</p> | <p>§ 4274. Trespassing animals—Duty of party taking up same.</p> <p>§ 4275. Mere happening from accident will not justify an award of damages.</p> <p>§ 4276. Two persons acting independently inflicting an injury.</p> |
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§ 4270. **Possession Alone Sufficient to Maintain the Action.** The court charged the jury that, before the plaintiff can recover, he must show that he is the owner of the mules, or some of them, and the burden of proving this is on the plaintiff, and he must prove it to the reasonable satisfaction of the jury by the preponderance of the evidence; and if, after considering all the evidence, the jury are unable to say with reasonable certainty that the property sued for, or some part of it, is the property of the plaintiff, the jury should find for the defendants.<sup>1</sup>

§ 4271. **Possession of Land Defined.** By possession is not meant a mere temporary and passing occupancy of lands or tenements, but must be of a lasting, permanent or substantial nature. A person entering on lands during the temporary absence of the owner or person in possession does not thereby acquire a possession of the premises or lands so entered upon.<sup>2</sup>

§ 4272. **"Evident Disregard of Plaintiff's Rights"—Exemplary Damages.** If you shall believe from the evidence that in moving the fence over he trespassed upon the plaintiff's property, trampled down his soil or his grass or his herbage, then the law is for the plaintiff, and you should find for him in such sum as will compensate him for the damage done him in that respect; and if the moving over of the fence by the defendant was high-handed and in wanton disregard of the plaintiff's rights, then you may, in your discretion, award him

1—Carter v. Fulgham, 134 Ala. 238, 32 So. 684.

The Court said that "possession alone is sufficient to sustain the action of trespass as against a mere wrong doer who is not the real owner of the cattle. Tarry v. Brown, 34 Ala. 159."

2—State v. Howell, 21 Mont. 165, 53 Pac. 314 (315).

"The first part of above instruction, wherein the court undertakes to define what kind of possession a person may lawfully defend is erroneous. We do not think that a person under the law, can only de-

fend a 'lasting, permanent or substantial possession.' It is doubtless true that one who unlawfully enters into the possession of premises during the temporary absence of the rightful possessor must be unlawful. If a person wrongfully in possession of a house leaves it temporarily, why may not the rightful possessor during such absence peaceably enter and take and defend his possession? And besides, a person may have a lawful possession such as he may defend, which is not lasting or permanent."

such a further sum in damages as you may think right and proper under the evidence, and what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights, not exceeding the sum of ——— dollars, the amount claimed in the petition.<sup>3</sup>

§ 4273. **Pasturing Cattle on Uninclosed Lands of Another.** The court instructs the jury that the lands within this state lying unin-closed, outside of the cities and towns, whether belonging to the government or to private individuals, is common pasture ground, and may lawfully be roamed over, and pastured upon by the live stock, flocks and herds of all the people of this state subject only to the right of any such private individual to drive off any such live stock, flocks or herds as may be found roaming or pasturing upon any such unin-closed lands belonging to such private individual; and such owner of live stock, flocks, or herds cannot be held liable in damages for any injury done to such unin-closed lands by any such roaming or pasturing upon them.<sup>4</sup>

§ 4274. **Trespassing Animals—Duty of Party Taking up Same.** But if you find by a preponderance of the evidence in this case that the defendant, while in the possession of the stock and milch cows of the plaintiff, failed to so keep water or milk the same as to prevent

3—Percifull v. Coleman, 24 Ky. L. R. 1685, 92 S. W. 29 (30).

"The following words in this instruction should have been omitted 'and what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights.' There was no substantial damage shown to the plaintiff, and we are at a loss to understand why so large a verdict was rendered, unless the jury understood from these words that the court directed them to find a verdict as a punishment of defendant for his evident disregard of plaintiff's rights, as stated by the court. These words were at least calculated to make that impression on the jury who should have been left to determine for themselves, under the evidence whether there was such a wanton disregard of plaintiff's rights as justified a verdict for more than the actual damage."

4—Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206 (211).

"In this Western country where the native grasses are adapted to the growth and fattening of domestic animals, it is a firmly settled rule of law that no trespass is committed when animals lawfully running at large wander upon and depasture the unin-closed lands of a private owner. That principle was alluded to in *State v. Johnson*, 7 Wyo. 512, 54 Pac. 502, and *Hecht v. Harrison*, 5 Wyo. 279, 40 Pac. 306.

The rule however does not go to the extent of permitting the owner of cattle or sheep to wilfully and knowingly drive them upon the premises of another, although unin-closed; and there is nothing in our statute relating to fences conferring such a privilege, or rendering unin-

closed lands of a private owner, in opposition to his will, common pasture ground for the public. It is generally held that one has no right to drive his animals upon such ground against the consent and expressed will of the owner. In *De-laney v. Erickson*, 11 Neb. 533, 10 N. W. 451, it was said: 'We know of no law requiring as a condition to one's right to the exclusive enjoyment of his own estate as against the willful injurious acts of others that he shall keep it inclosed by a fence.' See also *Powers v. Kindt*, 13 Kas. 74; *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690; *Monroe v. Cannon*, 24 Mont. 316, 61 Pac. 863, 81 Am. St. 439; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363; *Harrison v. Adamson*, 76 Ia. 337, 41 N. W. 34.

In the case last above cited, the court said 'There is nothing to be found in the statutes in this state depriving the owner of unin-closed land of the profits of the grass and pasture thereon and exempting one who against his consent appropriates the grass or pasture from liability to the owner. The laws of the state provide that trespass is not committed when cattle which are running at large enter upon unin-closed land. But it is quite a different thing when cattle not running at large, but in the charge and under the control of a herdsman, the employe and agent of their owner are driven and kept upon unin-closed land against the will of the landowner and with full knowledge of the owner of the cattle. In that case the trespasser takes and appropriates the use of the land for pasture and is held by the law liable therefor.'



injury resulting therefrom, you should find for the plaintiff in such sum as is equal to the damage that you find from all the evidence the plaintiff has sustained by reason of the failure of the defendant to so keep, feed, water or milk such stock and milch cows of the defendant.<sup>5</sup>

§ 4275. **Mere Happening of an Accident Will Not Justify an Award of Damages.** The court instructs you that if you believe from the evidence that the defendant forcibly ran his cart against the plaintiff's cart, in which the plaintiff was sitting, and thereby injured said cart and caused plaintiff's horse hitched to said cart to run away, and thereby the plaintiff received injuries which were the immediate result of said act of the defendant in running his cart against plaintiff's cart, then you should find your verdict in favor of plaintiff, even though you should believe from the evidence that defendant's act in running against the plaintiff's cart was unintentional.<sup>6</sup>

§ 4276. **Two Persons Acting Independently Inflicting an Injury.** The court says to the jury that if they believe from the evidence that the defendants, or either of them, collected the waste water from their said business house, or the surface water from their lot, into pipes or ditches, and thus conducted the same on or against the house of appellant, and thereby the walls, floors, and joists of his house were damaged, then, in that event, the defendants would be liable to the plaintiff for any actual damage he sustained by reason thereof, not exceeding the amount claimed in the petition.<sup>7</sup>

5—Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077.

The court said "The clear effect of this was to convey to the jury the impression that it was the duty of the defendant below, while in possession of the stock, to so keep, feed, water and milk the same as to prevent injury to the stock, and if he failed to do so he would be liable for any injury resulting from such failure. This makes the lienor an insurer of the safety of the stock against all damages arising from the manner in which it is kept. The lienor's duty is not so great. His position is analagous to that of a bailee, and he is only required in the care of the stock to take such precautions as a person of ordinary prudence would take under similar circumstances. Wasson v. Palmer, 13 Neb. 376, 14 N. W. 171; Ballard v. State, 19 Neb. 609, 28 N. W. 271; Fitzgerald v. Meyer, 25 Neb. 77, 41 N. W. 111; McClenehan v. Railroad Co., 25 Neb. 623, 41 N. W. 350, 13 Am. St. 508; Robb v. State, 35 Neb. 285, 53 N. W. 134; Bank v. Lowery, 36 Neb. 290, 54 N. W. 568; Carson v. Stevens, 40 Neb. 112, 58 N. W. 845, 42 Am. St. 661."

6—In Razor v. Kinsley, 55 Ill. App. 605 (612), the above was held erroneous, as to constitute liability there must be negligence or the act must be intentionally done.

7—In Bonte v. Postel, 22 Ky. Law, 583, 58 S. W. 536 (537), various property holders ran water from their premises into underground pipe in an alley which emptied into an open sewer which ran along appellant's wall and damaged it. Held the above instruction was erroneous because there was no evidence tending to show that they acted in concert or even knew that injury would result.

The court cited to the effect that where two persons acted, each for himself, so as to produce an injury to the plaintiff, they could not be sued as joint trespassers, unless it appeared that they acted in concert. Bard v. Yohm, 26 Pa. St. 482; Ellis v. Howard, 17 Vt. 330; Gallagher v. Kammerer, 144 Pa. St. 509, 22 Atl. 770, 27 Am. St. 673; Cool Co. v. Richards, 57 Pa. St. 142; Miller v. Ditch Co., 87 Cal. 430, 25 Pac. 550; Ferguson v. Terry, 1 B. Mon. (Ky.) 96 and Henry v. Sennett, 3 B. Mon. Ky. 311.

## CHAPTER CLXIII.

### VICIOUS ANIMALS.

See Approved Instructions, Chapter LXXXII, Vol. II.

<b>§ 4277.</b> Injuries by vicious or dangerous animals — Must prove that animal is vicious.	<b>§ 4278.</b> Vicious animals—Knowledge of party injured—Master and servant.
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**§ 4277. Injuries by Vicious or Dangerous Animals—Must Prove that Animal is Vicious.** This case presents two phases for your determination: (1) Whether or not the stallion, at the time of the accident was a vicious, dangerous animal. If you find from the evidence that at the time of the accident the stallion was a vicious, dangerous animal, and the defendant or his keeper knew such fact, then the defendant would be liable for any accident or injury done by such animal, and without negligence or carelessness on the part of the plaintiff; and this would be so, even though the defendant or his agent was not guilty of carelessness or negligence. (2) On the other hand, if you find from the evidence that the stallion, at the time of the accident, was not a vicious or dangerous stallion, beyond stallions in general, then, to entitle the plaintiff to recover in this action, it must appear from the evidence that the injury resulted from the carelessness and negligence of the defendant or his agent, and without contributory carelessness or negligence on the part of the plaintiff.<sup>1</sup>

1—Durrell v. Johnson, 31 Neb. 796, 48 N. W. 890 (1981).

"In this instruction too much weight is given to the statement or the testimony that the stallion was a vicious, dangerous animal, and therefore that the defendant would be liable for any accident or injury done by such animal. The proof tends to show that the animal was in the habit of kicking his stall, and perhaps, in one or two cases, kicking at other horses passing behind him. The proof fails to show that the horse had kicked any human being before the infliction of the injury of the plaintiff below, and even that may have been an accident. In *VanLeuven v. Lyke*, 1 N. Y. 515, 69 Am. Dec. 346, it is said: 'It is a well-settled principle that, in all cases where an action is brought for mischief done to the person or personal property of another by animals *mansuetae naturae*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are

not by nature fierce or dangerous, and such notice must be alleged in the declaration; but, as to animals *ferae naturae*, such as lions, tigers and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are fierce and dangerous. But this rule does not apply where the mischief is done by such animals while committing a trespass upon the close of another.' 1 *Thomp. Neg.* pp. 189, 190. Judge Cooley states the rule as follows: 'The keeper of a domestic animal is not, in general, responsible for any mischief that may be done by such animal, which was of a kind not to be expected from him, and which it would not be negligence in the keeper to fail to guard against.' *Vrooman v. Lawyer*, 13 Johns. 339; *Van Leuven v. Lyke*, *supra*; *Smith v. Causey*, 22 Ala. 568; *Wormley v. Gregg*, 65 Ill. 251; *Dearth v. Baker*, 22 Wis. 73; *Jackson v. Smithson*, 15 Mees. & W. 563; *Hudson v. Roberts*, 6 Exch. 697; *Cox v. Burbidge*, 13 C. B. (N. S.) 430; *Glidden v. Moore*, 14

§ 4278. **Vicious Animals—Knowledge of Party Injured—Master and Servant.** The court instructs you that if you believe from a preponderance of the evidence that the horse that injured plaintiff was at the time of said injury in possession of the defendant, and that said horse was vicious and accustomed to kick persons who should come near it, and that said viciousness was known to defendant prior to plaintiff's injury; and if you further find from a preponderance of the evidence that plaintiff while in the employ of the defendant, and while attempting to enter the stall of said horse, in line of his duty, and while exercising due care for his own safety was kicked and injured by said horse, as charged in the declaration, because of the viciousness of said horse, then your verdict should be for the plaintiff.<sup>2</sup>

Neb. 84, 15 N. W. 326, 45 Am. Dec. 98. The cases cited in our view state the law correctly."

2—St. Louis Nat'l Stock Yds. v. Morris, 116 Mo. App. 107 (109).

"Under the issues made by the pleadings and circumstances shown by the evidence, it was necessary to prove, and for the jury to find, that the plaintiff did not know or suspicion, as the term may be applied in this case, the vicious propensities of the horse, if he knew, or if from the nature of the business and his experience, as shown by the evidence, he should have known that the horse was vicious, or suspected, he may not recover. The servant assumes the risks incidental to the business for which he is employed. There is no dispute here as to that proposition. In addition to hazards ordinarily incidental to the business, he is held to assume the risk of all danger apparent or within his knowledge, by direct notice or otherwise, even though the circumstances or condition of danger is caused by the master's negligence. Chi. & E. I. R. R. Co. v. Geary, 110 Ill. 383. Cichowicz v. I. P. Co. 206 Ill. 346, 68 N. E. 1083. The doctrine of assumed risk grows out of contractual relation of the parties. The ordinary incidental hazards of the business are presumed to be in the minds of the parties to the contract of employment, and in an action on the case for damages the servant will be held to have assumed the risk of such hazards, and in such case will not be heard to say that he was ignorant of the danger. If by negligent act or omission of the master, the danger of his occupation is enhanced, and with knowledge and appreciation of the added risk he voluntarily continues in the service, he may not recover for injuries caused by such act or omission. Browne v. Siegel, Cooper & Co., 191 Ill. 226, 60 N. E. 815. The often repeated and well established proposition that the servant assumes only the ordinary risks incident to the business, applies in cases where the question of ordinary and incidental risk alone is

involved; but when, as under the evidence in this case, the contention is made that the plaintiff knew or must have known the circumstances or condition from which he suffered, though extraordinary and unusual, and that by reason of such knowledge he assumed the risk, it will be found that the cases referred to have only analogous application. It is the duty of the master to use reasonable care to protect his servants from extra hazards; at the same time the master may not be held to legal liability for such extra hazard if the servant, with knowledge and appreciation of the danger, exposes himself to injury; he will be held to have assumed the risk. In this case it is established that danger from a kicking and vicious horse was incidental to the business and employment of appellee. Furthermore, there is evidence, tending to prove that this horse was tied to the side of the stall; that this indicated to employees that the animal was under suspicion, and that the manner of tying the horse was understood by them as notice and warning of the danger in going into the stall, as did the plaintiff. In the exercise of ordinary care, it appears from the evidence to have been the duty of the plaintiff to ascertain before he entered the stall, the peculiar fastening of the horse, for by this his vicious disposition would be known. If this was his duty, and the jury so believed, they should have held, under proper instruction, that the danger was open and apparent, which he would have known by the exercise of ordinary care, and that the risk was voluntarily assumed. It is not intended to assert that plaintiff is held to the exercise of ordinary care in search of hazards caused by the negligence of the defendant; on the contrary, he may rest in the presumption that the plaintiff will not be negligent; but if in the exercise of ordinary care in the line of his duty, the danger would have been discovered in time to avoid it, then he may be held to have had notice by



which the defendant would be relieved from the consequence of the negligence charged. In *Browne v. Siegel, Cooper & Co.*, supra, it is said, 'even if the master failed in his duty to furnish the servant a place ordinarily safe in which to work, and there are to the knowledge of the servant defects which render their use hazardous, he is held to have assumed the risk, for he cannot go on, with knowledge of the danger, without complaint until he is injured, and then hold the master liable.' The allegation that plaintiff did not know the vicious disposition of the horse was a material part of the declaration requiring proof. By the plea and under the circumstances shown in the evidence, this became a controlling issue. Whether or not the plaintiff knew, or under the evidence may be held to have known the vicious disposition of the horse by which he was injured, is a vital question in determining the merits of this case. It was withheld from the jury by the plaintiff's first given instruction, which purported to recite all the facts necessary under the law to authorize a recovery. *Muren Coal*

& Ice Co. v. Howell, 107 Ill. App. 9, rev'd 205 Ill. 515, 68 N. E. 456, and *Springfield Ry. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884, cited by appellee in justification of the instruction are without application in this case, for the reason already stated. In those cases, using the language of the opinion in *Muren C. & I. Co. v. Howell*, supra: 'the element of assumed risk incidental to the employment is not involved in appellee's theory of the case,' and that is the contention of appellee here. In the application of the doctrine of assumed risk we distinguish between that which is ordinary and incidental to the business, from that which is outside and extraordinary, and which, by reason of prior knowledge, may be assumed. The second of the Appellee's instructions was defective and subject to the objection made by appellant, qualified, however, in the use and application of the term, 'reasonable care,' to accord with this opinion. It was not prejudicial error to refuse appellant's instruction of which complaint is made. The instruction modified might have been refused without error. The modification was not prejudicial error."

## CHAPTER CLXIV.

### WATERCOURSES.

See Approved Instructions, Chapter LXXXIII, Vol. II.

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| § 4279. Right to dam water—Flooding land—Liability—What constituted a stream.  | § 4282. Railroad company building bridge over water-course—Flooding lands. |
| § 4280. Diverting course of water—Preventing natural flow of water—Omitting element of ordinary care in instruction. | § 4283. Overflowing land—Injury to roadway—Measure of damages.             |
| § 4281. Polluting water-course.  | § 4284. Dominant heritage—Surface water.                                   |

**§ 4279. Right to Dam Water—Flooding Land—Liability—What Constitutes a Stream.** (a) The jury are instructed that in Nebraska the common law rule prevails, touching the damages occasioned by surface water, such as are sought to be recovered in this action, and you are instructed under the common law which prevails in Nebraska, that surface water is a common enemy, and that the owner may defend his premises by dike or embankment, and, if damages result to adjoining property by reason of said defense, he is not liable therefor. Under this rule, such water may be controlled by the owner of the land on which it falls or over which it flows. He may appropriate to his own use all that flows or comes on his land, and refuse to receive any that flows on or comes on his neighbor's land; and you are further instructed that under this rule the defendant railroad company stands in the same position that any individual would stand in like circumstances, so that the rule just announced applies to the railroad company in this case.

(b) The jury are instructed that it is important in this case to determine what is a stream or water course; and you are instructed that, to constitute a water course, the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes but the flow of water need not be continuous. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry, but it must flow in a definite channel, have a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire surface of a tract of land, caused or occasioned by freshets or other extraordinary causes. It does not include water flowing in hollow ravines in land, which is mere surface water from rains or melting snow, or is discharged there through from a higher to a lower level, which at other times are destitute of water.<sup>1</sup>

<sup>1</sup>—Missouri Pac. Ry. Co. v. Hemmingway, 63 Neb. 610, 88 N. W. 673 (674). "These instructions were properly refused. They do not state the law applicable to the facts in this

§ 4280. **Diverting Course of Water—Preventing Natural Flow of Water—Omitting Element of Ordinary Care in Instruction.** (a) The court instructs the jury that if the cutting down of any barrier along that road in such manner as to permit the water to flow in a direction in which it otherwise would not, was done by the company, then they would be responsible for that act. . . . I will not attempt to review the testimony, but leave you to consider it all, directing your attention to that one question, whether, under all the testimony in this case, you are satisfied that the digging of these ditches did change the course of that water so as to carry it in another direction for a certain distance, and then turn it so as to injure this plaintiff's land. If that is the case, then the plaintiff would be entitled to recover.<sup>2</sup>

(b) The court instructs the jury that no one has a right to dam up water so as to prevent its natural flow to the injury of another, without making him just compensation, and if the jury believe from the evidence in this case that the defendant railway company by its officers, servants, agents or employes built a dam or dyke across — Slough, and thereby dammed up the water in said slough so as to prevent its natural flow, and by reason thereof the plaintiff's crops or any portion thereof were flooded or destroyed, then the jury should find the issue for the plaintiff, and assess his damages at such a sum as they may think just and proper under all the evidence in this case.<sup>3</sup>

(c) If the surface water complained of was not collected together in a body by the city, nor diverted from the old sewer by the city, but was thrown back out upon the alley of the city by the filling up of —, and there was no sufficient outlet for said water from said alley, the city has the right in the protection of its own property to discharge said water upon a street of said city; and the city would not be liable for damages to any person whose property might incidentally be damaged by said water running down and along the street of the city and thence across and upon said property, if the overflow does not result from any defect in the plan or mechanism of the work adopted by the city to carry said water off, nor from any defect in the execution of said plan.<sup>4</sup>

case. See *Lincoln & B. H. R. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859; *Town v. Railroad Co.*, 50 Neb. 768, 70 N. W. 402; *Chicago, R. I. & P. R. R. Co. v. Shaw*, 63 Neb. 380, 88 N. W. 508. In the last case Commissioner Duffie reviews the authorities at length, and deduces the rule that 'a railroad can and should, in constructing its road-bed across such draw (ravine) provide for the discharge of such water as naturally flows therein; and if its road-bed is so constructed as to dam the water and flow it back on the premises of an adjoining proprietor, or to discharge the accumulated water in unusual quantities onto the lands of those adjoining, it will be liable for the damages occasioned thereby.' If that be the correct rule of law,—and we do not doubt it,—to have given the instruction asked would have been error."

<sup>2</sup>—*Burnett v. Great Northern Ry. Co.*, 76 Minn. 46, 79 N. W. 523 (524).

The court held the above instruction erroneous for omitting the element of ordinary care or prudence on the part of the defendant in diverting the flow of the water.

<sup>3</sup>—*St. Louis Merchants' Bridge Terminal Ry. Co. v. Pepper*, 84 Ill. App. 116 (120).

The court said that "instead of giving to the jury for their guidance the law as to measure of damages, this instruction in effect authorizes them to assess plaintiff's damage according to any notion of justice that might prevail in their minds, and makes them judges of the law."

<sup>4</sup>—*City of Crawfordsville v. Bond*, 96 Ind. 236 (241).

"Appellant makes no argument in favor of this instruction, but refers us to the cases of *Cummins v. City of Seymour*, 79 Ind. 491 (41 Am. Rep. 618), and *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135. In the first case cited, it is



§ 4281. **Polluting Water Course.** The court instructs the jury that the burden of proof in this case rests upon the plaintiff, and that it is not sufficient to entitle him to recover, for him to show that the city of S. gathered surface water and sewage into its sewers and caused the same to flow into C. creek and down through the lands in question, but he must go further, and prove to the jury by the greater weight of all the evidence that the rental value of said lands was depreciated between ———, and ———, by reason thereof, and that plaintiff has been damaged thereby; and unless he has so proven the jury must find for the defendant.<sup>5</sup>

said: 'One would think that the property owner was quite as seriously injured by the lack of skill in devising the plan as he can possibly be by any want of care or skill in the performance of the work. Whether the unskillfulness of the plan or the negligent manner of executing it destroyed the highway, the injury would be the same. The true rule reasonable in itself and just in its results is that the skill and care must extend both to the plan and its execution. And the second case referred to, is cited as authority which fully sustains it. It is true that a city has a right to use its streets and public highway for the purpose of drainage, and in making such improvements it is not liable as a general rule to abutting land owners for consequential damages. Such injuries are held to be *damnum absque injuria*. But the facts stated in this complaint and as shown to exist by the evidence are to be regarded as showing 'not a mere consequential injury resulting from the exercise of a lawful power, but a direct injury by confining in an artificial channel and pouring upon appellant's land the surface water which, before the construction of the drains, flowed off without injury to the plaintiff's property. *Weis v. City of Madison*, supra. A city has no right even by skillful plans and careful execution to accumulate by its system of drainage 'such vast quantities of water at the point in question,' but would be under the obligation to see to it that there was a way provided for the water to escape without damage to adjoining property owners.' *City of Indianapolis v. Lawyer*, 38 Ind. 348. A city cannot lawfully by drains gather surface water into one channel and pour it out even upon its own streets to the injury of property owners, without making some provision for its escape. But in such cases, it must provide some sufficient escape for the water thus gathered together. *Weis v. City of Madison*, supra; *Templeton v. Voshloe*, 72 Ind. 134 (37 Am. Rep. 150); *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *City of North Vernon v. Voegler*, 89 Ind. 77. There was no error in refusing to give the above instruction."

5—*Smith v. City of Sedalia*, 182 Mo. 1, 81 S. W. 165 (167), 48 L. R. A. 711.

"This instruction was erroneous, in that the plaintiff's recovery is not only limited to the amount of the diminution of his rent, but the jury are forbidden to find for him even in nominal damages unless he has proven special damages in the way of loss of rents. That is not the law. If the defendant city has collected its sewage and discharged it in a volume into the creek to the injury of the plaintiff, he is entitled to compensation for the depreciation caused thereby in the market value of his land if that is shown, for the destruction of its comfortable use and occupation if that is shown, and for actual loss or rent, if that is shown. But he is not required to prove special damages to entitle him to recover at least nominal damages. The following authorities cited in the brief of counsel for respondent, amply sustain this position: *Smiths v. McConathy*, 11 Mo. 518; *Joplin Consolidated Mining Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *City of Jacksonville v. Lambert*, 62 Ill. 521; *Cooley on Torts*, 62. In the case first above cited, this court, per Napton, J., said 'It is very true that there cannot be a private nuisance unless it be attended with some damage or inconvenience to the party injured, and this idea enters into every definition of a nuisance. Hence the books speak of the necessity of proving the injury sustained by the nuisance as well as the continuance or erection of the nuisance. But is very material to the plaintiff that the distinction between the nature and amount of damage which will constitute a nuisance and the extent of the injury which has actually resulted to the plaintiff from the nuisance be preserved. What constitutes a nuisance is a question of law for the determination of the court. If the facts stated in the declaration do not amount to a nuisance, the defendant can demur, and have the question of law decided by the proper tribunal. But if the facts averred do constitute a nuisance, it is sufficient for the plaintiff to prove them, and it is not necessary that he should also prove

§ 4282. **Railroad Company Building Bridge Over Water Course—Flooding Lands.** You are instructed that in order to entitle the plaintiff to recover in this case he must have satisfied you by a preponderance of proof, not only that the defendant's bridge and approaches caused the overflow and damage complained of, but also that in the construction of the same the defendant was guilty of some actual wrong or negligence, but for which the obstruction would not have existed, nor the overflow resulted. The defendant had a right to construct the bridge and the approaches across the river at the point named, although in so doing the river was necessarily obstructed to such an extent as to cause gorges and overflow, and, in the absence of negligence or want of ordinary skill in so doing, it cannot be held to have done a wrongful or negligent act. In the erection of its bridge, the defendant was bound to have, first, a special regard for the permanence and safety of the same as means for the transportation of persons and property over its line of road; and if, in the exercise of its discretion, the defendant chose to erect this bridge, which is known as a "pile and stringer bridge" instead of a bridge of some other kind, as, for instance, a truss bridge, in the belief, with such means of knowledge and in the light of such engineering skill as was then obtainable, that the former, more nearly than the latter, complied with those conditions, then it was guilty of no wrong or negligence in this respect, although the latter description of bridge, on account of greater length of spans, might have permitted a freer flow and passage of ice and water and might therefore have been less likely to contribute to an overflow of plaintiff's land than the bridge actually built; and under such circumstances the defendant would not be liable; even if it committed an error of judgment in this regard, and if it should now appear that the bridge actually built is not superior, in the respect named, to the truss or some other kind of a bridge.<sup>6</sup>

§ 4283. **Overflowing Land—Injury to Roadway—Measure of Damages.** The court instructs the jury that if they find from the evidence that plaintiff has rock in the bank of the river east of the "Q" bridge as far up as B., and that the water caused by the raising of the defendant's dam in ——— as claimed by plaintiff does not overflow or cover such rock, yet if the jury believe from the evidence that the raising of the dam has so injuriously affected the roadway, if any, along the margin of the stream upon plaintiff's lands as to prevent

that he has been specially injured by such nuisance."

6—*McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb. 523, 41 N. W. 350 (352), 13 Am. St. 508.

"We not only think this instruction fails to state the law correctly, but that it states it incorrectly. In *Omaha & Rep. V. Railroad Co. v. Brown*, 14 Neb. 170, 15 N. W. 321, a case quite similar to this, and growing out of the construction of the same bridge, Judge Cobb, in writing the opinion of the court, says: 'It was the duty of the railway company, in planning and constructing its bridge, to bring to

their execution the engineering knowledge and skill ordinarily practiced in such works, and to see to the practical application of such knowledge and skill to the work in hand; among other things, so as to allow of the passage of the water and ice such as is known to pass in the stream annually, or which may reasonably be expected to occur occasionally, without regard to sudden overflows, as are often designated as acts of God.' This rule of law was adhered to in the same case in 16 Neb. 166, 20 N. W. 202, by Judge Maxwell, and by Chief Justice Cobb at page 168."

plaintiff from getting to said rock to haul them out when quarried, without the construction of another or new road along said margin, then the cost of the construction of such other or new road is an element of damage which you have a right to consider unless you shall find from the evidence that the cost of construction of a new road would exceed the value of the rock in the bank, and if you shall so find from the evidence, then you should exclude the cost of the construction of a new road and take into account or consideration the value of the stone in the bank, if you shall find from the evidence that building stone can be quarried in said bank with profit.<sup>7</sup>

§ 4284. **Dominant Heritage—Surface Water.** The court instructs the jury that if they believe from the evidence that the defendant has, by his artificial system of tile drainage, cast upon the plaintiff's lands a larger amount of water than would have come there naturally, without said artificial system of drainage, and has cast the same upon the plaintiff's lands with much more rapidity than the same would otherwise have come there, and with stronger force of current than would naturally otherwise have been the case but for such system of tile drainage, as charged in plaintiff's declaration, or some count thereof, and that thereby the plaintiff has been injured and sustained damages as alleged in the declaration, then you should find the defendant guilty.<sup>8</sup>

7—*Sterling Hydraulic Co. v. Galt*, 81 Ill. App. 600 (603).

"We understand the true rule as to the measure of damages in cases of this kind to be the depreciation in the market value of the premises arising from the injury thereto, and that such depreciation is to be determined by a comparison of the market value of the same before and after such injury, as shown by the testimony. *K. & S. R. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621, and cases there cited. The instruction in question does not lay down the correct rule of law in regard to the measure of damages as shown by the above authorities. It calls the attention of the jury from the true measure of damages to another rule which could not fail to confuse them."

8—*Bickel v. Martin*, 115 Ill. App. 367 (368).

"Under this instruction, even if the jury found as proven what defendant's testimony strongly tended to establish, that defendant laid his tile drain in the course where the water naturally flowed, and drained by it no land which did not naturally drain along that course, yet as the jury must have found that

thereby a larger amount of water was cast upon plaintiff's land than would have come there naturally, and with more rapidity and a stronger force of current than would have been the case if the tile had not been put in and as there was no dispute but that this injured plaintiff's land, they were practically directed to find for plaintiff, although the facts so found do not in law give the owner of the lower land a cause of action.

It is urged that the words 'as charged in plaintiff's declaration or some count thereof,' used in said instruction, refer to the charge, 'not following any natural stream or water course,' contained in each count of the declaration, and that this supplies the defect. The object of an instruction is to convey information to the jury for immediate application to the subject-matter before them. The test of an instruction is not what meaning ingenious counsel can afterwards, at their leisure, reason into it, but in what sense under the evidence before them and the circumstances of the trial would ordinary men and jurors understand the instruction. *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166."



## CHAPTER CLXV.

### WILLS.

See Approved Instructions, Chapter LXXXIV, Vol. II.

#### NATURE OF WILLS AND GENERAL REQUISITES FOR EXERCISING TESTAMENTARY POWERS.

- § 4285. Power of testator to exclude relatives from a share in his estate.
- § 4286. Incompleteness of will.
- § 4287. Witnessing will—What is sufficient.
- § 4288. What is sufficient proof of due execution to sustain a will.

#### CAPACITY TO MAKE WILLS —INSANITY.

- § 4289. Insanity in general.
- § 4290. Sanity is presumed.
- § 4291. Burden of proof in case of insanity—Rule supported by weight of authority—Burden of proof on contestant, where due exertion is proved.
- § 4292. Same subject—Rule as to burden of proof in Illinois.
- § 4293. Sound and disposing mind and memory.
- § 4294. Partial insanity—Monomania.
- § 4295. Time at which unsoundness of mind must exist to defeat will.

- § 4296. Settled insanity presumed to continue.
- § 4297. Failure of memory.
- § 4298. Insane delusions—Groundless suspicion not necessarily an insane delusion.
- § 4299. Right of testator to dispose of property as he pleases.
- § 4300. Expert testimony.

#### UNDUE INFLUENCE.

- § 4301. Degree of proof necessary—Assumption of fact that undue influence was exercised.
- § 4302. Burden of proof.
- § 4303. Existence of confidential relationship.
- § 4304. Parent and child.
- § 4305. Husband and wife.
- § 4306. Influence in bringing about the marriage not to be considered.
- § 4307. Common law marriage.
- § 4308. Declarations and previously expressed purposes of testator.
- § 4309. Admissions of a legatee as to suppression of another will.

#### SPOILIATION OF WILLS.

- § 4310. Effect of spoliation.

#### NATURE OF WILLS AND GENERAL REQUISITES FOR EXERCISING TESTAMENTARY POWER.

§ 4285. **Power of Testator to Exclude Relatives from a Share in His Estate.** The deceased left surviving her as next of kin a brother and two sisters, and if you find that the sixth clause of the will, bequeathing the larger portion of the estate to the public library, is contrary to natural justice, this may be taken into consideration by you in determining the competency of the testatrix to make it.<sup>1</sup>

<sup>1</sup>—Spencer v. Terry's Est., 133 Mich. 39, 94 N. W. 372 (374).

"In the case of Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. 566, this court held that it was not error to charge the jury that they may consider the nature and character of the will and, if it be contrary to natural justice, this, with the other facts of the case, may be considered by the jury in

the determination of the question whether or not the testator was of sound mind.' The facts which justified that charge clearly appear in the opinion of the court, which approves it, and which we quote: 'The testator's daughter Rose was about 12 years of age when her mother died. The evidence for contestants showed that she assumed the mother's place in the household; did

**§ 4286. Incompleteness of Will.** (a) The court charges the jury that the proponent is bound upon this hearing to make proof of every fact essential to the validity of the instrument propounded, and of every fact on which the jurisdiction of this court to probate the instrument depends, and if the proponent has failed to satisfy the jury of every such fact they should find their verdict for the contestants.

(b) The presumption is always against a paper which bears self-evident marks of being unfinished, and it behooves those asserting the testamentary character of an instrument to show, either that the deceased intended the paper in such condition to operate as a will, or that she was prevented by an involuntary accident from completing it.

(c) The court charges the jury that they must find for the contestants, unless it affirmatively appeared that Mrs. B. intended at the time she executed it, that the paper propounded for probate should operate as her will, without any further changes, alterations or additions.

(d) The court charges the jury that wills, to be valid, require the genuine intent that the instrument operate as a will as it stands at the time of its execution, and without any other formalities or changes, and the mind must act freely and understandingly to this intent; and it will vitiate an alleged will, if, for any reason whatever, it was made without the idea of making it operate as a will.

(e) The court charges the jury that, no matter how clearly it may be shown that the paper offered for probate was signed by the testatrix, and attested by witnesses, it cannot be probated as the will of Mrs. B. unless it affirmatively appears that she signed the same

most of the work; she and her little sister milked the cows, and brought water from the lake, several hundred feet away; that she was faithful, obedient, and uncomplaining; that her lot was a hard one; that she did work which no father, possessed of the property which her father had, ought to permit a daughter to do. \* \* \* Either from an unfortunate marriage, or from other causes, the mind of his daughter Archange had become unbalanced, and after she left her husband her father took her to an asylum for care and treatment. The common sense of mankind condemns, as contrary to natural justice, a will which practically disinherits such children, and leaves the bulk of a large fortune to two who have done no more than they to deserve it, and are better able to meet the vicissitudes and struggles of life; and courts and juries have the right to take that fact into consideration in determining the competency of the testator to make the will.' In *McGinnis v. Kempsey*, 27 Mich. 363, it was held that the following charge was not erroneous: 'If a party makes a will contrary to natural justice, this, with other facts, may be considered. But the mere fact that a will is not exactly

according to what your own conception of justice would be, is not, of itself sufficient to invalidate a will, for the reason that sane men are known to disagree in this respect. By 'natural justice' we mean that which is founded in equity, in honesty and right. Natural justice requires that the parent shall care for his children. By bringing them into the world, the parent engages to provide for them. Natural justice requires that the child, who has been protected in the weakness of his infancy, should protect and support that parent in the infirmity of his age. \* \* \* \* These quotations prove that neither the case of *Rivard v. Rivard*, supra, nor *McGinnis v. Kempsey*, supra, is an authority for the giving of the charge now under consideration. It sufficiently appears from these cases that the circumstances must be extraordinary to justify the inference of testamentary incapacity merely because an heir is disinherited. Even when a child was disinherited, \* \* \* this court has never gone farther than to say that this circumstance may be considered with the other facts in the case in determining testamentary capacity. The charge under consideration contains no such qualification."

with the firm resolution and advised determination to make the document a testament.

(f) The court charges the jury that the question in this case is not alone whether Mrs. B. observed all of the formalities that the law requires in order to make a will, when the intent is that the paper shall, as executed, operate as a will, but also whether Mrs. B. did intend this paper to operate as a will as it stood at the time that she signed it. If she did not so intend it, there was no will, and the jury ought to find for the contestants.<sup>2</sup>

2—*Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831 (836).

"The present statute relating to wills and to their execution and attestation declares that, except in certain specified cases, no will is effectual to pass real or personal property 'unless the same is in writing, signed by the testator or by some person in his presence and by his direction, and attested by at least two witnesses who must subscribe their names thereto in the presence of the testator.' Code § 1966. The predecessor of the statute, borrowed from the English statute of frauds (29 Car. II c. 3, § 5) related exclusively to devises of real estate and authorized persons of the age of 21 years to devise real estate by last will and testament in writing 'provided that such last will and testament is signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested by three or more respectable witnesses, subscribing their names thereto in the presence of such devisor.' Clay Dig. 596 § 1. By the common law wills of personal property were valid and operative, though not written or signed by the testator, or attested by witnesses, if written in accordance with his instructions; and the rule of the common law prevailed here until the adoption of the Code of 1852 in which the present statute was embodied as section 1611. *McGrews v. McGrews*, 1 Stew. & P. 30; *Shields v. Alston*, 4 Ala. 248; *Couch v. Couch*, 7 Ala. 519; *Hilliard v. Binford*, 10 Ala. 982; *Ex parte Henry*, 24 Ala. 647; *Powell v. Powell*, 30 Ala. 697. Besides mere changes of verbiage not affecting the sense and meaning, the essential difference between the present and pre-existing statute is the reduction of the minimum of necessary attesting witnesses from three to two, and the subjection of wills of personal property to the mode of execution and attestation which had been necessary only to devises of land. The purposes of the present and of the former statute are identical, and the controlling words and phrases employed in each statute are the same. The will must be in writing, it must be 'signed by the testator' or 'by some person in his presence and by his direction.' Must be 'attested by at least two or more witnesses, who must subscribe their

names thereto in the presence of the testator' were the requirements of the former, and are the requirements of the present, statute. It is an elementary rule of statutory construction that re-enacted statutes must receive the known, settled construction which they had received when previously of force; for it must be presumed the legislature intended the adoption of that construction, or they would have varied the words, adapting them to a different intent. Suth. St. Const. § 256. \* \* \* 1 Brick. Dig. p. 349 § 2. *Armstrong v. Armstrong*, 29 Ala. 538; *Bailey v. Bailey*, 35 Ala. 687. When words have a known signification, when standing in a particular relation, or as applied to a particular subject-matter, the signification is not varied because of their translation from one statute to another; the statutes having a common purpose, the same relation, and subject-matter. The particular questions now involved, deemed of chief consequence, may not have been the matter of decision in this court but in their determination this rule of statutory construction must be observed. That which has been declared a valid, complete will must now be so declared. \* \* \* The next inquiry is whether due execution—the signing of the instrument by the testatrix, and the attestation by the subscribing witnesses—is shown by the requisite degree of evidence. The burden of proving these facts rested on the proponent. The rule of the common law prevailing in this state as declared in *Bowling v. Bowling*, 8 Ala. 538, was that, on a contest in the court of probate of the validity of a will purporting to pass lands, the proponent was bound to call all the subscribing witnesses. But if any of these witnesses had become incompetent, or were dead, or without the state, and, of consequence, without the jurisdiction of the court, the proponent was relieved from the duty of calling them, and could satisfy the burden resting upon him in this respect by making proof of their handwriting. Since, the statute, as we have seen, requires that wills of personal, or of real and personal, property must be in writing and executed with the same formalities and the statute has provided that all wills in writing must be proved by one or more of the sub-



§ 4287. **Witnessing Will—What is Sufficient.** (a) The jury are instructed that in order that a will be properly attested and be a valid will, it is necessary that the attesting witnesses subscribe their names to the same as witnesses in the presence of the testator and at his request, and that the name of the testator be signed to the in-

scribing witnesses, or, if they be dead, insane, or out of the state, or have become incompetent since their attestation, then, by proof of the handwriting of the testator, and of one of the subscribing witnesses. Code § 1979. \* \* \* Snider v. Burks, 84 Ala. 53, 4 So. 225; Woodcock v. McDonald, 30 Ala. 411; Hoffman v. Hoffman, 26 Ala. 535; Moore v. Spier, 80 Ala. 129; Hall v. Hall, 38 Ala. 131; Dewey v. Dewey, 1 Metc. (Mass.) 349, 35 Am. Dec. 367; 1 Jarm. Wills 80; 2 Greenl. Ev. 675; Leverett v. Carlisle, 19 Ala. 80; Garrett v. Heflin, 98 Ala. 617, 13 So. 329, 39 Am. St. 89.

The next inquiry which is presented is whether the instrument is not to be taken as an unfinished and incomplete testamentary paper, to the validity of which extrinsic evidence that the testatrix intended it to take effect as it now stands is essential. The argument in support of the affirmative of this inquiry is drawn principally if not exclusively, from the rules applied to papers operating or intended to operate as testamentary dispositions of personal property, when the common law prevailed, and such dispositions were valid, though not signed by the testator or attested by witnesses. The case of Boling v. Boling, 22 Ala. 826, occurring before the present statute became operative, on which there is now much of reliance in support of the argument of the appellees, is an example. The effort was to obtain probate of an unsigned and unattested instrument having a formal attestation clause, devising real estate and bequeathing personal property as a will of personal property only. The court held that the instrument was on its face, unfinished and incomplete; that the testator contemplated its signing and attestation; and without extrinsic evidence that he intended it to take effect as to personal property unsigned and unattested probate of it could not be obtained. Not being attested of course, it could not pass real estate without contravening the requirements of the statute. In the course of the opinion, treating solely of incomplete or unfinished testamentary dispositions of personal property, the court quotes a sentence from Jarm. on Wills which is in substance the second instruction given by the court of probate at the instance of the contestants. The sentence is in these words: "The presumption is always against a paper which bears self-evident marks of being unfinished; and it behooves those who assert its testamentary character

distinctly to show either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it.' It was, doubtless, one of the purposes of the statute, in requiring that testamentary dispositions of personal property should be executed with the same formalities required in devises of land, to remove them from the doubt and uncertainty, in this respect, which attended them while the rule of the common law prevailed. There is no other mode of giving a valid expression to the *animus testandi*, than that which the statute prescribes. Whatever form the expression may assume, whatever solemnity may accompany it, the statute declares it ineffectual, unless the formalities it prescribes are observed. When these formalities are observed, if the writing be testamentary, if it imports a posthumous destination of property the statute in itself and of itself attaches and conclusively attaches, the *animus testandi*. The requisition of extrinsic or additional evidence of its existence is to add to the requirements of the statute; and to receive such evidence to repeal the existence of the intent would be to receive evidence against the statute. The instrument was written by the testatrix. It bears internal evidence as we have said, that it was the result of much thought and deliberation. And it bears evidence that it was not written at one time, continuously, as it would have been written by a scrivener instructed to write from memoranda. The testatrix was the author and the scrivener. Of her own volition, after having written to a formal conclusion, she signs it, and calls witnesses to attest her signature, and they do attest. Every formality the statute requires is observed, and these formalities it is contemplated shall only attend final and complete testamentary acts. In a recent case it was said by the supreme court of Illinois: 'As regards the allegation of the bill that the will was never completed to the satisfaction of the testatrix, it is conclusively shown that the will was signed and executed by her, and attested by witnesses, in the mode prescribed by law, and this is, in law conclusive evidence of the fact that it was completed to her satisfaction.' Taylor v. Cox, 153 Ill. 224, 38 N. E. 656; Waller v. Waller, 1 Grat. 454, 42 Am. Dec. 564; see also Sewell v. Slingluff, 59 Ind. 537. When a sane testator, not subject to coercion or restraint, intentionally,

strument before the signatures of the attesting witnesses are attached; and you are instructed that if you find from the evidence that the signature of N., was not attached to said instrument so offered here as his will until after the names of the attesting witnesses were attached thereto, then said instrument is not the last will and testament of said N., and it is your duty so to find.<sup>3</sup>

(b) The court instructs the jury for the proponents that, although the jury may believe from the evidence that the attesting witnesses went into an adjoining room to a table to sign their names as attesting witnesses, and that the testatrix did not actually see them sign the same, yet if the jury believe from all the evidence and circumstances proven that it was within the physical power of the testatrix to have seen them sign the same, if she had so desired, the attesting would be in compliance with the law, although the testatrix may not have actually witnessed the signing of the names of the witnesses.

executes, with the formalities required by the statute, a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports the *animus testandi*, i. e., the mind to dispose, the firm and advised determination to make a testament, closing all inquiry as to the existence and manifestation of the intent.

While this is admitted to be true of all testamentary papers which do not bear upon their face evidence of being unfinished and incomplete, it is vigorously argued that it is not true, and cannot be true, of a paper like the present, which it is said, contains 'unnecessary and unreasonable blank spaces sufficient to enable it to be changed and added to after execution in such manner that the additions will not be distinguishable from the original text, and indeed so written for that purpose.' The argument overlooks the true inquiry, which is not as to the completeness of the paper, but as to the finality of the intent and purpose of the testatrix, manifested by the observance of the formalities of execution required by the statute. The rule is well settled that a will is not invalid by reason of having blank spaces left in the body of it. 1 Jarm. Will, 18; Harris v. Pue, 39 Md. 535. See also Corneby v. Gibbons, 1 Rob. Ecc. 705. The case of Soward v. Soward, 1 Duv. 126, upon which so much reliance is placed by the counsel for appellees is not in conflict with Corneby v. Gibbons, supra, but is in harmony with it, referring to unnecessary and unreasonable blank spaces intervening between the conclusion of the will and the subscription by the testator or witnesses, and not to blank spaces in the body of the will. The case is in construction of the statute of Kentucky, variant from our statute, and from its original, the English statute of frauds, and holds that attesting witnesses must subscribe at the foot or end of the instrument, a conclusion different

from that reached by Lord Campbell in Roberts v. Phillips, 4 El. & Bl. 450.

The questions we have decided are all which it is probable will arise on another trial, rendering unnecessary any extended consideration of instructions given or refused to which exceptions were reserved. According to the views we have expressed, the instructions given at the instance of the contestants numbered 2, 3, 4, 5 and 6 are erroneous and should have been refused. The first instruction given at the instance of the contestants is erroneous in one respect. If it had asserted that on the proponent rested the burden of proving the facts on which the jurisdiction of the court depended, i. e. in this particular case, the testamentary age of the testatrix, her death, and her inhabitancy of the county of Mobile at the time of her death, and further the due execution of the instrument, it would have been free from objection. But the instruction proceeds to assert in most general terms that on the proponent rested the burden of proving every fact essential to the validity of the will. Testamentary capacity—sanity—is of the essence of the validity of every testamentary disposition. Yet, when testamentary age and due execution are shown it is presumed, and the burden of proving its absence is cast upon whoever may affirm it. Stubbs v. Houston, 33 Ala. 555. Without this explanation the immediate tendency of the instruction was to mislead the jury."

3—Gibson v. Nelson, 181 Ill. 122 (124), 54 N. E. 901, 72 Am. St. 254. The giving of this instruction was held reversible error upon the ground that a will might be a good and valid will even though the witnesses affixed their signatures before it was signed by the testator, if it appeared that the testator and the witnesses signed the will at the same time and before separating.

(c) You are further instructed that if you believe from the evidence that at the time the witnesses signed the will in evidence the said G. if she had desired to do so, was physically able, by turning her head or changing her position to have seen them sign, then you are instructed that the attestation of the will in evidence was legally accomplished in the presence of the testatrix as the law requires.

(d) The jury are instructed that if you find from the evidence that the witnesses signed the will in such a place that the testatrix could have seen them sign if she so desired, then you are instructed that the said will was, under the law, attested in the presence of the testatrix, and it makes no difference whether she actually saw them sign or not.<sup>4</sup>

**§ 4288. What is Sufficient Proof of Due Execution to Sustain a Will.** You are instructed that on appeal from an order of the County Court refusing probate of a will, as in this case, the party insisting on the validity of the will has the burden at the outset of proving by one or more of the subscribing witnesses, if alive and within the jurisdiction of the court, that the instrument was legally executed, acknowledged and witnessed as a will, and where, as in this case, the instrument bears unmistakable evidence of having had the signature of the testator, together with the attesting clause, severed from the balance of the document, the added burden also rests on proponent, in making out her case, of proving by at least one of such subscribing witnesses that the instrument is the one which L. signed or acknowledged signing in their presence.<sup>5</sup>

4—Witt v. Gardiner, 158 Ill. 176 (180), 41 N. E. 781, 49 Am. St. 150.

"By the provisions of the statute, all wills, to be entitled to probate, must be attested in the presence of the testator or testatrix by two or more creditable witnesses (Revised Statutes Chap. 148 sec. 2). What constitutes the presence of a testator or testatrix within the meaning of the statute has been made the subject of much discussion by the courts, but the rule supported by the weight of authority may be stated substantially in the language of a distinguished modern law writer as follows: 'Contiguity with an uninterrupted view between the testator and the subscribing witnesses, is the indispensable element to the physical signing in the testator's presence. The subscription is not invalidated by not having been performed in the same room or even in the same house, provided it took place within the testator's range of vision, as in a case where the witnesses left the testator who lay in bed in one room and subscribed their names at a table in another room opposite and in sight through a passage, the doors being thrown open, or where a lobby intervened but the testator might have seen the subscription made in a gallery through the lobby and a broken glass window; or where the testatrix sat in her carriage and the will was attested in the attorney's office but not out of her sight. In all such cases the attestation is held good on

the theory that the testator might at least have seen the signing considering his position and the state of his health at the time of the subscription; and it is deemed immaterial that he did not see when he might have done so, for the act being done in his presence could not have been vitiated by his turning and looking away. On the other hand, no mere contiguity to the witnesses will constitute a 'presence' with the act, if the testator's presence be such that he cannot possibly see them sign, as where, for instance, he occupies his bed-chamber and the witnesses subscribe in an outer hall where they are necessarily hidden from sight by an intervening flight of stairs, or where his position, which he cannot readily change, is such that the witnesses are in reality out of sight. If the subscription is made in an adjoining room with the door closed, it is not enough that the testator might have seen it if the door stood open, nor will even a subscription in the room he occupies suffice provided that from his actual position he could not have seen it done."

5—Webster v. Yorty, 194 Ill. 408 (412-13), 62 N. E. 679.

"This instruction required the proponent to make proof by at least one of the subscribing witnesses, and that is not the law even as applied to the execution. The proponent is not confined to the testimony of subscribing witnesses, where from failure of memory or inten-



## CAPACITY TO MAKE WILLS—INSANITY.

§ 4289. **Insanity in General.** As a general rule, the symptoms of insanity seem largely incapable of description. Insanity is sometimes quite obvious. At other times it may exist in so subtle a form as to elude the observation of the most experienced physician. The belief in the existence of mere illusions or hallucinations, the creatures purely of the imagination, such as no sane man could believe in, are questions of fact, as well as the proper inferences arising upon them, for the jury, as may be unequivocal evidence of insanity, and, if so, will avoid a will for partial insanity of the testator at the time of the execution of the will, and, entering into it, makes it void. The statutes of Indiana do not permit a person of unsound mind to make a will, but leaves his or her property to go according to the laws of descent.<sup>6</sup>

§ 4290. **Sanity is Presumed.** If from all the evidence in this case, you should be in doubt as to whether E., at the time he signed the instrument in controversy (if you believe from the evidence that he did sign it), was able to and did understand the nature and effect of the same, then you should find it is not his last will.<sup>7</sup>

§ 4291. **Burden of Proof in Case of Insanity—Rule Supported by Weight of Authority—Burden of Proof on Contestant, Where Due Execution Proved.** (a) If the evidence satisfies you that at any time prior to the execution of said will that A. B. was a person of unsound mind, then the law presumes that the condition of mind continued, unless the mental unsoundness was from some merely temporary or transitory cause; and if the evidence satisfies you that at any time prior to the execution of said will said A. B. was a person of unsound mind, not from a temporary cause, then the burden of showing a return of sanity, or a lucid interval, at the time of the execution of the will, rests upon the defendants, and must be shown by them by a preponderance of the evidence.<sup>8</sup>

tionally, they fail or refuse to testify to the execution of the will. On appeal from the refusal of the County Court to admit a will to probate, the proponent may support it by any evidence competent to establish a will in chancery. He is neither limited to nor bound by the testimony of the subscribing witnesses, but may establish the validity of the will by any legitimate evidence. *Crowley v. Crowley*, 80 Ill. 469; *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046; Ill. *Masonic Orphan Home v. Gracy*, 190 Ill. 95, 60 N. E. 194."

6—*Stacer v. Hogan*, 120 Ind. 207, 22 N. E. 990.

"Even after supplying the words necessary to give this instruction meaning, it cannot be said that it is free from criticism; but, however this may be, the instruction attempts to announce a merely abstract principle of law, and, when construed with the other instructions in the cause, there is no reasonable ground for the belief that it misled the jury."

7—*Entwistle v. Meikle*, 180 Ill. 9 (28), 54 N. E. 217.

"The instruction is contrary to the rule laid down by this court in *Myatt v. Walker*, 44 Ill. 485 and in *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837, where we said: 'Hence, it is not sufficient that the evidence raises a mere doubt as to the sanity of the testator; the evidence must preponderate in favor of his unsoundness of mind.' The instruction was properly refused."

8—*Roller v. Kling*, 150 Ind. 159, 49 N. E. 948 (949).

"This instruction, so far as it informed the jury that the burden of proof concerning the unsoundness of mind of the testator at the time of the execution of the will was upon the appellants under the conditions stated, was erroneous. The appellees, by bringing this action to set aside said will and the probate thereof, assumed the burden of showing by a preponderance of the evidence that the testator did not, at the time the will was executed, have testamentary capacity. It is

(b) If you find by a preponderance of evidence that on and prior to ———, the testatrix was suffering from some disease of the mind of a progressive and permanent nature, amounting to unsoundness of mind as herein defined, and you further find by a preponderance of the evidence that the said condition is found to have existed after the ——— day of ———, the burden will be on the proponent to show by a preponderance of the evidence that said instrument was executed at a time when the testatrix understood the nature of the transaction, and if not shown you will find for the contestant.<sup>9</sup>

§ 4292. Same Subject—Rule as to Burden of Proof in Illinois. (a) The court instructs the jury that the burden of sustaining the will in this case is by law cast on defendant, and who avers its validity; and unless the defendant has shown, by the burden of proof, that said A. B. at the time he executed said will was of sound mind and memory, you should find said will not to be the last will of said A. B.<sup>10</sup>

true that, if unsoundness of mind of a permanent nature has been established by the party having the burden of proof, the presumption is that the same continues until the contrary is shown. *Wallis v. Lühring*, 134 Ind. 447, 450, 34 N. E. 231; *Raymond v. Wathen*, 142 Ind. 367, 370, 41 N. E. 815. But it is equally true that in order to remove such presumption, the party not having the burden of proof as to such fact or allegation is not required to prove the contrary by a preponderance of the evidence, but it is sufficient if the scales are evenly balanced, so that there is no preponderance either way. In such case, the party having the burden of proof cannot recover. *Young v. Miller*, 145 Ind. 652, 44 N. E. 757. Such instruction was clearly erroneous so far as it required appellants, under the conditions stated, to prove by a preponderance of the evidence that the testator was of sound mind at the time the will was executed."

9—In *re Jones Estate*, *Stephen v. Jones*, 130 Ia. 177, 106 N. W. 613 (614).

"This instruction was misleading and clearly erroneous. All that contestant was required to do in order to shift the burden was to show that on and prior to ——— testatrix was suffering from a disease of the mind of a permanent and progressive nature amounting to unsoundness. There was testimony from various witnesses which tended to show that after ——— testatrix was much improved in health; hence the jury may have concluded that no burden rested upon proponents. As sustaining our conclusions see *Bever v. Spangler*, 93 Ia. 601, 61 N. W. 1072; *Blake v. Rourke*, 74 Ia. 522, 38 N. W. 392; in *re Knox's Will*, 123 Ia. 24, 98 N. W. 470."

10—*Pendley v. Eaton*, 130 Ill. 69 (71), 22 N. E. 853.

"In *Carpenter v. Calvert*, 83 Ill. 63, where instructions were involved relating to the burden of proof, it is said: 'Our statute from an

abundance of caution provides that in the first instance the validity of a will shall not rest merely upon this presumption of law arising from the fact that the will was duly executed, but requires that the witnesses who subscribed to the will shall testify affirmatively to the testamentary capacity of the party making the will. When this has been done, however, and contradictory testimony is produced tending to show want of testamentary capacity, the party asserting the validity of the will must prevail unless the contradictory testimony be sufficient to overcome or neutralize not only the effect of the affirmatory testimony given in favor of the validity of the will but also to overcome or neutralize that presumption arising from the general rule of law that all men are presumed sane until the contrary is proven.' In *Holloway v. Galloway*, 51 Ill. 160, where a similar question arose, it is said: 'The defendants had put in evidence . . . the testimony of the subscribing witnesses given when the will was admitted to probate and this was prima facie evidence of its validity. This testimony raised a presumption of the competency of the testator, which would be valid until disproved by counter-testimony. It placed upon the plaintiffs in error the burden of showing the incompetency of the testator by proof sufficient to overcome the prima facie case made for him.'

"In view of the principle established by these authorities, it is plain that the instruction as to the burden of proof was calculated to mislead the jury. Considering that the burden of proof in the first instance devolved upon the defendant to sustain the will, after he had put in evidence the will and the testimony of the subscribing witnesses given when the will was admitted to probate, the burden of proof no longer rested upon his shoulders. It was then the duty of the jury to determine whether the testator possessed the necessary

(b) The jury are instructed that it devolves upon the proponent of this will to prove by a preponderance of the evidence that at the time of signing and acknowledging said will, the said A. B. was of sound mind and memory, as defined in the instructions of the court, and if he has failed to do so, you should find that it is not his will.<sup>11</sup>

(c) The court instructs the jury that if they believe from the evidence that upon the question whether the said A. understood the nature and effect of the said supposed will at the time the same was executed that the evidence is equally balanced, then and in that case you should find that it is not his will.

(d) You are instructed that the burden of proof is upon the proponents, that is, upon the defendant, D., in this case, to show that the will offered by them was signed by the said A., and that at the time of signing the said will the said A. was of sound and disposing mind.<sup>12</sup>

**§ 4293. Sound and Disposing Mind and Memory.** (a) By sound mind and memory is meant that his mind and memory were such as to be able to transact the ordinary business of life.<sup>13</sup>

testamentary capacity from the weight of all the evidence introduced by the respective parties. The instruction did not, however, leave the jury free to determine the question from the weight of the evidence, but directed them that the burden still rested upon the defendant, who asserted the validity of the will. This imposed a higher degree of proof on defendant than the law required. In *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076, a similar instruction was held to be erroneous, and we refer to that case for a fuller expression of our views on the question."

11—*Wilbur v. Wilbur*, 129 Ill. 392 (398), 21 N. E. 1076.

"This instruction was not limited to the question of the proponent's duty to establish the validity of the will in the first instance by the testimony of the subscribing witnesses, but lays down a rule requiring it to appear upon consideration of the whole case, that the preponderance of the evidence as to the testamentary capacity of the testator was with the proponent. Such is not the rule. The instruction was therefore erroneous."

12—*Todd v. Todd*, 221 Ill. 410 (417, 418), 77 N. E. 680.

"These instructions ignored and conflicted with two well settled presumptions of the law. There was no averment in the bill that testator did not know the nature of the will nor what was in it. There is always a presumption that one who signs an instrument understands its nature and contents, and the general rule is, that proof of the testator's signature to the will is prima facie evidence of his having understandingly executed the same. *Yoe v. McCord*, 74 Ill. 323. In *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334, it

was said: 'Where a will is shown to have been prepared at the request of a testator, even under general directions, and is afterwards executed in the manner provided by law, it should not be set aside on ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact.' Another general presumption is, that all persons are of sound mind until the contrary is proved. It is true that under our statute the validity of a will cannot rest on that presumption alone, but proof must be made of testamentary capacity. Under the issue formed on a bill to contest a will, the burden is on the party asserting the validity of the will to make such proof, and if it is not made the will must be set aside; but if it is made, the law adds the presumption of sound mind which applies to all men, and the evidence of want of testamentary capacity must be sufficient to neutralize both the testimony of testamentary capacity and the presumption of the law. The law gives, and the instructions should give, to the proponent of a will the benefit of the presumption of soundness of mind. (*Carpenter v. Calvert*, 83 Ill. 62.) The instructions in this case did not give to the defendant the benefit of the legal presumptions, and the sixth directed the jury to find that the will was not the will of the testator if the evidence before them upon the question whether he understood its nature and effect was equally balanced. The court erred in giving the instructions."

13—This instruction was held good in *Keithley v. Stafford*, 126 Ill. 507 (521), 19 N. E. 749, but that case was over-ruled in *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885.



(b) The court further instructs the jury that although it may appear from the evidence that, before the last sickness of S., deceased, he was of sound mind and memory, yet such fact, if proven, will not be sufficient alone to maintain the will in controversy if the jury from a preponderance of all the evidence in the case believe that afterwards and in his last sickness, and before said will was executed, said deceased suffered from softening of the brain, and such disease, at the time the will was executed, rendered said deceased not capable of transacting ordinary business.

(c) The court further instructs the jury that it matters not, in determining this case, if the jury should find from the evidence that S., before and at the time of the execution of the alleged will, had intervals of apparent reason, in which he conversed with and knew acquaintances, or that he conversed on familiar topics; if the jury still believe from a preponderance of all the evidence that his mind was then impaired by disease to an extent as to render him incapable of performing ordinary business, and if his mind was so impaired at the time of the execution of said will, then said alleged will is not entitled to be regarded as his last will.<sup>14</sup>

(d) The court declares the law to be that, in order to constitute a sound and disposing mind, the testator must not only be able to understand that he or she has by his or her will given the whole of his or her property to one object of his or her regard, but must also have capacity to comprehend the extent of his or her property, and the nature of the claims of others whom by his or her will he or she is excluding from all participation in that property, and that he or she must at the time be capable of recollecting who those relations are, and of understanding at the time of their respective claims upon his or her regards and bounty, and must be of sufficient mind and judgment to deliberately form an intelligent purpose of excluding them from any share in his or her property; and in this case, unless it appears from the evidence that the testatrix was of sufficient strength of mind and memory to comprehend the extent and description of her property interest, as well to remember and give to the scrivener writing her will the names of each of her grandchildren entitled to participate in her property, the issues will be found for the plaintiffs.<sup>15</sup>

14—*Sinnett v. Bowman*, *supra*.

"The test of want of testamentary capacity laid down in these instructions is the inability of the testator to perform or transact ordinary business. That this is not a correct or reliable test is settled by the recent case of *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361. We there said: 'If it be found that the deceased had capacity to transact ordinary business affairs, the presumption would arise that he was capable of doing any act requiring no greater capacity. The converse of this proposition is not, however, true. Men, ordinarily, have contemplated the ultimate disposition of their effects, and when they enter upon the preparation of their last will, the matter has already taken shape and form, and it may require

a much less degree of mental capacity to intelligently give effect to the purpose already formed, than would be required to protect themselves against the cupidity of others, or to rationally contract, or transact ordinary business. Hence, it can not be said, as a matter of law, that because incapable of transacting ordinary business, a person is therefore incapable of making testamentary disposition of his estate.' By this decision, so much as was said in *Keithley v. Stafford*, 126 Ill. 507, 8 N. E. 740, sustaining the contrary view, was virtually disapproved and overruled."

15—*Lorts v. Wash.*, 175 Mo. 48, 75 S. W. 95 (98).

"As to the above instruction, it will suffice to say that it is not in all respects in harmony with the ap-

(e) Under the issue as to the mental capacity of the deceased, S., the court, at the request of the proponent charges the jury that when it is proven that a will has been duly executed by one over twenty-one years of age, in writing, in the presence of two or more witnesses, then the burden of proving the mental incapacity of the party to make a will is on the contestant, and even if it should be shown in this case, that S. was at the time of making her will afflicted with consumption, and was from that disease in a dying condition, and that this had a tendency to produce mental weakness, and that from that cause she had not sufficient mental capacity to clearly and intelligently understand and transact the business affairs of life, and was not at the time in a mental condition to clearly discriminate between objects of affection and interest to her, and objects of no interest or importance to her, this would not be sufficient to show that said S. when she signed the paper offered for probate, was not of sound and disposing mind, memory and understanding, and it would not be sufficient to show that she was not competent to will, devise and bequeath her real and personal estate by the instrument in writing offered for probate by the said W.<sup>16</sup>

(f) I instruct you that a person who is of unsound mind is incapable of making a valid will; and, if there is unsoundness of mind, it was not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property. In such a case the will is invalid, whether it is shown that the unsoundness of mind had or had not affected the character of the testament.<sup>17</sup>

proved precedents; it requires a test of capacity which would render most people incapable of disposing of their property. While the instruction in the main is correct, yet it undertakes to add to the approved precedents, which renders it objectionable."

16—*Schieffelin v. Schieffelin*, 127 Ala. 14, 20 So. 687 (694).

The above charge "given for proponent is erroneous. The facts there hypothesized as to the condition of testatrix not only do not indicate testamentary capacity, but show the want of it. We are unable to conceive of testamentary capacity remaining after such incapacity as is here postulated, and we have been cited to no case in this state that sustains such a charge. Incapacity to transact the ordinary business of life, cannot as is well settled be made the standard of testamentary capacity. We apprehend the court in an explanatory charge laid down the rule correctly, that if 'testatrix at the time of the execution of the instrument had mind and memory sufficient to understand the business she was engaged in, to remember the property she was about to bequeath, the objects of her bounty and the manner in which she wished to dispose of it (she had testamentary capacity) and if at the time of executing said instrument, this test was lacking (she was without such capacity). This is the standard de-

clared in many of our decisions. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Stubbs v. Houston*, 33 Ala. 555; *O'Donnell v. Rodiger*, 76 Ala. 223, 228, 52 Am. Rep. 322; *Kramer v. Wienert*, 81 Ala. 416, 1 So. 26. The court had instructed the jury that the burden was on the contestant to show mental incapacity. The explanation given of the charge by the court did not cover the defects in the charge as asked, to relieve it of its injurious effects on the minds of the jury. If the charge was illegal, not simply misleading, it should have been refused, and no explanation or qualification of it could make it good. *Elland v. State*, 52 Ala. 323."

17—*Blough v. Parry*, 144 Ind. 463, 40 N. E. 70 (74), 43 N. E. 560.

"The above instruction was given in the case of *Durham v. Smith*, 120 Ind. 468, 22 N. E. 333. The court said: 'By adding the words, 'In such a case the will is invalid, whether it is shown that the unsoundness had or had not affected the character of the testament,' it changed the meaning of the instruction, and was in effect telling the jury that, upon considering all the evidence, if they came to the conclusion there was any unsoundness of mind or defect of any character in the mind of the testatrix, no difference to what extent such defect affected or impaired the mind, or whether it in any way affected the

(g) It is not necessary, in order to avoid the will in question in this suit, that the mental unsoundness of X., the testator, if it is shown to have existed, should have actually entered into or affected the will or caused its execution. It will be sufficient to avoid the will if the evidence shows to your satisfaction that, at the time it was executed, the testator, X., was a person of unsound mind, as the laws of this state do not permit a person of unsound mind to execute a will.<sup>18</sup>

(h) The jury are instructed that unsoundness of mind embraces every species of mental incapacity from raging mania to that delicate and extreme feebleness of mind which approaches near and degenerates into unconsciousness.<sup>19</sup>

§ 4294. **Partial Insanity—Monomania.** (a) In regard to the question as to whether this testator was of sound and disposing mind, it is true, of course, that if a person is under an insane delusion in reference to the subject-matter, or has an insane delusion concerning a fact which affects his duty and responsibility in preparing a will, if such an insane delusion is proved, that would affect what otherwise would be considered a good will. The question, so far as that is concerned, is whether there is any insane delusion or hallucination which affects his conduct in the making of the will, so that the will is not the will of a man of sound mind.<sup>20</sup>

disposition of the property devised or the making of the will, the will would be invalid, and this, too, even though the evidence might affirmatively establish the fact that such defect in no way entered into the making of the will or disposition of the property, and that she had at the time sufficient mental capacity to make a will. In short, this charge recognizes but two conditions of the human mind—one sound and capable of doing all acts, and the other unsound and incapable of doing any act; that a person is responsible for all his acts, or not responsible for any of his acts. This is an erroneous theory of the law. *Trumbull v. Gibbons*, 2 Zabreskie, 117, 51 Am. Dec. 253; *Clark v. Fisher*, 1 Paige's Ch. 171, 19 Am. Dec. 402; *Jackson v. King*, 4 Cowen, 207, 15 Am. Dec. 354, and note 363. It is evident that a person might be possessed of the requisite capacity to make a will, as held in *Lowder v. Lowder*, 58 Ind. 538, and yet have some defect of the mind, some delusion in relation to some subject entirely foreign to the execution of the will, the disposition of the property, the devisees, or those who are the natural objects of his bounty."

18—*Blough v. Parry*, 144 Ind. 463, 40 N. E. 70 (73), 43 N. E. 560. "This instruction told the jury that if the testator was a person of unsound mind, even though such unsoundness was so slight that it did not impair his capacity to make an intelligent testamentary disposition of his property, or, in other words, though the unsoundness was so slight that it had no influence or effect either in the production of the

will, or in the disposition of property therein provided for, the will would, nevertheless, be void. Notwithstanding the statute provides that 'all persons except infants and persons of unsound mind may make a will,' it has been the construction uniformly given thereto by this court for a long time that, 'in legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in mind long enough to, and could, form a rational judgment in relation to them, is a person of sound mind. If he has not mental capacity to this extent, he would not be a person of sufficient disposing mind.' *Lowder v. Lowder*, 58 Ind. 538."

19—*Nieman v. Schnitker*, 181 Ill. 400 (405), 55 N. E. 151.

"This instruction ignores the extent of the unsoundness of mind, because in effect it states 'every species of mental incapacity' is embraced in the term 'unsoundness of mind.' This states the rule of law broader than warranted by the authorities of this state. It was error to give this instruction."

20—*Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413 (414, 415).

"The above request for instruction was rightly refused, and the instructions given were proper. In common, untechnical speech one may have delusions which do not imply or show unsoundness of mind. The



(b) There can be no abstract rule given to you to determine the question submitted to you. The entire evidence in the case, including all the facts and circumstances, is before you, and you have the opinion of the medical experts, and from all thereof you are to determine, by weighing all such evidence after a common-sense fashion, whether the said Y. was at the time and in the execution of the alleged will responsible or irresponsible, mentally capable or mentally incapable.

(c) As I have already said, if the testator was of sound mind, he could lawfully do what he pleased with his property; otherwise, of course, if he was not mentally sound, or, what is the same thing, if he was at the time of the execution of the will laboring under a mental delusion, whereby his mind was clouded in the particular respect in question, and hence that this act cannot be said to be a sane act. Taking now the general principles I have stated to you as a guide you will determine from all the evidence before you whether at the time of the execution of the instrument the said Y. was or was not laboring under a mental delusion, or condition of partial insanity such as that his act can or cannot be said to have been the deliberate act of a sound mind and disposing mind.<sup>21</sup>

(d) The court instructs the jury that if you shall believe from the evidence that on the ——— day of ———, A. D. ———, at the time of the execution of the paper read as evidence herein, purporting to be the will of L., deceased, the said L. was of sound mind, then you should find the said paper to be his last will, unless he was of unsound mind at the time said paper was executed.

(e) Soundness of mind in a testator means a sufficient mental capacity upon his part to know his children and their natural claims upon his bounty, and to know his estate, of what it consists, and to be able to take a general survey thereof, and make a rational disposition thereof, according to a fixed purpose of his own.

(f) The court further instructs the jury that if the deceased, at the time of the execution of the paper in contest, was under an insane delusion that appellant was not his son, and was of unsound mind on

request for instructions might have been understood to mean delusions of that kind. It was right, therefore, to limit the instructions to insane delusions, such as would go to show unsoundness of mind. *Brown v. Ward*, 53 Md. 376, 392. 36 Am. Rep. 422, 1 Redf. Wills, 71 (86), note."

21—*In re Evans' Estate*, *Leveridge v. Evans*, 114 Ia. 240, 86 N. W. 283 (284).

"This is all that was said regarding testamentary capacity. The proponents asked an instruction to the effect that a person is considered of sound and disposing mind who knows the nature of the act he is performing, and is fully aware of its consequences. This, or something embodying the same thought, should have been given. The test is the capacity of the testator to understand the testamentary act. One who is capable of weighing the consequences of his will, and to a

reasonable degree its effect upon his estate and his family, is sound of mind. A person devoid of such capacity of mind is incompetent to make a valid will. Although his mind be clouded, if he is capable of comprehending his property interest, and of determining what disposition he desires to make of such property, and of making such disposition, he has testamentary capacity. These rules are well settled, and scarcely need fortification by the citation of authority. But see *Bates v. Bates*, 27 Ia. 115, 1 Am. Rep. 260; *In re Convey's Will*, 52 Ia. 197, 2 N. W. 1084; *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656; *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Webber v. Sullivan*, 58 Ia. 265, 12 N. W. 319. The court was in error in leaving the jury to infer that partial insanity or possession of an insane delusion would in itself avoid the will, and in not defining more clearly testamentary capacity."

this subject, and by reason of such unsoundness of mind, made a different disposition of his estate than he would otherwise have made, they should find it not to be his last will and testament, although his capacity was good on other subjects.<sup>22</sup>

§ 4295. **Time at Which Unsoundness of Mind Must Exist to Defeat Will.** If the statements made by the several witnesses be true, they clearly show a sufficient mental capacity in Z. to make a valid will. Over against that you put the statements of what the doctors say, and what they say about his not having awakened sufficiently to speak, and so forth. These matters you can remember.<sup>23</sup>

§ 4296. **Settled Insanity Presumed to Continue.** The court instructs the jury that if you have found that the said K. at any time prior to the date of the execution of said will was of unsound mind, then his mental unsoundness is presumed to continue, unless a recovery or restoration is shown; and the burden is upon the defendants to

22—*Layer v. Layer*, 22 Ky. L. 1936, 62 S. W. 15 (17, 18, 19).

"Under the instructions given them, the jury would understand that they were to find the paper to be the will of the testator, if he had general capacity at the time it was made, although he was laboring under an insane delusion in regard to his son, and the will was the direct result of this delusion. It is well settled that such is not the law. In *Dew v. Clark*, 1 Hagg. Ecc. 311, the testator was a sensible, clever man, conducting himself rationally in the ordinary affairs of life. He amassed a considerable fortune by his profession. His friends, some of them physicians, never suspected he was of unsound mind. Yet it was shown that he labored under a strange hallucination, both as to himself and his daughter. She was proved to have been always chaste, modest, dutiful, and affectionate, yet her father regarded her as the most extraordinary instance of depravity and profligacy. He considered himself a pattern of fatherly tenderness, though tying his daughter to a bedpost, and compelling her to perform services to which even a servant would not submit. These impressions, which no persuasion or argument could change, were recorded in his will, which was set aside by the court on the ground that it was the result of insane delusion. This case has often been followed in America. See also *Boyd v. Eby*, 8 Watts, 71; *Flore v. Florey*, 24 Ala. 241. In *Ballantine v. Proudfoot*, 62 Wis. 216, 22 N. W. 392, the judgment of the circuit court rejecting the will was sustained, although the general capacity of the testatrix was unimpeached. \* \* \* The authorities seem to be uniform. See *Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Mullins v. Cottrell*, 41 Miss. 291; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 353; *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Robin-*

*son v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Potter v. Jones*, 20 Ore. 239, 25 Pac. 769, 12 L. R. A. 161; *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211; *Appeal of Kimberly*, 68 Conn. 428, 36 Atl. 847, 37 L. R. A. 261. \* \* \* The court below should have instructed the jury further that if the deceased, at the time of the execution of the paper in contest, was under an insane delusion that appellant was not his son, and was of unsound mind on this subject, and by reason of such unsoundness of mind made a different disposition of his estate than he would otherwise have made, they should find it not to be his last will and testament, although his capacity was good on other subjects. On another trial the court should also change the phraseology of instruction No. 1, so as to direct the jury to find the paper to be the will of the deceased, unless he was of unsound mind at the time it was executed. *Boone v. Ritchie*, 21 Ky. L. 864, 53 S. W. 518, and cases cited."

23—*Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 111.

"This was error. The doctors did not see Z. until the afternoon of the 19th of August. The will was made between 10 and 11 o'clock in the morning of the same day. He was failing rapidly from a stroke of paralysis. His condition, according to the testimony of several witnesses for proponent, was not alarming while the will was being signed. He lay propped up in bed, and, though his right arm and hand were considerably affected, they testified he could talk, and that he bore no evidences at that time of mental aberration. In the afternoon, however, his condition very much changed. What his condition was at that time could not be weighed against the testimony of witness, who stood unimpeached, as to the condition when the will was made."

show such recovery, and that at the very time of the execution of the instrument in question the said K. was of sound mind, as elsewhere defined in these instructions. If you find by a preponderance of the evidence that the said K. for a longer or shorter time before the execution of the will was of unsound mind, yet, if you further find by a preponderance of the evidence that at the very time of the execution of the will the said K. was of sound mind, then your verdict will be for the defendants. But if you find, as hereinbefore instructed, that at the time of the execution of the will the said K. was of unsound mind, then your verdict will be for the plaintiffs.<sup>24</sup>

§ 4297. **Failure of Memory.** Failure of memory is to be considered in connection with other circumstances tending to show mental derangement; but failure of memory is not sufficient incapacity unless it goes to the extent of such a loss of memory as to deprive the testator of the ability to call up to the mind the immediate members of his family and property. Memory is generally impaired by age, and also by disease, while the mind may remain entirely rational, and if A.'s mind was rational at the time of making the will, the mere loss of memory will not be sufficient to set it aside.<sup>25</sup>

§ 4298. **Insane Delusions—Groundless Suspicion not Necessarily an Insane Delusion.** (a) If the jury shall find that at the time of the making the will or the codicil the testator was acting under any hallucination or delusion, or erroneous opinion amounting to delusion, as to facts in the conduct of any of the beneficiaries under the will, this will be evidence that at the time he was not of sound and disposing mind.<sup>26</sup>

24—*Kirsher v. Kirsher*, 120 Ia. 337, 94 N. W. 846.

"Primarily, every person is presumed to be sane until the contrary is proved, and the burden of proof of insanity rests in the first instance upon the party alleging it. It is equally as true that, when settled and general unsoundness of mind is proved, a presumption arises in favor of its continued existence. *Corbit v. Smith*, 7 Ia. 65, 71 Am. Dec. 431; *Blake v. Rourke*, 74 Ia. 523, 38 N. W. 392; *Bever v. Spangler*, 93 Ia. 601, 61 N. W. 1072. But this court has never held (and, so far as we have examined the cases, no other) that proof of insanity at a stated period, without reference to the particular circumstances connected therewith, is sufficient to authorize the inference of insanity at a remote subsequent period. Temporary mental aberration is not uncommon, and the causes thereof are numerous, among which, science and observation have taught us, are all forms of violent disease, including apoplexy. *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79. The instruction given failed to recognize the distinction we have pointed out, and permitted the jury to infer insanity at the time the will was executed from the testator's mental condition immediately following the stroke, and without requiring it to find that

there was then a settled condition of mental unsoundness. In other words, the jury was told that if it found mental unsoundness two years before, whether habitual or temporary, it could presume that Mr. K. was insane when he executed his will. That such is not the rule is held by our own cases, supra, and by the weight of authority."

25—*Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171 (173).

"There are at least two faults in this instruction: First, it assumes facts which ought to be left to the jury; second, it affirms that loss of memory does not destroy testamentary capacity. The latter fault is a very grave one, and of itself condemns the instruction. A man without a memory cannot make a will."

26—*Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413 (414, 415).

The above "request for instruction was rightly refused, and the instructions given were proper. In common, untechnical speech, one may have delusions which do not imply or show unsoundness of mind. The request for instructions might have been understood to mean delusions of that kind. It was right, therefore, to limit the instructions to insane delusions, such as would go to show unsoundness of mind. *Brown v. Ward*, 53 Md. 376, 392, 36 Am. Rep. 422, 1 Redf. Wills, 71, 86, note."



(b) If, therefore, you find from the evidence which has been introduced in this case that the decedent, S. C., at the time of writing the codicil bearing date ———, believed that the contestant, M. C., was wanting in affection for her, and insincere, and cared only for her property, or was endeavoring to take advantage of her infirmities to cheat and defraud her of her moneys during her lifetime, and you find further that such belief on her part was without foundation in fact, and was not based upon any information or evidence upon the subject communicated to her, then your verdict upon the issue of insanity should be against the will and in favor of the contestant.<sup>27</sup>

**§ 4299. Right of Testator to Dispose of Property as He Pleases.**

(a) The court instructs the jury that a person may have, upon some subjects, and even generally, mind and memory and sense to know and comprehend ordinary transactions, and yet upon the subject of those who ought naturally to be the objects of his care and bounty, and of a reasonable and proper disposition as to them of his estate, he may be of unsound mind.<sup>28</sup>

(b) You are instructed that if you believe from the evidence that prior to and at the date of the instrument offered in evidence as the will of L., she relied on her nephew, H., to transact the greater part of her business subsequent to her husband's death, and that he then had access to all her papers and had her confidence; and if you believe also from the evidence that said H. would receive the bulk of her estate under the provisions of said instrument, and that her brothers and sisters would receive a much smaller share than if she had died without leaving a will, and that her relations to her brothers

27—In re Calef's Estate, 139 Cal. 673, 73 Pac. 539.

"In our opinion it was clearly erroneous. It is hazardous to undertake to tell a jury that from certain facts they should find insanity and, if that can be done at all, the recitation of facts in this instruction is entirely too meager. The things recited would not alone even justify a jury in finding insanity or an insane delusion, and most certainly they do not justify the proposition that they 'should' so find. An instruction in which a jury is told that they should find insanity, or an insane delusion, if they find certain enumerated facts, is erroneous, if it omits any facts necessary to that conclusion, and the facts recited in this instruction do not warrant the direction with which it closes. See Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Estate of Scott, 128 Cal. 57, 60 Pac. 527. As was said in Estate of Kendrick: 'In order to sustain a contest for the probate of a will for the unsoundness of mind of the testator by reason of insane delusions, it must be shown that the delusions were not merely temporary hallucinations, or unfounded dislikes or antipathies, or false opinions and beliefs of a diseased mind, which no argument or evidence could convince to the contrary, and which a ra-

tional mind would not entertain, and also that the insane delusions operated to cause the production of the will under attack.' The instruction now under consideration does not meet the rule stated in the Kendrick case, or in any other case to which our attention has been called. It applies to the first two grounds of contest, and therefore the verdict as to those issues cannot be sustained."

28—Nieman v. Schnitker, 181 Ill. 400 (407), 55 N. E. 151.

"It is not the province of the jury to determine whether a will is a just, wise and proper disposition of the testator's property. Carpenter v. Calvert, 83 Ill. 62. In Freeman v. Easley, 117 Ill. 313, 7 N. E. 656, this court said (p. 321): 'In this case the testator suffered greatly from severe bodily disease, and no doubt his mind was affected to a degree, it might be in at least a partial sense unsound; but the jury should not be told for that reason alone as a matter of law, that would incapacitate him to make a valid will. That would be to state the rule of law on this subject broader than the authorities in this state and other states warrant.' \* \* This instruction is much more vicious than the one to which the foregoing language was applied, and is of itself sufficient on which to base a reversal of this case."

and sisters were such as naturally to call for a liberal remembrance in her will, then the burden rests on the proponent to show, by a preponderance of the evidence, that said instrument is reasonable and fair under all the circumstances, and if she has failed to make such proof you should find the instrument not to be the last will and testament of L.<sup>29</sup>

(e) The court instructs the jury that if they believe from the evidence the decedent, M., at the time he executed the writing in contest, did not have mind and memory enough to know the natural objects of his bounty, and his duties to them, and to know his property, and to dispose of it in a rational manner, according to a fixed purpose of his own, then he was not of sound mind and memory, within the meaning of the law, and the jury will find that said writing is not the will of said decedent. If the jury believe from the evidence the decedent, M., at the time he executed the writing in contest, had sufficient mind and memory to know the natural objects of his bounty, and his duties to them, and to know his property, and to dispose of it in a rational manner, according to a fixed purpose of his own, then he was of sound mind and memory, within the meaning of the law. The court instructs the jury that the burden of proof is upon the propounders of the will to establish that the decedent signed or acknowledged the writing in contest as his will in the presence of C. and T., and that they signed said writing as attesting witnesses in the presence of the decedent, M., and the burden of proof is on the contestants to show mental incapacity or undue influence, as explained in the former instructions.<sup>30</sup>

29—Webster v. Yorty, 194 Ill. 408 (418), 62 N. E. 907.

"It will be noticed that this instruction states that H. would receive the bulk of the estate which was not true under any evidence.

\* \* \* It was error to assume the existence of the vital fact in the controversy. The more serious error is in resting the validity of the will upon the opinion of the jury as to its being reasonable and fair. A person of testamentary capacity has a lawful right to dispose of his property as he sees fit, and it makes no difference whether it is just or not. Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698; Hollenbeck v. Cook, 180 Ill. 65, 54 N. E. 154. The validity of the will does not depend upon the question whether, in the opinion of the jury, it is just and wise and a proper disposition of the testator's property. Carpenter v. Calvert, 83 Ill. 62; Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150."

30—Murphy's Ex'r. v. Murphy, 23 Ky. L. R. 1460, 65 S. W. 165 (168).

"The serious objection is that the instructions required the disposition of testator's property to be made in a rational manner, and that the jury were authorized to find against the will if they did not believe that the disposition was a rational one, or such a one as they would have made under like circumstances. In Newcomb's Ex'r. v. Newcomb, 96 Ky. 125, 27 S. W. 997, quoting Tudor v.

Tudor, 17 B. Mon. 391; Best v. Best's Ex'r, 11 Ky. L. 215, 11 S. W. 810, and Phillips' Ex'r. v. Phillips' Adm'r, 81 Ky. 328, a similar instruction was approved. In the cases of Newcomb and Phillips it was sustained against the objection of the administrators, who had the right to complain of any test greater than the true one. In the Phillips case, this instruction was criticised. In Dean v. Phillips, 22 Ky. L. 1621, 61 S. W. 11, the definition given was not subject to this criticism. In the case of Warren's Devises v. O'Connell, 23 Ky. L. 262, 62 S. W. 890, a similar instruction to the one here complained of was given. Said the court, through Judge Guffy: "This instruction is open to the objection that it leaves the jury to determine whether the estate was disposed of in a rational manner, and not merely whether or not she was able to which she disposed of her estate. It may be said that the manner in which she disposed of her estate might, to the minds of some of the jurors, have been in an irrational manner; and in fact many persons would doubtless honestly believe that some of the provisions in the will were irrational or unreasonable, and brought about by some superstitious idea. The law is that a person who is rational may dispose of his property according to a fixed purpose of his own, although such purpose, according to the notions of

§ 4300. **Expert Testimony.** (a) A number of physicians have been called as medical experts; that is, they have given their opinions, based upon hypothetical questions put to them. You will carefully consider this testimony, and give it the weight you may think it justly entitled to. The weight and value of such testimony depends upon whether the statement of facts, of which such experts have not personal knowledge, but which they accept as true for the purposes of answering the question propounded them, are in material and important particulars correct, fair, and impartial. Then such testimony may be of great value. But if you find such statements of facts are in material and important particulars incorrect, unfair, partial, and untrue, then you should attach little or no weight to such testimony.<sup>31</sup>

(b) In weighing such testimony, it will be proper for you to consider the degree of learning and skill possessed by such witnesses, their capacity to determine, as experts in that branch of knowledge, the probable or actual condition of the testator's mind from the facts submitted, and the degree of harmony there may be, or the opposite, between the facts stated in the hypothetical questions and those established by the evidence. In proportion to the degree of such harmony between the facts embraced in the hypothetical questions and those established by the evidence, and the skill and capacity of these experts, judging by the law of mind, to deduce therefrom just conclusions, will be the value and force of such testimony; and, in view of all the facts presented to you by the evidence on these points, you will consider and determine what weight and effect you should give to such testimony. If you believe from such evidence, when considered in connection with all the other proofs in the case, that during the period of time in which the will of the testator was executed, he

many persons, might be irrational. But, as the proof is not very convincing that the testatrix was really not competent to dispose of her property according to a fixed purpose, we are the more inclined to the opinion that the instruction aforesaid was prejudicial to the rights of the propounders.' In the case just cited, there was a bequest for the purpose of procuring masses to be said. It is suggested that the argument in that opinion is equally applicable to a case like the one at bar, and that the jury might be equally disposed to consider irrational a disposition of the testator's estate which provided for the wealthiest member of his immediate family, and did not provide for the poorest. As was said in the Newcomb case, *supra*, there is much force in the argument. But the majority of the court are of the opinion—the writer not concurring therein—that this doctrine is not applicable to the case at bar, and the instruction, though not technically accurate, could not have misled the jury to the prejudice of contestees."

31—*Kirsher v. Kirsher*, 120 Ia. 337, 94 N. W. 846 (847).

"It hardly needs the citation of authority to show that this instruction is erroneous. The practical experience of lawyers and courts has so often demonstrated the fact that a very slight change in the hypothesis will change completely the answer of an expert witness, that it is unnecessary to say that the value of answers to such questions must be based solely upon the truth of the facts upon which they are based, and that, if the facts are not found to be as stated, the answers are of no value, and cannot be considered at all. *Hall v. Rankin*, 87 Ia. 264, 54 N. W. 217; *Schouler on Wills*, (3d. Ed.), § 207. If the instruction had not said that 'little or no weight should be given to the testimony if the hypothesis were found untrue,' it might be said that the jury would understand that it was not to consider answers to such question, under the rule stated in *Bever v. Spangler*, 93 Ia. 576, 61 N. W. 1072, where no instruction on the subject was given. But the language here, by implication, at least, authorized the consideration of the testimony of the experts in any event."



was of unsound mind, then it will be your duty in like manner to find for the plaintiffs.<sup>32</sup>

(c) Medical witnesses have been examined in this contest, and so far as their testimony is dependent upon hypothetical questions the court instructs you that the testimony of experts is frequently unsatisfactory and many times unreliable. It is unsatisfactory because it cannot convey to our minds the precise reasons why the conclusions are reached, and it is unreliable because it is frequently based upon speculations instead of fact. Experts in the exact sciences and in mechanics, who base their opinions upon the laws of nature, and of the exact sciences, and their own experiences with those laws, have tangible facts before them; but where the opinions are based upon speculation, where the subject of the inquiry, namely, the operation and condition of the human mind, is beyond the possibility of human knowledge, we should receive those opinions as at least uncertain. So when we see a person perform such or such an act, we can form an opinion whether the act is rational or irrational—whether it is consistent with the standard of average human intelligence and reasonableness; but when we advance to speculation upon what would or would not follow upon some supposed existence of mental conditions, we go beyond the scope of knowledge, and tread upon the realm of imagination or conjecture. You are instructed therefore, that while we receive and you will take into consideration the opinion of experts, such opinions are not entitled to as much weight as facts, especially where there is a conflict between an opinion and a fact. When a fact is established it is a fact and cannot be overcome, while an opinion is but an opinion, and it may be true and it may be untrue. Opinions of different experts are often diametrically opposed to each other, even when based upon the same supposed conditions.<sup>33</sup>

32—Blough v. Parry, 144 Ind. 463, 40 N. E. 71 (73), 43 N. E. 560.

"The fore part of this instruction was calculated to mislead the jury. It laid down too narrow and too inflexible a rule for estimating the weight to be given to the testimony of an expert, and limited too closely the various matters which the jury were entitled to consider in weighing such testimony. It gave too much prominence to the mere skill of the expert, leaving out of view his credibility as exhibited by his conduct and bearing on the witness stand, and invaded the province of the jury in attempting to set too narrow limits to their exclusive province of judging the value and force of such testimony. Cuneo v. Bessoni, 63 Ind. 524; Eggers v. Eggers, 57 Ind. 461; Durham v. Smith, 120 Ind. 463 (468), 22 N. E. 333."

33—In re Blake's Est., 136 Cal. 306, 68 Pac. 827 (828), 89 Am. St. 135.

"The testimony of the experts was competent, and went to the very gist of the claim made by contestants. By the instruction the court so discredited it as to practically destroy it. The jury could not but see that the judge had a very poor opinion of testimony of this charac-

ter. The jury were told that it was unsatisfactory and the reason why it was so. They were further told that it was unreliable, and the reason why it was so. Not only this but to make assurance doubly sure, they were told that opinions of experts are not entitled to as much weight as facts, and that such opinions based upon the same supposed conditions are often diametrically opposed to each other. While the opinion of the judge may have reasons to support it, it was not proper for him to give his opinion to the jury. Neither was it proper for him to give the jury in the instruction an argument as to the reasons why such evidence in his opinion was unreliable and unsatisfactory. See Langford v. Jones, 18 Ore. 307, 22 Pac. 1064; Pannell v. Com, 96 Pa. 260; L. R. R. Co. v. Whitehead, 71 Miss. 451, 15 So. 890, 42 Am. St. 472; Wannack v. Mayor, etc., 53 Ga. 162; State v. Hundley, 46 Mo. 414; Louisville & N. R. R. Co. v. Malone, 109 Ala. 509, 20 So. 33; Kansas v. Hill, 80 Mo. 523; Bever v. Spangler, 93 Ia. 576, 61 N. W. 1072; Ryder v. State, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. 334. In this state it has been held error for the judge below to express an opinion that a witness is a person of respectability (McMinn v. Whelan,

## UNDUE INFLUENCE.

**§ 4301. Degree of Proof Necessary—Assumption of Fact that Undue Influence Was Exercised.** (a) To vitiate a will on account of undue influence it must appear from the evidence that there was something wrongfully done, amounting to a specimen of fraud, compulsion or other conduct improper under the instructions herein.<sup>34</sup>

(b) The fifth ground of the contest avers conjointly that the testatrix was of unsound mind, and also that the will was procured by fraud and undue influence; and having so averred in the fifth ground of contest, unless the contestants have satisfied the jury that the testatrix at the time of making her will was mentally so unsound as to be incapable of making a valid will, was superinduced both by fraud and undue influence, then the court charges you that your verdict must be in favor of the proponent.

(c) The court charges you that under the ground of contest numbered three, in order to make out their case, the burden of proof is upon the contestants to establish to the satisfaction of the jury by the evidence, that the will which is offered for probate was the result both of fraud and undue influence; that if the evidence fails to establish that there was fraud, but fails to establish that there was any undue influence, then the jury must find in favor of the proponent under the third ground of contest.

(d) Under the issues in this case which allege fraud and undue influence, the burden of proof is upon contestants to prove the issue as presented; and, unless the evidence satisfies the jury that there was both fraud and undue influence, the verdict of the jury upon such issue must be against the contestants and for the proponent.<sup>35</sup>

(e) The fifth contest contains three grounds—want of testamentary capacity, and fraud, and undue influence; and that, in order to entitle the contestants to a verdict under that, it is necessary for the contestant to have satisfied the jury of the existence of each and all of these.

27 Cal. 319); to state to the jury that verbal admissions of a party should be received with great caution (Kauffman v. Maier, 94 Cal. 282, 29 Pac. 481, 18 L. R. A. 124); to tell the jury that a certain fact was a strong circumstance (People v. Ah Sing, 59 Cal. 401); to tell the jury that a witness had contradicted herself several times (People v. Willard, 92 Cal. 489, 28 Pac. 585); to state to the jury that they may consider the probabilities of a certain class of witnesses telling the truth (People v. Christensen, 85 Cal. 568, 24 Pac. 888); to single out a witness or class of witnesses with remarks as to their credibility (Thomas v. Gates, 126 Cal. 1, 58 Pac. 315); and to state to the jury that circumstantial evidence is not entitled to a less degree of credit than direct evidence (People v. Vereneseneckhoff, 129 Cal. 499, 58 Pac. 156, 62 Pac. 111; People v. O'Brien, 130 Cal. 3, 62 Pac. 297)."

34—Weston v. Teufel, 213 Ill. 291 (301), 72 N. E. 908.

"An examination of the entire series of instructions discloses no language to which the words italicized above could apply. In fact many circumstances were proven and relied upon by contestants to establish undue influence which are not specially referred to in the instructions in any manner, and the jury might well conclude that such circumstances were by this instruction excluded from their consideration."

35—Moore v. Heineke, 119 Ala. 627, 24 So. 374 (376, 379).

These "charges also exact too high a degree of proof, in that they require the evidence upon which a verdict is asked to satisfy the minds of the jury. Evidence is sufficient to justify a verdict if it reasonably satisfies and convinces the mind. Torrey v. Burney, 113 Ala. 496, 21 So. 348; Prince v. State, 100 Ala. 146, 14 So. 400, 46 Am. St. 281."

(f) The court instructs the jury that the third ground of contest avers both fraud and undue influence, and that, having averred that the will was procured by fraud and undue influence the contestants must satisfy the jury, before the jury can find in favor of the contestants on the third ground, both fraud and undue influence existed.<sup>36</sup>

(g) If you believe from the evidence that the relations of L. to her brothers and sisters were such as to have naturally impelled her to liberally provide for them, and that it was through and because of the fraudulent and undue influence of her nephew, H., over her, that she was prevented from doing this, and was prevailed on to bequeath to him the bulk of her property, and that such disposition of her estate was contrary to her deliberate wish and purpose, then you should find that the will offered in evidence is not the will of said L.<sup>37</sup>

§ 4302. **Burden of Proof.** (a) The court instructs you that the circumstance, if proven, that a will has been procured to be written by a person largely benefited by it, will excite stricter scrutiny, and require stricter proof of volition than where such circumstance is not found. In such case, proof should be such as to satisfy the jury by a preponderance of the evidence, that the testator has not been imposed upon, but knew what disposition he or she was making of his or her property when the will was made.<sup>38</sup>

(b) While the burden of proving the will to be the product of undue influence rests upon those alleging it, and though, when the testator is shown to have been of sound mind, there is no presumption of undue influence from the mere fact that the will is unreasonable and unjust, and that there was interest and opportunity to make use of undue influence, still, when the evidence shows certain relations between the testator and the beneficiaries, well calculated to give them an undue influence over him, and that his condition of mind and body was such as to make it probable that he was not able to resist the influence of others, and that the provisions of the will are unnatural and unreasonable, and contrary to previously expressed intentions, and when the evidence further shows that the beneficiaries are strangers to the blood; that they had possession of the person of the testator, who was in a condition of weakness and sickness; that they were active in procuring the will; that they furnished instructions for the draftsman, and appointed him, summoned witnesses, and were present at the execution, in the absence and without the knowledge of the relatives,

36—Moore v. Heineke, 119 Ala. 627, 24 So. 374 (379, 376).

These "charges requested by the proponent assert the proposition that where two or more objections to the validity of the will are alleged in one subdivision of the grounds of contest, and the proponent joins issue thereon, the contestant cannot have a verdict, unless he proves all the objections stated in such subdivision."

37—Webster v. Yorty, 194 Ill. 408 (417), 62 N. E. 907.

"The above instruction assumes as a fact that there was fraudulent and undue influence on his part. It was error to assume the existence of the vital fact in controversy."

38—Webster v. Yorty, 194 Ill. 408 (415-416), 62 N. E. 907.

"This was an abstract proposition of law, and in the nature of an argument on the question of fact. \*

\* \* It was erroneous and misleading in this case, because there was no question or issue whether the testatrix had been imposed upon and did not know what disposition she was making of her property by will. \*

\* \* \* The instruction not only casts the burden on the proponent, but required her to satisfy the jury, and an instruction of that character has always been condemned. Ruff v. Garrett, 94 Ill. 475."



and that concealment was resorted to; and that the relatives and friends of the deceased were denied or excluded from his society with the view of acquiring and maintaining influence over him, the presumption of undue influence does arise, and it is incumbent upon the proponents to satisfy the jury that the will expresses the free and intelligent wishes of the testator.<sup>39</sup>

§ 4303. **Existence of Confidential Relationship.** (a) It is not undue influence for a person, by forethought or affectionate attention for the wants of another, to acquire the confidence of that other, and a controlling influence over him; and even should the jury believe that any of the beneficiaries under the will offered for probate had acquired a controlling influence over the testatrix, yet, if that influence was acquired by forethought, affectionate care, and attention to the testatrix, that would not authorize the jury to find that the will was the product of undue influence. Before the jury can find that the will was the product of undue influence, the evidence must satisfy their minds that the execution of the same was procured by fraud or deceit, or coercion of the will of the testatrix, or other than the control over that will acquired by kindness, affectionate care, and attention.

(b) If the jury believe from the evidence that on or about the — day of —, Mrs. K., the testatrix, called for C., the proponent, and in her presence, and at her request, that he made a memorandum of the disposition which she desired to make of her property by her last will and testament; that said C. carried such memorandum to R., an attorney at law, and handed the same to him for the purpose of preparing the will; that said R. on the same day that he received the memorandum visited Mrs. K., and went over with her, while he and she were alone, each item of the memorandum, and she stated that that was the disposition which she wished to make of her property, with some slight changes which were made in the memorandum, and that he from it prepared the original will given in evidence in this case; that on the next day he carried the said will to Mrs. K., and read it over in her presence; that thereupon she signed the same, and the witnesses' names which were thereto signed were thereto

39—*Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459 (464, 471).

"This charge asserts that 'the presumption of undue influence does arise, and it is incumbent upon the proponent to satisfy the jury that the will expresses the free and intelligent wishes of the testator,' upon proof by the contestant of certain facts, among which is the existence of 'certain relations between the testator and the beneficiaries well calculated to give them an undue influence over him.' We cannot treat the words last quoted as a sufficient statement of the existence of those confidential relations between the beneficiary and the testator, which, coupled with activity in and about the preparation of the will, cast upon the former the burden of showing that it was not the result of coercion or fraud. The existence of a relation which merely gives one the power to unduly influence another in the execution of

his will, unaccompanied by any element of confidence and trust reposed, even though there is the necessary activity in and about the preparation and execution of the will, does not raise the presumption of undue influence. Neither of the facts stated in the charge, nor all combined, give rise to any legal presumption. The charge, moreover, is erroneous because it exacts too high a degree of proof in rebuttal of the facts stated in the charge, in that it requires such proof to 'satisfy the jury.' Even where a legal presumption is to be overcome, the law does not require so high a degree of proof. The true measure of proof, to justify a verdict based upon it, is that it shall reasonably satisfy or convince the minds of the jury. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348; *Vandeventer v. Ford*, 60 Ala. 615; *Prince v. State*, 100 Ala. 146, 14 So. 409, 46 Am. St. 28; *Rowe v. Baber*, 93 Ala. 425, 8 So. 865."

signed in her presence,—then, as to the original will, the jury must find the issues in favor of the proponent, unless the evidence satisfies the minds of the jury that she was induced to sign such will by some fraud or deceit practiced upon her by some of the beneficiaries thereunder, or by the coercion of her will by some of such beneficiaries; and the evidence of such fraud or deceit or coercion must be sufficient to satisfy the minds of the jury that at the time she executed the will she was controlled by such fraud or deceit or such coercion, and thereby compelled to sign a will which she would not have signed but for such fraud or deceit or coercion.

(c) If the jury believe from the evidence that Mrs. K., the testatrix, requested C., the proponent, in the month of ———, ———, to send the witness, R., to her with the will which she had signed the day preceding; that said C. delivered said message; that thereupon the said R., procured the said will and carried it to testatrix; that she thereupon, while in the presence of R. alone, directed him to draw up a codicil to her will, disposing of the storehouse and lot on C. street in the manner in which it is disposed of by said codicil; that said R., after receiving such instructions, went to his office and prepared said codicil given in evidence; that some time thereafter he carried the same to the testatrix and read it over to her; that she thereupon did sign the same, and it was attested by the persons whose names appear thereto as witnesses in her presence, then the jury must find the issue in favor of the proponent and admit such codicil to probate, unless the evidence satisfies the minds of the jury that the testatrix was induced at the time she signed said will to sign the same by some fraud or deceit practiced upon her by the beneficiaries under the said codicil or by some of them, or unless the jury are satisfied from the evidence that she was induced to sign the said codicil at the time she signed it by some coercion exercised over her by said beneficiaries or some of them.

(d) Undue influence, to justify the jury in finding a verdict against the probate of the will, must have operated upon the mind of the person executing the will at the very time at which the same was signed by her or him. Although the jury may believe that the beneficiaries under the will now offered for probate, or some of them, exercised undue influence over the testatrix, Mrs. K., unless they are satisfied from the evidence that it operated on her mind at the time she signed said will and codicil, and controlled her in signing such will and codicil, then the jury must find a verdict for the proponent on the issue of undue influence.<sup>40</sup>

§ 4304. **Parent and Child.** (a) If you find that one L. T. was the son of said J. T. and that he died intestate in ——— Co., Iowa, before the death of J. T.; and if you find that contestant is and was

40—*Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459 (465, 472).

"These charges exact too high a degree of proof, in requiring the verdict to be based upon evidence which 'satisfies' the minds of the jury, and were properly refused for this reason. They are also misleading, since they seem to require affirmative evidence of undue influence,

whereas, if the existence of confidential relations, and activity in and about the preparation or execution of the will, should be found from the evidence, the law would presume undue influence without any affirmative evidence of the fact, and the burden would be on the proponent to rebut the presumption. *Higginbotham v. Higginbotham*, 106 Ala. 314 (318), 17 So. 516."

the only child of L. T.; and if you further find that said L. T. was a favorite son of J. T. up to the death of said L. T., and if you also find that contestant had the affection and love of J. T. up to the time of the execution of the alleged will; and if you further find that said contestant is, and at the execution of said writing was a minor, poor and needy, and unable to earn her own living; and if you also find that her mother, the widow of said L. T., if such the fact is, and was at the execution of the alleged will also poor; and if you find that the living sons of J. T., the beneficiaries of his alleged will, were less needy than contestant and better able to earn their respective livings than contestant; and if you find that J. T. at the time he made the alleged will, and at the time of his death was a man of considerable property; and if, from all these circumstances if they have been shown or if, from the facts and circumstances in evidence you will find that the alleged will is unreasonable, under the circumstances, in making no provisions therein for contestant—then the unreasonableness of said alleged will is a circumstance which it is proper for you to consider and weigh, in connection with all the other facts and circumstances in evidence when you come to pass on the question of undue influence, and it is your province to say what weight the combined circumstances shall have.<sup>41</sup>

(b) Suppose that while the testator and his daughter K. were not at a good understanding, and that the proponents, or their mother, took advantage of this difficulty, and got the testator to make his will so that the daughter would be left out, thereby destroying his will, this would be undue influence; and if the will was executed under this undue influence, your verdict will be for the contestant.<sup>42</sup>

§ 4305. **Husband and Wife.** The fact that a short time before the execution of the proposed will the wife of the testator conveyed all her property to him and that testator at the time of the execution of the proposed will stated to the party who drew the will that his wife had deeded to him all her property, and in consideration therefor he had promised to will her all his property. This, you are instructed, is entitled to much consideration in determining the justness, reasonableness or unreasonableness of the will, and is also a circumstance which it is proper for you to consider in determining the mental capacity of the testator at that time.<sup>43</sup>

41—Smith v. James, 72 Ia. 515, 34 N. W. 309.

"We think it was erroneous in that it permits the jury to find from the facts therein recited that undue influence was used. Such is not the law. Denning v. Butcher, 91 Ia. 425, 59 N. W. 69."

42—Higginbotham v. Higginbotham, 106 Ala. 314, 17 So. 516 (517).

"That part of the court's charge given *ex mere motu* to the jury, to which an exception was reserved, is erroneous. The form of expression is open to criticism on the score of tending to impress the jury that the court believes the facts hypothesized to be true or assumes their truth. And beyond this, the instruction is affirmatively bad in that all the influence hypothesized does not

necessarily amount to coercion or fraudulent subornation of the testator's will. The proponents and their mother may 'have got the testator to make his will so that the daughter would be left out,' without having at all resorted to undue influence in the sense of the law."

43—In re Knox's Will, 123 Ia. 24, 98 N. W. 468 (469).

"It is said that the instruction involves error, and for three reasons: (1) Therein facts are assumed which do not appear in evidence;

(2) The jury was told in effect, that what was stated by the testator to the party who drew the will might be accepted as sufficient to establish the matters of fact referred to in the statement made;

(3) The court invaded the province of the jury in assuming to de-



§ 4306. **Influence in Bringing about the Marriage Not to Be Considered.** If the jury shall find upon the evidence that the relation of man and mistress existed between the testator and A. B. up to the date of the marriage, and if they shall believe upon the evidence that the marriage was brought about for the purpose of unduly influencing the testator to make a will in favor of A. B., or in accordance with A. B.'s desire, the jury will be justified in rendering a verdict that the will was obtained by undue influence.<sup>44</sup>

§ 4307. **Common Law Marriage.** (a) If the jury believe from the evidence that J. and N. agreed to live together as husband and wife and agreed to be husband and wife in the state of Ohio, then I charge you that J. and N. were husband and wife.

(b) If at the time of the marriage of E. to J. on the — day of —, you should believe from all the testimony in the case that there was a valid marriage existing between himself and N., then that would be a fraud which would vitiate the will, provided you should further believe that he deceived the said E.

(c) If the jury are not reasonably satisfied from all the evidence that said will was the free and voluntary act of E., then their verdict should be for the contestant.

(d) Before you can render a verdict at all in favor of the proponent you must be satisfied from the evidence that the testatrix, E., knew the contents of the instrument offered in evidence, and that she intended to dispose of her property in the manner set forth in said instrument; and the burden of proof is on the proponent to show this.<sup>45</sup>

termine the weight and sufficiency of the evidence. We think that each of these several contentions must be sustained. \* \* \* Conceding that the fact that a man has made a just will may properly be considered as a circumstance tending to prove sanity, nevertheless it is for the jury to say what weight should be attached to such circumstances. It was not within the province of the court to exalt the circumstance as a piece of evidence, or otherwise indicate the degree of importance that should be attached to it. *Napper v. Young*, 12 Ia. 450; *Robinson v. Ry. Co.*, 30 Ia. 401; *Muldowney v. Ry.*, 32 Ia. 176. The principle which authorizes the court in a proper case to advise the jury with reference to the relative value of certain species or classes of evidence—as that opinion evidence is of a low grade, the value of writings as opposed to oral testimony, etc.—cannot be invoked as authorizing one item of evidence to be singled out and made the subject of special commendation.”

44—*Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413 (414).

“The court rightly refused to give this instruction. Bringing about a marriage with a view to the pecuniary benefits that may flow therefrom either during the life or after the death of the one who has the most property, is no ground of invalidating a marriage, unless fraud or

force is used. Nor is every kind of fraud available for this purpose. *Reynolds v. Reynolds*, 3 Allen 605; *Foss v. Foss*, 12 Allen 26; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98. After marriage a husband or a wife may lawfully use persuasions to induce the other to make a favorable will, and such persuasions may even be proper. *Parfitt v. Lawless*, L. R. 2 Prob. & Div. 462, 470. The relations between the parties are then greatly changed, and a husband and wife lawfully married and living happily together are bound to all conjugal duties toward each other, and none the less because illicit relations may have existed between them before marriage.”

45—*Moore v. Heineke*, 119 Ala. 627, 24 So. 374 (380).

“The charge given at the request of the contestant, which asserts that J. and the alleged first wife were in fact husband and wife if they ‘agreed to live together as husband and wife, and agreed to be husband and wife in the state of Ohio,’ ignores cohabitation following the agreement as an element of a valid marriage by mere agreement without solemnization. *Ashley v. State*, 109 Ala. 48, 19 So. 917; *Mickle v. State*, — Ala. —, 21 So. 67; *Farley v. Farley*, 94 Ala. 503, 10 So. 646. But as the fact of cohabitation was not disputed, was in fact admitted, the proponent was not injured by

**§ 4308. Declarations and Previously Expressed Purposes of Testator.** In the determination of the questions submitted as to mental capacity and undue influence, you should consider the age of the testator, his physical and mental condition at and before the time the will was executed, his habits and associations, his relations to the parties in interest, his affection toward them, their claim upon his bounty, the character and extent of his property, and the disposition made of it in his will, whether such disposition was reasonable and natural or otherwise, his previous intentions as expressed by himself to others or shown by his conduct and any and all facts and circumstances shown in evidence bearing upon the question.<sup>46</sup>

**§ 4309. Admissions of a Legatee as to Suppression of Another Will.** (a) The statements and admissions of N. S., made after the death of his wife, if found by you from the evidence, are competent to show the destruction or suppression by him of a will made by J. S. after her visit to her relatives, and should be so considered by you.

(b) If you find that the beneficiary, N. S., admitted after the death of J. S. that said J. S. had made a later and different will from the one of 1886 offered for probate, and that he had suppressed or destroyed the same, then you will find against the will.<sup>47</sup>

### SPOILIATION OF WILLS.

**§ 4310. Effect of Spoliation.** You are instructed that a person presenting a mutilated will for probate assumes the burden of accounting for the mutilation by showing such circumstances as prove, by a preponderance of the testimony, that notwithstanding the changed condition of the paper, it is still the will of the maker; and if in this case proponent has failed to so account for the mutilation of the alleged will of L., then you should find that it is not her will.<sup>48</sup>

the charge. Charge (b) given at the request of the contestant should have been refused. The fact that at the time J. married testatrix he had a wife living, would not vitiate the will, unless the testatrix was deceived, and executed the will in ignorance of the fact, which the evidence fails to show. Charge (c) misplaces the burden of proof as to undue influence, and charge (d) exacts too high a degree of proof."

46—Wiltsey v. Wiltsey, 122 Ia. 423, 98 N. W. 294 (296).

"The matters referred to therein were to be considered by the jury in the issues of undue influence and unsoundness of mind. This instruction seems to run counter to the law as announced in Muir v. Miller, 72 Ia. 585, 34 N. W. 429. Prior declarations of the testator are not evidence of undue influence. Neither is his age, nor the character and extent of his property. Trotter v. Trotter, 117 Ia. 417, 90 N. W. 750."

47—Earp v. Edgington, 107 Tenn. 23, 64 S. W. 40 (43).

"Evidence of casual statements or admissions by a party, made in a casual conversation with another, is

regarded as affording weak support to that which they are adduced to prove. It is universally agreed that they are of little weight, and, unless corroborated, are to be received with caution. Wittick's Adm'r. v. Keiffer, 31 Ala. 199; Richmond & D. R. R. Co. v. Kerler, 88 Ga. 39, 13 S. E. 833; Becker v. Crow, 7 Bush. 198; Prater v. Frazier, 11 Ark. 249; Haven v. Markstrum, 67 Wis. 493, 30 N. W. 720. In the case at bar, after a careful reading of the testimony of this witness, we are satisfied that it is subject to great suspicion. So that, if the trial judge had called the attention of the jury to these alleged admissions, it would have been his duty to have admonished them of their inherent probative weakness. The special requests were properly declined, failing, as they did, to embody any limitation or qualification as to such evidence."

48—Webster v. Yorty, 194 Ill. 408 (414-415), 62 N. E. 907.

"This instruction directed the jury to find against the will unless the proponent proved by a preponderance of the testimony that notwithstanding the changed condition

of the paper, it was still the will of the maker. \* \* \* An inspection of the instrument itself may throw suspicion and distrust upon it, but the question is one of fact and not of law. \* The law indulges no presumption as to the condition of an instrument when it is executed, or whether there has been a subsequent

change. In determining the question of fact the jury might consider the appearance of the will in connection with the relations of the parties to it and their interest in what has been done, and all evidence and circumstances relating to it. \* \* \* The law raises no presumption on the subject."



## CHAPTER CLXVI.

### MISCELLANEOUS—CIVIL.

See Approved Instructions, Chapter LXXXV, Vol. II.

- § 4311. Civil action in case for conspiracy to injure plaintiff—  
Recovery may be had  
against one alone.  
§ 4312. Insolvency defined.  
§ 4313. Diligence required by sheriff  
in making levy.

- § 4314. Malicious mischief—Claim of  
possession must be in good  
faith—Probable cause of  
arrest, question for jury.  
§ 4315. Marriage license — Action  
against judge for issuing  
it.

**§ 4311. Civil Action in Case for Conspiracy to Injure Plaintiff—Recovery May be Had Against One Alone.** (a) The court instructs the jury as a matter of law that the plaintiff must prove by a preponderance of the evidence that there was a conspiracy entered into between A. B. & C., the defendants in this case, to do an unlawful act whereby the plaintiff was injured, in order to entitle the plaintiff to any recovery. And the court instructs the jury that if it does not believe, from the evidence, that such a conspiracy was formed between those parties to do an illegal act which resulted in the injury of the plaintiff as charged in the declaration, your verdict should be for the defendants.

(b) The court further instructs the jury that it is necessary for the plaintiff in order to recover to have shown by a preponderance of the evidence that each of the defendants were guilty of the wrongful acts charged in the declaration, or that those acts were done by the combination and agreement between each of the parties to do or cause the same to be done, as charged in the declaration.<sup>1</sup>

(c) The court instructs the jury if a conspiracy be proved and the evidence connects but one defendant with the wrong actually com-

1—Martin v. Leslie, 93 Ill. App. 44 (53).

"The first of these instructions tells the jury in effect that there must be a recovery against all or none, and the second tells them that, before the plaintiff can recover, he must prove his case against each of the defendants. The law is in our opinion that if the conspiracy alleged is proven, and a wrongful act done pursuant thereto by either, any number or all of the defendants resulting in damage to the plaintiff, there may be a recovery against either, any number or all of such defendants. The wrong is the gist of the action when damage results, not the conspiracy. But in an action on the case, though a conspiracy is charged as to several and

is not proven, still if the evidence connects one of the defendants with the wrong alleged and actually committed resulting in damage to the plaintiff, there may be a recovery against him alone. Cooley on Torts, 142 *et seq.* and cases cited; Jones v. Baker, 7 Cowen 445-448; Hutchins v. Hutchins, 7 Hill 104-107, and cases cited; Laverty v. Vanarsdale, 65 Pa. St. 507; Goring v. Fraser, 76 Me. 37-41, and cases cited; Place v. Minister, 65 N. Y. 90-95; Parker v. Huntington, 3 Gray 124-127, and cases cited; Doremus v. Hennessy, 62 Ill. App. 391-402, *aff'd*. 176 Ill. 608-614, 52 N. E. 924, 54 N. E. 524, 68 Am. St. 203, 43 L. R. A. 797; Kimball v. Harman, 34 Md. 408, 60 Am. Rep. 330; Bush v. Sprague, 31 Mich. 41-48, 18 Am. Rep. 142."

mitted in pursuance of the conspiracy, the plaintiff may recover against him as if he had been sued alone.<sup>2</sup>

§ 4312. **Insolvency Defined.** A man is said to be insolvent when his property cannot be made to respond to his debts.<sup>3</sup>

§ 4313. **Diligence Required of Sheriff in Making Levy.** You are instructed that by ordinary diligence, as used in these instructions, is meant that degree of care and attention which, under the same circumstances, a man of ordinary prudence and discretion would ordinarily use in reference to the particular matter in question if it were his own affair.<sup>4</sup>

§ 4314. **Malicious Mischief—Claim of Possession Must be in Good Faith—Probable Cause of Arrest, Question for Jury.** (a) If the jury believe from the evidence in this case that the defendant knew, or had good reason to know, that the plaintiff was in possession of the real estate and personal property which it was charged he maliciously injured, claiming to own the same at the time the criminal charge was alleged to have been committed, then there was no probable cause for the prosecution.

(b) The jury are instructed as a matter of law, that a person who is in possession of property, claiming to be the owner of the same, can not be guilty of malicious mischief in destroying such property, nor can he be guilty of larceny in regard to such property.<sup>5</sup>

2—Martin v. Leslie, supra.

"This instruction was erroneous in that it assumed that a wrong was actually committed. As an abstract proposition of law, we are inclined to think the instruction is correct, but the assumption referred to was calculated to mislead the jury."

3—Hudson v. Bauer Grocery Co., 105 Ala. 200, 16 So. 692 (696).

"When referred to the facts of this case, the oral instruction above given is not erroneous, however it might be as a general proposition. No matter how much property H. may have had, if it was so held as that his creditors could not reach it, and, concealing this fact from the plaintiff, he bought the goods in question, having an intention not to pay for them, this is as much a fraud on the seller as if he had had no property at all, since though having property he will not, and the seller cannot force him to, apply it in payment of the price of the goods."

4—Gilbert v. Gallup, 76 Ill. App. 526 (530).

"This can only mean that 'ordinary diligence,' which the law required of the sheriff, is such as a man of ordinary prudence and discretion would exercise, if he were the plaintiff in the execution. A man of ordinary prudence might, and ordinarily does, exercise greater diligence when his own pecuniary interest is at stake, than he would exercise, or be required to exercise, if he were acting as an impartial and personally disinterested public officer. A man of ordinary prudence and discretion might, if he were plaintiff in the suit, spend money in

endeavoring to ascertain whether the defendant had property; he might employ a detective to dog his steps and pry into his affairs; he might consult the tax lists to ascertain if he had assessable property and how much; none of which things is the sheriff required to do. The sheriff is not required by law to act as if he were plaintiff in the suit. On the contrary, the statute recognizes that one thus interested might be oppressively zealous, and expressly provides that when the sheriff, or his deputy, is a party to a case, or interested therein, or is of kin, or partial to, or prejudiced against either party, the process shall be directed to the coroner and the latter shall perform the duties of the sheriff in the case. 1 S. & C. Stat. 980, § 10. A sheriff is only bound to exercise reasonable diligence. Hargrave v. Penrod, Breese 401; Dunlap v. Berry, 4 Scam. 327; Crosby v. Hungerford, 59 Ia. 712."

5—Wilmerton v. Sample, 39 Ill. App. 60.

"This instruction (a) is open to two objections. The jury are told that if the plaintiff was in possession of the property, claiming it, then there was no probable cause for the prosecution without reference to the fact whether appellee was claiming in good or bad faith. The mere possession and claim of ownership in property is not of itself conclusive of his right to it as against a better or rightful owner, nor as against such better title, authorizes him to destroy it. Such possession and claim of ownership must be made in good faith and in an honest and reasonable belief that

**§ 4315. Marriage License—Action Against Judge for Issuing It.** If you believe from the evidence that the defendant was led to believe, and actually believed, that the father, S. W., consented to said marriage, or to the issuance of the license, then the plaintiff cannot recover in this case.<sup>6</sup>

it is his own property and that he has a right to injure or destroy it. After announcing this erroneous principle of law the court then declares, as a matter of fact, that if such claim was made then there was no probable cause for such arrest. Whether the facts all considered or any of them furnished ground for believing there was probable cause for the arrest, was for the jury and not the court. This instruction was highly prejudicial to the defendant, and well nigh took the case from the jury. What we have said in discussing the thirteenth (a) instruction, applies equally to this (b). It was error to give it.

Before passing from the consideration of these instructions, we can not forbear expressing our strong and emphatic disapprobation of giving to the jury such a heterogeneous mass of ill digested and multifarious instructions. Instead of instructing the jury upon the very few and very plain principles of law involved in the case, they could scarcely fail to mislead and confuse the jury. Such practice scarcely ever fails to result in error. The

court has ample power to protect itself from such abuse and should not hesitate to do so."

<sup>6</sup>—Willis v. Byrne, 106 Ala. 425, 17 So. 332.

"The consent of a parent or guardian that a license may be issued for the marriage of a minor is a consent preceding or attending the issue of the license. It may be expressed to the judge of probate personally or communicated to him in writing. Code, § 2315. If it is not in either of these modes expressed, but was in fact given, the statutory penalty is not now recoverable. Code, § 2319. But it must have been given in point of fact. If it was not given, however, the judge of probate may have been misled or deceived as to the fact by others than the parent or guardian, the statutory penalty is recoverable. The judge can readily protect himself by requiring the consent to be expressed to him personally or communicated to him in writing. It is his own fault or misfortune if he is misled or deceived by information derived from others. It is obvious the circuit court erred in the instructions given the jury."



## PART V.

### ERRONEOUS INSTRUCTIONS—CRIMINAL.

#### CHAPTER CLXVII.

##### CRIMINAL—IN GENERAL.

##### ALIBI—ARREST—ATTEMPT TO ESCAPE—FLIGHT.

See Approved Instructions, Chapter LXXXVI, Vol. II.

###### ALIBI.

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| <p>§ 4316. Definition of alibi—The necessary distance from the place of action.</p> <p>§ 4317. Whether alibi should cover whole period of transaction—Need not be proved to the satisfaction of the jury.</p> <p>§ 4318. Defendant could not with ordinary exertion have reached the place where the crime was committed—When defense is entitled to consideration.</p> <p>§ 4319. An alibi must be established by a preponderance of the evidence, but if it falls short of this it is nevertheless to be considered with the other evidence upon which to base a reasonable doubt.</p> <p>§ 4320. Duty to acquit if reasonable doubt exists.</p> | <p>§ 4321. Discrediting the defense of an alibi or evidence in support of it is error.</p> <p>§ 4322. Weight or sufficiency of testimony as to alibi—Singling out defense of alibi.</p> <p style="text-align: center;">ARREST.</p> <p>§ 4323. Right of officer to arrest—Self-defense — Believing conspiracy between union miners.</p> <p>§ 4324. Right of officers to arrest without warrant—Whether crime committed in presence of officer.</p> <p>§ 4325. Illegal arrest.</p> <p style="text-align: center;">ATTEMPT TO ESCAPE—FLIGHT.</p> <p>§ 4326. Flight not evidence of guilt, but as tending to prove guilt.</p> <p>§ 4327. Flight as evidence of guilt—Voluntary surrender for trial.</p> <p>§ 4328. Fleeing from other reasonable motives — Argumentative.</p> |
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###### ALIBI.

§ 4316. **Definition of Alibi—The Necessary Distance from the Place of Action.** (a) The court instructs the jury that the defendants claim as a part of their defense what is known as an alibi; that is, at the time the crime with which they stand charged was being committed, that they were at such a distance and different place that they could not have participated in its commission. The defense of alibi, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused were at another place, so far away and under such circumstances that they

could not, with ordinary exertion, have reached the place where the crime was committed. Proof of an alibi must be sufficient to raise in your minds a reasonable doubt of the defendants' presence at the time and place of the commission of the crime charged.<sup>1</sup>

1—*Peyton et al v. State*, 54 Neb. 188, 74 N. W. 597 (598).

"An 'alibi' in criminal law is defined in Black's Law Dictionary as follows: 'Elsewhere; in another place. A term used to express that mode of defense to a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime with which he is charged, offers evidence to show that he was in another place at the time; which is termed setting up an alibi.' And in 2 Am. & Eng. Enc. Law (2d Ed.), p. 53: 'The word 'alibi' means, literally, 'elsewhere,' and a prisoner or accused person is said to set up an alibi when he alleges that, at the time when the offense with which he is charged was committed, he was 'elsewhere,' that is, in a place different from that in which it was committed.' The trial court made use of the words 'at such distance and different place that they could not have participated in' the commission of the crime, in defining an 'alibi.' The expression as to the element of distance was an incorrect one. That parties charged with acts constituting a crime were at a place other than that of the alleged acts embraces necessarily, as elemental of its existence of a fact, that they were also at some distance from the alleged place of the commitment of the crime. But that the distance disclosed by the evidence be long or short is not always an absolutely controlling fact. It can do no more than to lend greater or lesser countenance and force to the defense, in a degree proportionate to its extent. That the distance must be such as to preclude any possibility of a participation in the crime, as expressed in the instruction quoted, was incorrect, conveyed a wrong impression, and was calculated to prejudice the rights of the parties on trial.

"What we have just said is equally forcible and applicable to the portion of the instruction in which the jury was told that the defense presented, to be entitled to consideration, must establish that when the crime was committed the accused were so far away, and under such circumstances, that they could not, by ordinary exertion, have reached the place of the crime. This was wrong in its absolute requirement that it be shown that the place where plaintiffs in error claimed to have been, other than that of the crime, was so far distant from the latter that the parties charged could not, by any ordinary exertions, have been at the latter place.

"The instruction was also objectionable for casting the burden of proof of the alibi on the plaintiffs

in error. In regard to the burden of proof, generally, in criminal cases, it was stated in *Gravely v. State*, 38 Neb. 871, 57 N. W. 751; 'In criminal prosecutions, the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt, beyond a reasonable doubt.' 'This rule applies, not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify the act charged.' See citations in the body of the opinion, 38 Neb. 873, 57 N. W. 752. It was said by Maxwell, C. J., in *Burger v. State*, 34 Neb. 397, 51 N. W. 1027. 'An instruction that 'if you find the defendants tendered a reasonable doubt' is erroneous, as it in effect shifts the burden of proof on to the accused. The true rule is that if, upon all the evidence, the jury entertain a reasonable doubt of the guilt of the accused, they should acquit.' In *Casey v. State*, 49 Neb. 403, 68 N. W. 643, directly on the subject of the defense of an alibi, it was held: 'It is error to instruct that the accused in a criminal prosecution is required to prove an alibi. It is sufficient to entitle him to an acquittal if the jury, from a consideration of all of the evidence, entertain a reasonable doubt of his presence at the commission of the crime charged, whether such doubt arise from a failure of proof on the part of the state, or from evidence submitted by the accused in his own behalf.' In the body of the opinion it was stated: 'There are, it must be confessed, precedents for the instructions complained of, but the sound rule is believed to be that the accused in a criminal prosecution is entitled to an acquittal whenever the jury, from a consideration of all of the evidence adduced, entertain a reasonable doubt of his presence at the time and place where the crime is shown to have been committed.' In the opinion in the case of *Henry v. State*, 51 Neb. 149, 70 N. W. 924, 66 Am. St. 450, appears the following statement: 'We are also of the opinion that the court erred in giving instructions Nos. 10 and 11, by which the burden was imposed upon the accused of proving his presence in F. county for such length of time that it was impossible for him to have been present at the commission of the homicide. It follows logically, if not necessarily, from the decisions of this court, that the proof of an alibi is not required to cover the entire period within which

(b) That one of the defenses interposed by the defendant is what is known in law as an alibi,—that is, that the defendant was at another place at the time of the commission of the crime charged in the information,—such a defense is as proper and as legitimate, if proved, as any other, and all the evidence bearing on that point should be carefully considered by the jury; and in this connection you are further instructed, as a matter of law, that where the state makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence of an alibi, the burden is upon the defendant to prove this defense by a preponderance of the evidence; and when the proof is in, the question for you to determine, from all the evidence, both that given for the state and for the defendant, is, is the defendant guilty beyond a reasonable doubt, as charged in the information? And if from all the evidence on the part of the state and upon the part of the defendant, touching the question of an alibi, then, if you have any reasonable doubt of the guilt of the defendant in this case as he stands charged in the information, your verdict should be not guilty.<sup>2</sup>

§ 4317. **Whether Alibi Should Cover Whole Period of Transaction—Alibi Need Not Be Proved to the Satisfaction of the Jury.** (a) The court instructs the jury that in this case, what in law is known as an alibi—that is, that the defendant was at another place at the time it is claimed the offense was committed—is, in part, relied on by the defendant. To render the evidence of an alibi satisfactory it must cover the whole time of the transaction in question, so as to render it impossible that the defendant could have committed the act.<sup>3</sup>

the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged.' See also *McLain v. State*, 18 Neb. 154, 24 N. W. 720; *Beck v. State*, 51 Neb. 106, 70 N. W. 498; *State v. Child*, 40 Kan. 482, 20 Pac. 275."

2—*Beck v. State*, supra.

"It will be observed that this instruction, among other things, told the jury that, with regard to an alibi, 'the burden is upon the defendant to prove this defense by a preponderance of the evidence.' This was error. *Casey v. State*, 49 Neb. 40, 68 N. W. 643; *Gravely v. State*, supra. It is suggested that the instruction as a whole states the law correctly. It is true that in another part of the instruction it is said that if from all the evidence, including that relating to the alibi, there is any reasonable doubt of the guilt of the defendant, he should be acquitted. But the most that can be said is that the instruction in its different parts is conflicting. An inaccurate or incomplete instruction may be cured, if by reference to the rest of the charge the defect is supplied or the law accurately stated. But an absolute misstatement of the law is not cured by a correct statement elsewhere in the charge. Was-

*son v. Palmer*, 13 Neb. 376, 14 N. W. 171; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271; *Barr v. State*, 45 Neb. 458, 63 N. W. 856."

3—*Briggs v. The People*, 219 Ill. 343, 16 N. E. 499.

In this case the court said that the objection urged against the instruction was that it required the proof "of an alibi to be satisfactory to the jury, whereas the law is, that if such proof is sufficient to raise a reasonable doubt in the minds of the jury it is sufficient; also that it is subject to the objection that it required the defendant to prove that he was at another place during the whole of the time of the killing, so as to render it impossible that the defendant could have committed the act. In answer to these criticisms it is said the instruction is in no sense directed to the measure of proof of an alibi, but its purpose was to define that defense and in support of the position the case of *Creed v. People*, 81 Ill. 565, is cited. It must be conceded that this decision in the main sustains the contention of counsel, though in that case the instruction passed upon only required proof of the alibi 'to render it impossible or very improbable that the defendants, or any of them, could have committed the act.' In the later case of *Hoge v. People*, 117 Ill. 35, 6 N. E. 796, the language of an instruction was: 'The law is that the burden of proving an



(b) The court instructs you that you should indulge in no prejudice against an alibi as a defense, for the reason that, if it is clearly established by intelligent and reliable witnesses, it is a legal and complete defense.<sup>4</sup>

(c) When an alibi is established by the evidence to the satisfaction of the jury, it is conclusive evidence of the innocence of the person accused; and in the case at bar, if you find from the evidence and are satisfied that the defendant, A., was not present at the time and place the deceased was killed, you should find a verdict of not guilty.<sup>5</sup>

alibi devolves upon the accused, and it must be clearly and satisfactorily established before it can avail, where the evidence otherwise makes a clear case against the accused.' In passing upon it this court said, speaking through the late Justice Schofield (p. 44): 'To require the defendant to satisfactorily explain his recent possession of the stolen property and to satisfactorily establish an alibi before it can avail, is imposing a burden on him but little short of convincing the jury beyond a reasonable doubt (Herrick v. Gary, 83 Ill. 85), whereas the burden is upon the people to establish his guilt; and if, after considering the evidence introduced by him as to either or both of these questions, in connection with all the other evidence in the case, and giving due consideration to the entire evidence, the jury shall have a reasonable doubt of the defendant's guilt he cannot be convicted.'

"The authorities generally are not harmonious as to the correctness of the instruction here in question. While a lawyer might understand it as in no way directed to the measure of proof required to establish an alibi, but as simply an attempt to define that defense, it seems apparent to us that the jury would be very liable to construe it differently. In other words, an ordinary jury, following the instruction, might well conclude that there was evidence tending to prove an alibi as defined in the instruction, and yet that such evidence was not sufficient to satisfactorily establish that fact. In the case of Herrick v. Gary, cited in the opinion in Hoge v. People, supra, an instruction on behalf of defendant stated that 'in order to recover in this case the plaintiff must show by the evidence in the case, to the satisfaction of the jury,' etc., and it was said by Breese, J. (p. 89), 'The objection to this instruction is manifest. The first branch of it places the standard of the degree of proof required higher than the law demands in controversies of this character. It is enough that the jury shall believe, from the evidence, that the essential facts are true. The jury may so believe, although the same may not be shown by the evidence to the satisfaction of the jury. This instruction requires not

merely that the evidence shall produce belief in the minds of the jury of the facts alleged, but that such belief shall be so strong as to be satisfactory. This is, perhaps, not quite so strong as to require a belief beyond a reasonable doubt, but it approximates it, and which is only required in criminal cases. The mind cannot well be said to be satisfied as to a given proposition so long as such matter remains at all in doubt.' So, here the instruction not only required the jury to believe the testimony to prove the alibi, but that such evidence, to avail the defendant, must be satisfactory,—at least the instruction is liable to that interpretation and therefore to mislead the jury. We also think, especially in view of the facts of the case, that the instruction is too strict in requiring the proof to cover the whole of the time of the commission of the crime, so as to render it impossible that the defendant could have committed it. We think an instruction defining the defense of alibi would be sufficient and proper if it simply stated, to render the defense of alibi available the proof must cover the whole of the time of the commission of the crime, so as to render it impossible, or highly improbable, that the defendant could have committed the act. It is true in this case the court instructed the jury properly that if, considering all the evidence, including that of the alibi, the jury had a reasonable doubt of the defendant's guilt, they should acquit him, and if the only grounds of reversal were the giving of the instruction objected to we should hesitate to reverse the conviction."

4—State v. Sepult, 81 Ia. 40, 46 N. W. 748 (749).

The court said "it is not necessary to acquittal that an alibi should be clearly established. It is sufficient if it is established by a preponderance of evidence. State v. Red, 53 Ia. 69, 4 N. W. 831; State v. Hamilton, 57 Ia. 596, 11 N. W. 5; State v. Maher, 74 Ia. 77, 37 N. W. 2; State v. Reed, 62 Ia. 40, 17 N. W. 150; State v. Rivers, 68 Ia. 611, 27 N. W. 781."

5—Adams v. State, 34 Fla. 185, 15 So. 905 (909).

"This clause of the charge upon the question of an alibi is decidedly

(d) The court instructs you that the defendant to establish an alibi, must not only show that he was present on the south side of the R. River, between the towns of F. and G. in F. county, state of Nebraska, at the time when the murder was committed at B. post office, J. county, Nebraska, but also that said defendant was at some point between the said towns of F. and G. in F. county, Nebraska, such a length of time that it would be impossible for him to have been at B. post office, J. county, Nebraska, where the murder was committed.

(e) That a defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed.<sup>6</sup>

(f) The jury were instructed that to make the defense of an alibi available as a perfect defense, the evidence of its existence must cover the whole time when the presence of the defendant was required to commit the criminal act.<sup>7</sup>

**§ 4318. Defendant Could Not, with Ordinary Exertion Have Reached the Place Where the Crime Was Committed—When Defense Is Entitled to Consideration.** The court instructs the jury that one of the defenses relied upon by the defendant is that of alibi. You are further instructed that, although you may believe, from the evidence, that the movements of the defendant may have been accounted for at some part or portion of the time before and at the commission of the crime charged in the indictment, still, before this defense is entitled to consideration, it must appear that at the very time of the commission of the crime charged in the indictment the defendant was at another place so far away or under such circumstances that he could not, with ordinary exertion, have reached the place where the crime of the burglary was committed, so as to have participated therein.<sup>8</sup>

faulty in requiring the evidence of the alibi to satisfy the jury that the accused was not present at the time and place."

6—*Henry v. State*, 51 Neb. 149, 70 N. W. 924 (1925), 66 Am. St. 450.

The court said: "We are of the opinion that the court erred in giving the above instructions, by which the burden was imposed upon the accused of proving his presence in F. county for such a length of time that it was impossible for him to have been present at the commission of the homicide. It follows logically, if not necessarily, from the decisions of this court, that the proof of an alibi is not required to cover the entire period within which the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged. *McLain v. State*, 18 Neb. 154, 24 N. W. 720; *Casey v. State*, 49 Neb. 403, 68 N.

W. 643. See also *Kaufman v. State*, 49 Ind. 248; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *Pollard v. State*, 53 Miss. 410, 24 Am. Rep. 703; *State v. Jaynes*, 78 N. C. 504; *Albritton v. State*, 94 Ala. 76, 10 So. 426; *Caffey v. State*, 94 Ala. 76, 10 So. 426; *Bennett v. State*, 30 Tex. App. 341, 17 S. W. 545; *Beck v. State*, 51 Neb. 106, 70 N. W. 498."

7—*Adams v. State*, 34 Fla. 185, 15 So. 905.

"The last clause of this charge," the court said, "would more accurately express the law as to the time to be covered by the proof of the alibi by the addition thereto of the following: 'Or it should locate the accused at some other point, at such a time, either before or after the commission of the crime, as made it impossible for him to be present at its commission.'"

8—*Waters v. People*, 172 Ill. 367 (373), 50 N. E. 148.

"The use of the words 'before this defense is entitled to consideration' took away the right of the jury to consider this testimony and was prejudicial."

§ 4319. **An Alibi Must Be Established by a Preponderance of the Evidence, but if It Falls Short of This It Is Nevertheless to Be Considered with the Other Evidence upon Which to Base a Reasonable Doubt.** One of the defenses interposed by the defendant in this case is what is known in law as an alibi; that is, that the defendant was at another place at the time of the commission of the crime alleged, and you are instructed that such a defense is as proper and as legitimate, if proved, as any other, and all the evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defendant the benefit of the doubt, and acquit him.<sup>9</sup>

§ 4320. **Alibi—Burden of Proof—Duty to Acquit if Reasonable Doubt Exists.** (a) Where an alibi is set up, the burden of proof is on the defendants. But the defendant or defendants are not bound to prove it beyond a reasonable doubt; but if the evidence offered by defendants, or either of them, to establish an alibi, taken in connection with all the testimony in the case, raises a reasonable doubt in your minds of the presence of the defendants, or either of them, at the commission of the crime, then it will be your duty to acquit all or such of the defendants as you so believe not to have been present at the commission of the crime.<sup>10</sup>

(b) If the jury entertain any reasonable doubt as to whether or not the defendant was at his own home, or at the scene of the alleged offense at the time such offense was committed, then it is your duty under the law to acquit him.<sup>11</sup>

9—State v. Worthen, 124 Ia. 408, 100 N. W. 330 (332).

"There was evidently a misuse of language in this instruction, for the thought of the court clearly was that, if there was a reasonable doubt as to whether the defendant was present at the time and place and when and where the crime was committed, they should acquit; and it must have been so understood by the jury. But, however it may have been understood in this respect, it was not prejudicial to the defendant, because it, in effect, directed the jury to acquit if there was a reasonable doubt of the defendant's being present when the crime was committed, and this was favorable to the defendant. The rule is that an alibi as a direct issue must be established by a preponderance of the evidence. State v. Hamilton, 57 Ia. 596, 11 N. W. 5; State v. McGarry, 11 Ia. 709, 83 N. W. 718. But, if the evidence in support thereof falls short of this, it is nevertheless to be considered by the jury, and if, upon the whole case, including the evidence of an alibi, there is a reasonable doubt of the defendant's guilt, there should be an acquittal. It is apparent, therefore, that the defendant cannot justly complain of the instruction. An instruction advised the jury to scan the evidence of an alibi with care and attention. It is a stock instruction, which has been often approved by this and

other courts. State v. Blunt, 59 Ia. 468, 13 N. W. 427; State v. Rowland, 72 Ia. 327, 33 N. W. 137."

10—Garcia v. State, 34 Fla. 311, 16 So. 223 (231).

The court held the latter part of this charge to be misleading and objectionable. "In any future trial, the latter portion, reading thus, 'as you so believe not to have been present at the commission of the crime,' should be omitted. In their place should be the words 'to whom such reasonable doubt applies.' Murphy v. State, 31 Fla. 166, 12 So. 453." In that case the following instruction on alibi was approved:

"Proof of an alibi is sufficient to acquit if it, considered in connection with all the testimony, raises a reasonable doubt in the minds of the jury of the presence of the accused at the commission of the crime. It is not necessary that it should satisfy the jury that he was not so present."

11—Carlton v. The People, 150 Ill. 181 (189), 27 N. E. 244.

"Such an instruction," said the court, "was held to be incorrect in Mullins v. The People, 110 Ill. 42. The reasonable doubt of guilt, which will acquit the prisoner, when his defense is an alibi, is the doubt, which arises from a consideration by the jury of all the evidence, 'as well that touching the question of the alibi, as the criminating evi-



§ 4321. **Discrediting the Defense of an Alibi or Evidence in Support of It Is Error.** (a) The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing, as it does, that the party asserting it could not have been present at the time of the homicide, and therefore did not participate in it. It is, when credited, a defense of the most conclusive and satisfactory character. The fact, however, which experience has shown that an alibi, as a defense, is capable of being, and has been occasionally, so successfully fabricated that, even when wholly false, its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance. There are considerations attendant upon this defense, which call for some special suggestions upon the part of the court. These are that while you are not to hesitate at giving this, as a defense, full weight,—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitled the defendant to an acquittal,—still you are to scrutinize the testimony offered in support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you.<sup>12</sup>

(b) The defendant pleads specially an alibi. He has attempted to prove that he was not present at the place where the crime was committed.<sup>13</sup>

(c) The court instructs the jury that, though an alibi may be a

dence, introduced by the prosecution.”

In *Legen v. State*, 111 Tenn. 368, 77 S. W. 1061, 102 Am. St. 781, the court said that the “rule on this subject as laid down in *Davis v. State*, 5 Baxt. 617; *Wiley v. State*, Id. 662, and *Jefferson v. State*, 3 Tenn. Cas. 330, and approved in many other cases, is that, ‘where the proof fairly raises the defense of an alibi, the jury should be instructed that if this proof, in connection with the other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the homicide, or at a different place, the defendant should be acquitted.’ As has been said, ‘This is a sound rule, and ought to be given to the jury in direct and unequivocal language.’ It can be admitted and considered for what it may be worth. If it renders it very improbable that defendant could have been present, it should be considered, in connection with the other evidence in the case, in determining whether or not there is a reasonable doubt of defendant’s guilt.”

12—*Henry v. State*, 51 Neb. 149, 70 N. W. 924 (1925), 66 Am. St. 450. “The above instruction would, it is conceded, be defensible in those jurisdictions where it is permissible, in charging the jury, to comment upon the evidence. But that it is within the province of the judge under our practice, by means of cau-

tionary instructions, to discredit a particular defense or the evidence in support of a particular proposition, we cannot admit, since witnesses are by no known rule of law or logic presumed to be less truthful simply because they testify concerning an alibi. In *Sater v. State*, 56 Ind. 378, it is said of an instruction of similar import that, ‘taken altogether, it tends too strongly to cast suspicion upon an alibi as a defense, and to prejudice the minds of the jury against such defense. It seems to have been intended, too, by it to lay down a more rigorous rule for the consideration of evidence tending to prove an alibi than was required as to the other evidence in the cause.’ See also to the same effect *Line v. State*, 51 Ind. 172; *Spencer v. State*, 50 Ala. 124; *Simmons v. State*, 61 Miss. 243; *Nelms v. State*, 53 Miss. 362; *Dawson v. State*, 62 Miss. 241; *Murphy v. State*, 31 Fla. 166, 12 So. 453; *People v. Kelly*, 35 Hun. 295.

13—*Kimbrough v. State*, 101 Ga. 583, 29 S. E. 39.

“While, no doubt, the court did not intend to express any opinion upon the evidence offered by the accused, the language above quoted would necessarily discredit his defense. The injurious effect of this charge was not remedied by an additional instruction, that, if the jury believed the ‘plea of alibi,’ they were not authorized to convict.”

well-sworn defense, yet it is a legal one, to the benefit of which the defendant is entitled.<sup>14</sup>

§ 4322. **Weight or Sufficiency of Testimony as to Alibi—Singling Out Defense of Alibi.** (a) The evidence produced to establish an alibi should be cautiously received, though, when proved, it is as strong as any other defense. You must be the sole judges of the weight to be given to the testimony, and, in determining the weight to be given to it, you should take into consideration the interest any witness may have in the issues of this case, the manner in which they have testified, and all the circumstances surrounding their testimony; and if you believe beyond a reasonable doubt, from all the evidence, that these defendants are guilty as charged in the information, then you will so state in your verdict.<sup>15</sup>

14—*State v. Crowell*, 149 Mo. Div. No. 2, 391, 50 S. W. 893 (894), 73 Am. St. 402.

The Supreme Court said that there "was error in giving this instruction, as the court is not permitted to disparage the defense of an alibi, or to refer to it in a slighting or sneering manner. Evidence in regard to an alibi is to be tested and treated just like evidence offered in support of any other defense,—insanity, self-defense, etc. 1 Bish. New Cr. Proc., ¶ 1062; *Sater v. State*, 56 Ind. 378; *Walker v. State*, 37 Tex. 366; *Albin v. State*, 63 Ind. 598; *State v. Chee Gong*, 16 Or. 534, 19 Pac. 607; 11 Enc. Pl. & Prac. 360 et seq., and cases cited."

It was said in *Casey v. State*, 49 Neb. 403, 68 N. W. 643, "that an alibi is a legitimate defense and should not be disparaged by the trial court, the sufficiency of the evidence for the purpose of establishing such defense being a question of fact for the jury." \* \* \*

In *Legere v. State*, 111 Tenn. 368, 77 S. W. 1059, 102 Am. St. 781, the court criticised an instruction stating in substance as follows:

"The defense of the alibi is liable to abuse not only when a design exists to practice a fraud on the state, but often, where that design does not exist, by ignorant mistakes as to the particular hour at issue, and by reason of lapse of time; and I therefore caution you against this abuse to which the defense is exposed."

15—*Casey et al v. State*, 49 Neb. 403, 68 N. W. 643 (644).

"The question of the weight or sufficiency of such testimony for the purpose of establishing an alibi, is not now before us. The accused were, however, entitled to have it submitted with the other evidence adduced, without disparagement by the court. There are, it must be confessed, precedents for the instructions complained of; but the sound rule is believed to be that the accused in a criminal prosecution is entitled to an acquittal whenever the jury, from a consideration of all the evidence adduced, entertain a reasonable doubt of his presence at the time and place where the

crime charged is shown to have been committed. *McLain v. State*, 18 Neb. 154, 24 N. W. 720; *French v. State*, 12 Ind. 670, 74 Am. Dec. 229; *Albin v. State*, 63 Ind. 598; *Dawson v. State*, 62 Miss. 241; *Johnston v. State*, — Tex. App. —, 17 S. W. 252, 54 Am. Rep. 535; *State v. Howell*, 100 Mo. 628, 14 S. W. 4 (overruling *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236, contra); *State v. Taylor*, 118 Mo. 153, 24 S. W. 449; 1 Bish. Cr. Proc., ¶ 1066; *Thompson v. State*, 124 Ind. 106, 24 S. W. 252, 54 Am. Rep. 535; *State v. Taylor*, supra, the trial court on its own motion gave the following instruction: 'If the jury shall find and believe from the evidence that, at the time the offense charged in the indictment was committed, \*

\* \* the defendant was at a place other than the place where such offense or crime was committed, the jury will find the defendant not guilty.'—and refused to charge that the accused was entitled to an acquittal, provided the evidence created a reasonable doubt on the minds of the jury of his presence at the time and place in question. But the court, reversing the judgment of conviction in an exhaustive and valuable opinion by Gantt, P. J., say: 'The weight of the evidence tending to prove an alibi is to be determined by the jury, and, although it falls short of absolute conviction of its truth, still, if it raises in their minds a reasonable doubt of the presence of the defendant at the commission of the crime, he is entitled to an acquittal; and it is not material whether this doubt arises from a defect of the evidence of the state, or the evidence of the defendant in rebuttal. \* \*

\* The burden placed upon the defendant to show his presence elsewhere took away the free action of the minds of the jury in forming a reasonable doubt upon the whole evidence, for the simple reason that the evidence which tended to establish his alibi was to be excluded from their consideration in that subject, and to only become available if it established the defense affirmatively.' And in *Gravelly v. State*, 38 Neb. 871, 57 N. W. 751, it was

(b) The jury is instructed that for obvious reasons, the evidence for as well as against the defense of an alibi in the case at bar demands your most careful and thoughtful consideration.<sup>16</sup>

### ARREST.

§ 4323. **Right of Officer to Arrest—Self-Defense—Believing Conspiracy Between Union Miners.** If the jury believe from the evidence that said union miners had assembled at said place, and had confederated or banded themselves together for the purpose of intimidating, alarming, disturbing or injuring any person, or that they had confederated or banded themselves together and went forth for the purpose of molesting, injuring or destroying any property of another, then, in such case, they were guilty of a felony, and the deputy sheriff, L., and the other defendants, had the right, and it was lawful for them, to disperse such persons, and to arrest them without warrant, provided the defendant L. had reasonable grounds to believe, and did in good faith believe, that said T. and the others with him, had committed, or were then committing, such a felony; and in such state of case it was the duty of T. and others to disperse, if commanded, and submit to arrest, if required, and the defendants had the right to use such force as was reasonably necessary to make the arrest; and if the jury believe from the evidence that defendant L., as deputy sheriff, had reasonable grounds to believe, and did in good faith believe, that said T., and others with him, acting in concert, had confederated and banded themselves together for the purpose of intimidating, alarming, disturbing or injuring any person or persons, or the property of any person, and were then going forth for such purpose, then it was lawful for L. and his posse to arrest, or attempt to arrest, said T. and others with him, even though in fact they were not guilty of a felony; and if, in attempting to do so, he was assaulted by H. T. or C., or both, and he had reasonable grounds to believe he was in imminent danger of losing his life or suffering great bodily harm at the hands of said T., or others connected with him, then the defendant L. had the right, and it was lawful for him, in the exercise of reasonable judgment, to use such force as was reasonable and necessary, or apparently necessary, to save his own life, or protect his person from great bodily

held that the burden in a criminal prosecution never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout, and that the rule thus stated applies, not alone to the case made out by the state in the first instance, but also to any distinct substantive defense interposed by the accused. The vice of the instruction here assailed is, when tested by the authorities cited: First, that it discredits a legitimate defense by advising the jury that the evidence in behalf of the accused should be received with caution; second, in imposing upon them (the accused), the burden of proving the alibi relied upon, instead of directing an acquittal in case the jury were not satisfied, from a consideration of all the evidence, beyond a

reasonable doubt, of their presence at the commission of the robbery charged."

16—Adams v. State, 34 Fla. 185, 15 So. 905 (909).

"This we think," said the court, "should have been omitted. It would have been well enough to impress the jury with the idea that the entire evidence in the cause, touching all of the issues therein, demanded their most careful and thoughtful consideration; but to single out the defendant's effort to establish an alibi, and to concentrate the jury's most careful and thoughtful consideration upon that phase of the case alone, might have had a tendency to impress the jury unfairly, with the idea that the court viewed that phase of the case with suspicion."



harm, even to the taking of the life of said T., on such grounds and under such circumstances the defendant L. is excusable, and the jury will acquit him.<sup>17</sup>

§ 4324. **Right of Officers to Arrest Without Warrant—Whether Crime Committed in Presence of Officer.** (a) The court instructs the jury that sheriffs, deputy sheriffs, and constables are not only authorized to arrest public offenders without warrant, but are required to do so, for all offenses committed in the presence of an officer.<sup>18</sup>

17—*Lindle v. Commonwealth*, 111 Ky. 866, 64 S. W. 986 (1900).

"This instruction does not state the law. In the first place, it requires the jury to believe from the evidence that the union miners had banded themselves together and gone forth for the purpose of alarming, intimidating and disturbing others, before it was lawful for the deputy sheriff and his posse to arrest or disperse them. This is an entirely erroneous and misleading statement of the law. The question was not what the jury might believe the purpose of the miners to have been in assembling, banding themselves together, and going forth, but what the defendants, as officers, believed and had reasonable grounds to believe, their purpose was at the time of the attempted arrest. And, in the second place, the instruction tells the jury that if they believe from the evidence that L., as deputy sheriff, had reasonable grounds to believe, and did in good faith believe, that T., and others with him, were acting in concert, and had confederated and banded themselves together for the purpose of intimidating, alarming, disturbing or injuring any persons or property, and were then going forth for such purpose, it was lawful for L. and his posse to arrest or attempt to arrest them, even if they in fact were not guilty of a felony. But in the latter part of the instruction the right of L. to use such force as was reasonably and apparently necessary to effect such arrest is made to depend upon a previous assault upon him by either T., C., or both of them, and required that he should have had reasonable grounds to believe that he was in imminent danger of losing his life, or suffering great bodily harm, at the hands of T. and others connected with him, before it was lawful for him to take the life of T. If this is a correct statement of the law, then peace officers, in attempting to discharge the duty imposed upon them by their official position, truly occupy a position of great peril. But fortunately for them, and for the peace and good order of society, they are placed in no such position. All that the law required of L. was that he should have in good faith believed, and had reasonable grounds to believe, that T. and the others with him had banded themselves together, and gone forth armed, for the purpose of alarming, intimidating or injuring

any person or persons. If this was true, he and the other defendants summoned by him had the lawful right to disperse and arrest such persons without warrant, and to use such force as was reasonably necessary to effect this purpose; and if T., and those with him, resisted such arrest, it was lawful, if necessary to make such arrest, to shoot the persons so resisting. If, on the other hand, L., and those acting with him, did not in good faith believe, and did not have reasonable grounds to believe, that T., and those with him, were then going forth for the purpose of alarming, intimidating, disturbing or injuring any person or persons, and they were not acting in good faith in what appeared to be the discharge of their official duty, but first began by shooting, or making demonstrations to shoot, then they could not rely upon the protection with which the law clothes officers, and be excused on the ground of self defense."

18—*Roberson v. State*, 42 Fla. 223, 28 So. 424 (425), 52 L. R. A. 751.

"This instruction, it will be observed, asserts that the officers named therein are authorized and required to arrest without warrant for all offenses committed in the presence of an officer. It does not require that the offense shall be committed in the presence of the officer making the arrest, but when committed in the presence of any officer, it authorizes an arrest without warrant. It will be further observed that the charge makes no distinction between felonies and offenses tending to a breach of the peace, and misdemeanors generally. If a felony be committed in the presence or view of the officers named in the instruction, or if they have reasonable ground for believing that such an offense has been committed, they may arrest without waiting for a warrant. By our statutes, sheriffs are invested with authority, and it is made their duty, in their respective counties, to suppress all tumults, riots, and unlawful assemblies, and to apprehend without warrant any person who is in the disturbance of the peace, and to carry him before the proper judicial officer, that further proceedings may be had against him according to law. Rev. St., § 650. At common law a sheriff or his deputy could arrest without warrant for any misdemeanor tending to a breach of the peace, when committed in the presence or view

(b) Upon information from some credible person, it is the duty of a peace officer to arrest without warrant and disarm any person unlawfully carrying arms. If X. was a policeman on duty, and had been informed by some credible person that defendant unlawfully had on or about his person a pistol, then said X. had the right to arrest and disarm the defendant, if he was unlawfully carrying a pistol. In such event the said X. would have had the right to use sufficient force to make such arrest and to disarm defendant, and, if said X. lawfully attempted to arrest the defendant for carrying a pistol, upon information from some credible person, and did not use more force than was reasonably necessary to make such arrest, then defendant would not be justified in making an assault upon said X. in resisting arrest.<sup>19</sup>

§ 4325. **Illegal Arrest.** If the defendant was unlawfully arrested, and did not believe the arrest to be illegal, he had no right to attempt to release himself, and in such case the fact of arrest would not be adequate cause for passion, as that expression occurs in the definition of manslaughter.<sup>20</sup>

of the officer making the arrest. 2 Am. & Eng. Enc. Law (2d Ed.) 869, 873, and notes. Without undertaking to enumerate all the cases in which a sheriff or his deputy may lawfully arrest without warrant, it can safely be stated that the proposition that an arrest can lawfully be made without warrant for all offenses committed in the presence of such officer is too broad, and it is clearly wrong to assert that one officer may arrest without warrant for all offenses committed in the presence of another officer. Shanley v. Wells, 71 Ill. 78. In Wharton Cr. Pl. & Prac. § 8, it is stated that: 'Sheriffs, constables, officers of the police, are not only authorized to arrest public offenders without warrant, but are required to do so, if there be reasonable ground for suspicion. For all offenses committed in the presence of an officer, this power exists, though for past offenses the power is limited to cases of felony and breaches of the peace.' The author further says in the same section that 'the better view is that the right, even as to offenses committed in the officer's presence is limited to felonies, breaches of the peace, and such misdemeanors as cannot be stopped or redressed except by immediate arrest.' The statement in the above quotation, that for all offenses committed in the presence of an officer the power to arrest without warrant exists, must not be taken to mean that, for an offense committed in the presence of any officer, a sheriff or his deputy may arrest without warrant when acting independently of the officer who saw the offense. The authorities do not sustain such a doctrine, and the general statement was doubtless not intended to convey such idea. Nor do we think the author intended to approve, as absolutely correct, the statement that

for all offenses committed in the presence of the officer an arrest without warrant may be made, as in the latter part of the same section it is said, in accordance with the better view, that 'it was rightly held in New York in 1871 that neither a justice of the peace nor a constable can, at common law, arrest without warrant a person committing an illegal act in his presence, unless such act be a felony or involve a breach of the peace, and that cruelty to an animal, though a statutory misdemeanor is not such an offense as authorizes arrest without warrant.' Citing *Butolph v. Blust*, 5 Lans. 84. In *Barber v. State*, 13 Fla. 675, it is held that a person indicted for unlawful imprisonment may show in his defense or justification that the party imprisoned was committing an offense, and that the arrest was for the purpose of taking the offender before a magistrate; but this was in reference to an offense of felony, as the case clearly shows. It is clear, we think, that the accused was entitled, on the evidence adduced, to correct instructions on the subject of arrest, and this one was clearly wrong."

19—*Mooney v. State*, — Tex. Cr. App. —, 65 S. W. 926 (927).

There was no evidence justifying it. "If there had been enough proof in the case the court should have stated the circumstances which authorized the arrest without warrant, and then should have stated to the jury the method which the officer should have pursued in order to make a lawful arrest under the circumstances. See *Lynch v. State*, 41 Tex. Cr. App. 510, 57 S. W. 1130; *Montgomery v. State*, — Tex. Cr. App. —, 65 S. W. 537, 55 L. R. A. 866."

20—*Earles v. State*, — Tex. Cr. App. —, 85 S. W. 1.

"We believe the authorities estab-

## ATTEMPT TO ESCAPE—FLIGHT.

§ 4326. **Flight Not Evidence of Guilt, but as Tending to Prove Guilt.** It is claimed by the state that the defendants D. and P. at once fled, and endeavored to escape arrest by such flight. If you find said defendants at once after the alleged offense fled to Missouri, and endeavored to avoid arrest and prosecution by such flight, such fact would be presumptive evidence of guilt; and if such fact is unexplained, the jury would be justified in considering such flight as evidence of guilt.<sup>21</sup>

lish a different rule, and that an arrest which is illegal, without reference to the knowledge or belief of the party that it is illegal, may, under the circumstances, afford adequate cause to reduce an unlawful homicide to manslaughter. *Miers v. State*, 34 Tex. Cr. App. 161, 29 S. W. 1074, 53 Am. St. 705; *Cortez v. State*, 69 S. W. 536, 5 Tex. Ct. Rep. 591.

<sup>21</sup>—*State v. Poe*, 123 Ia. 118, 98 N. W. 587 (589), 101 Am. St. 307.

The court, in holding this erroneous, said: "The fact that defendant fled from the vicinity where the crime was committed, having knowledge that he was likely to be arrested for the crime, or charged with its commission, or suspected of guilt in connection therewith, may be shown as a circumstance tending to indicate guilt, and may be considered by the jury, with other circumstances tending to connect the defendant with the commission of the crime, to authorize the inference of the guilt of the defendant, the *corpus delicti* being proven. To this proposition there is general assent among the authorities, and it is well settled that evidence of flight is admissible." 1 *Bishop's New Crim. Proc.*, § 1250; *Abbott's Trial Brief*, § 458.

"The admissibility of such evidence depends upon the assumption—which is in accordance with usual human experience—that a guilty person will, and an innocent person will not, attempt to avoid an investigation of a charge of crime; and yet it is well recognized as a fact that guilty persons do not universally attempt to escape; for, recognizing the danger of such attempt, or relying on the inability of the prosecution to connect them with the crime charged, they may well think it to be to their advantage to defy suspicions or accusations; while on the other hand, innocent persons, through mere timidity, or by reason of a fear that they may not be able to meet apparent evidences of guilt, may seek to elude arrest for the purpose of escaping or postponing investigation until the excitement has subsided, or facts establishing their innocence may have been developed. It is therefore usual and proper, not only to instruct the jury

that they may consider evidence of flight with other circumstances tending to show defendant's guilt, but also to advise them as to the weight which should be given to such evidence. *Commonwealth v. Bezek*, 168 Pa. 603, 32 Atl. 109; *Elmore v. State*, 98 Ala. 12, 13 So. 427; *Sewell v. State*, 76 Ga. 836. In *State v. Thomas*, 58 Kan. 805, 51 Pac. 228, the court approves an instruction that flight of defendant "is a circumstance to be considered, in connection with all the other evidence, to aid you in determining the question of his guilt or innocence." The weight of such circumstances is frequently greatly modified by the condition shown to have existed as bearing upon the conduct of the defendant, and under some circumstances, such as that the defendant was of immature years, or thought himself to be in danger of violence, such evidence is of very little probative force. *Mathews v. State*, 19 Neb. 330, 27 N. W. 234; *Ryan v. People*, 79 N. Y. 593. Indeed, it has been held that the court should not say to the jury in such cases, that flight is evidence of guilt, but rather that it is only evidence tending to prove guilt, and accordingly it is said that the court should not instruct the jury that if flight is proved, it must be satisfactorily explained consistently with the innocence of the defendant. *Fox v. People*, 95 Ill. 71. The last sentence of the instruction above quoted is open to criticism, therefore, in that it might have been reasonably interpreted by the jury as authorizing them to convict the defendant of the crime charged without other evidence of the defendant's guilt than that he had, soon after the commission of the crime and with knowledge that he was suspected thereof, fled from the vicinity where the crime was committed. The instruction does incorporate the thought that such circumstance might be explained, but it leaves the jury to infer that, if unexplained, it is sufficient evidence to warrant them in finding that the defendant was guilty of the crime. Even if unexplained, such conduct is not, as already pointed out, inconsistent with innocence, but merely a circumstance from which with other cir-



§ 4327. **Flight as Evidence of Guilt—Voluntary Surrender for Trial.** (a) Flight is not evidence of guilt unless defendant fled from a sense of guilt. And, if defendant voluntarily surrendered herself for trial, this explained away her flight, and it will not be weighed against her.<sup>22</sup>

(b) The state has offered evidence tending to show flight; that is, that immediately after the alleged homicide, defendant left the state of Texas, and went to the territory of New Mexico. You are instructed that such testimony was admitted as tending to show conscious guilt of the offense for which he is now on trial, and you will consider it for no other purpose; and you will consider said evidence, in connection with all the other evidence in the case, in determining whether the flight, if he fled, was caused by conscious guilt or by other circumstances.<sup>23</sup>

§ 4328. **Fleeing from Other Reasonable Motives—Argumentative.** The court charges the jury that flight, though a circumstance to be weighed by the jury as evidence against the defendant, is of weak and inconclusive character; and that it may not be evidence of guilt at all, if it appears that there was any other motive for the

cumstances, the inference of guilt may be drawn. This sentence cannot, perhaps, be said to be in itself erroneous as stating a proposition of law; but as the instruction, as quoted, embodies all that was said to the jury on the subject and in view of the equivocal nature of the evidence relating to the flight, as it will be hereafter, more fully referred to, we think that it was calculated to mislead the jury as to the effect which might be given to such evidence.

"On principle and authority, the instruction as to the presumption to be drawn from proof of flight is erroneous, and should not be sustained, unless it is so far sanctioned in the cases in our own state that we are precluded from following the dictates of reason as illustrated by the weight of authority. In *State v. Rodman*, 62 Ia. 456, 17 N. W. 663, and *State v. Fitzgerald*, 63 Ia. 268, 19 N. W. 202, we approved instructions to the effect that evidence of flight or attempt to escape, should be considered as tending to establish guilt. In *State v. Schaffer*, 70 Ia. 371, 30 N. W. 639, and *State v. Stevens*, 67 Ia. 557, 25 N. W. 777, we held that evidence of flight was properly introduced and that the fact of flight was material. In *State v. Seymour*, 94 Ia. 699, 63 N. W. 661, an instruction was approved which told the jury that if they found from the evidence that defendant upon being informed that he was suspected of or charged with crime 'fled to avoid arrest, and remained away, going under an assumed name, such fact is a circumstance which prima facie is indicative of guilt.' In *State v. James*, 45 Ia. 412, a similar instruction is quoted, but without discussion of its correctness as a proposition of

law, the only question considered being as to whether there was sufficient evidence of flight to warrant the submission of the question to the jury. In *State v. Arthur*, 23 Ia. 430, an instruction is condemned which told the jury that a mere attempt to escape raised in law a strong presumption of guilt. In the last cited case the court says: 'That an unexplained attempt to escape is a circumstance against a party accused of crime is undoubtedly true, and as such it may be proven to and considered by the jury. But at most it only raises a presumption—a presumption ordinarily inconclusive rather than strong and one which is variable in force dependent upon the circumstances surrounding the prisoner. . . . The true course is to allow the fact of evading or attempting to evade justice to be proved to the jury as a circumstance which prima facie is indicative of guilt.' But these authorities are far from sufficient to justify the instruction given in this case. To say that flight is a circumstance prima facie indicative of guilt is a very different thing than saying that 'such fact would be presumptive evidence of guilt.'"

22—In *Thomas v. State*, 107 Ala. 13, 18 So. 229 (230), the above instruction was held to be properly refused, as it invaded the province of the jury.

23—Held error as being "upon the weight of the evidence." *Seeley v. State*, 43 Tex. Cr. App. 66, 63 S. W. 309 (310). Citing *Clark v. State*, 38 Tex. Cr. App. 30, 36 S. W. 273, where a like instruction was condemned. It was held error for the court to single out this fact of flight and instruct upon it. Also citing *Santee v. State*, — Tex. Cr. App. —, 37 S. W. 436.

flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution; from being in a strange land, without relatives or friends, or from fear of the result; from an inability to explain certain false appearances, to avoid public excitement, or from other reasonable motives; and if, from any cause, it be that the flight was produced by anything other than a sense of guilt, the flight would be no evidence of guilt; and if upon all the evidence, it is reasonably doubtful whether the flight was from conscious guilt, the jury should not regard it as evidence of guilt.<sup>24</sup>

24—*Mitchell v. State*, 129 Ala. 23, 30 So. 348 (351). Citing *Kelsoe v. State*, 47 Ala. 573.

The court said this "was argumentative, and, besides, it was abstract, in that there was no evidence indicating that defendant's flight

was on account of his being in a strange land, without relatives or friends. Moreover, the jury were not bound to reject the fact of flight as evidence of guilt though they may have considered it doubtful whether it was inspired by conscious guilt."

## CHAPTER CLXVIII.

### CRIMINAL—BURDEN OF PROOF—CHARACTER EVIDENCE— CIRCUMSTANTIAL EVIDENCE.

See Approved Instructions, Chapter LXXXVII, Vol. II.

#### BURDEN OF PROOF.

- § 4329. Burden of proof—State need not negative matter of defense.
- § 4330. Burden on defendant to show killing accidental or justifiable—Instructing on defenses not involved.
- § 4331. Burden of proof—Defendant need not "satisfactorily establish" his defense.
- § 4332. Burden on defendant to prove insanity or drunkenness as an excuse.
- § 4333. Burden of proof as to inability to retreat is on defendant.

#### CHARACTER EVIDENCE.

- § 4334. Jury may consider defendant's good character in connection with all the other evidence—If reasonable doubt is thereby raised, duty to acquit.
- § 4335. Weight of evidence of good character — Whether depending on strength of the rest of the evidence.
- § 4336. Reputation in the community for peace and quietude.
- § 4337. Proving good character for morality and virtue.
- § 4338. Reputation of defendant—No presumption that it is good.
- § 4339. To what extent character evidence may be considered in raising reasonable doubt.
- § 4340. Evidence of good character should be considered with all the other evidence and not apart.
- § 4341. Good character and absence of motive may generate a reasonable doubt.
- § 4342. Reputation of drunkard—Credibility of witnesses testifying to reputation.
- § 4343. Court should not state in instructions the reasons for character evidence.

- § 4344. Evidence of the commission of other crimes must be limited to its legitimate object.
- § 4345. Prosecution may rebut good character, although not allowed to attack defendant's character in the first instance.
- § 4346. Disparaging evidence of good character—Purpose of its admissibility.
- § 4347. Reputation—Limiting its effect and scope.
- § 4348. Penitentiary sentence as affecting reputation as a good citizen.

#### CIRCUMSTANTIAL EVIDENCE.

- § 4349. Circumstantial evidence is legal—Compared to direct evidence.
- § 4350. Circumstantial evidence is of equal dignity with direct, and not inferior.
- § 4351. Degree of proof required on circumstantial evidence.
- § 4352. Circumstantial evidence so strong that it is incompatible with any reasonable hypothesis of innocence.
- § 4353. Guilt must be proven beyond reasonable doubt but not each circumstance.
- § 4354. Circumstantial evidence not a chain composed of links.
- § 4355. Conviction may be had on circumstantial evidence alone—Rule when direct evidence is attainable.
- § 4356. Circumstantial evidence—No one else suspected.
- § 4357. Circumstantial evidence—Error to argue in favor of.
- § 4358. Direction to jury to consider all the surrounding circumstances improper.
- § 4359. Putting the body of deceased in the river.
- § 4360. Criminative circumstances denied by defendant.
- § 4361. Theft proved by circumstantial evidence.



## BURDEN OF PROOF.

**§ 4329. Burden of Proof—State Need Not Negative Matter of Defense.** (a) The killing of a human being, without the authority of the law, by poison, shooting, stabbing, or any other means, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case. I, therefore, charge that under the statute of Florida in reference to homicide it is not enough to show that the homicide is unlawful. The state must prove to you beyond a reasonable doubt that the homicide was not only unlawful, but the burden of proof is on the state further to show that, according to the facts and circumstances of the case, the homicide was also not justifiable or excusable.<sup>1</sup>

(b) The law presumes the prisoner to be innocent, and it devolves upon the state to prove beyond a reasonable doubt that, at the time of the killing, the defendant was not in danger either of losing his life or suffering great bodily harm at the hands of the deceased; and if you believe from the evidence that the defendant was in danger of losing his own life, or of suffering great bodily harm, from the deceased, at the time he shot deceased, you will acquit him.<sup>2</sup>

**§ 4330. Burden on Defendant to Show Killing Accidental or Justifiable—Instructing on Defenses Not Involved.** And it devolves upon the perpetrator of the act, if he would shield himself from the legal consequences, to rebut by evidence the presumption against him that the law raises. If the killing was accidental, or an excusable or a justifiable homicide, or if it was only what is termed manslaughter, the party charged with the crime must prove the facts in defense; or, if he fails to do so, he must be a murderer. The presumption of killing with intent to kill remains until it is rebutted by competent proof.<sup>3</sup>

**§ 4331. Burden of Proof—Defendant Need Not Satisfactorily Establish His Defense.** (a) The court instructs the jury, as a matter

1—Alvarez v. State, 41 Fla. 532, 27 So. 40 (41).

"This instruction was properly refused, because it 'puts the burden upon the state of negating beyond a reasonable doubt defensive matter, the burden of affirmatively showing which is upon the defendant, and that, too, whether the defendant affirmatively establishes such matter by proof or not.' Padgett v. State, 40 Fla. 451, 24 So. 145."

2—Padgett v. State, supra.

The court said: "This instruction requested and refused is not sound law wherein it puts the burden upon the state of negating beyond a reasonable doubt defensive matter, the burden of affirmatively showing which is upon the defendant, and that, too, whether the defendant affirmatively establishes such matter by proof or not."

3—State v. Cater, 100 Ia. 501, 69 N. W. 880 (883).

"The underscoring appears in the instruction as it was given by the trial judge. It is said that the instruction is open to the objections that it refers to an accidental or justifiable homicide, and that no such question was involved in the case. That is true, and in incorporating such statements in the charge, the court was in error. In view of the real and only defense,—suicide,—the instruction, we think, in other respects was hardly proper, and was calculated to work prejudice to the defendant. By this instruction, matters are injected into the case which are foreign to any issue presented, and the jury are told that in the case stated the one charged with the crime must 'prove the facts in defense, or, if he fails to do so, he must be a murderer.' The effect of this may have been to divert the minds of the jury from the real issue, and to confuse them; and, in any event, it was uncalled for, and improper."

of law, that if the jury shall find, from the evidence, beyond a reasonable doubt, that the killing of B. has been proved as charged, then any defense which the defendant may rely upon in justification or excuse of the act, or to reduce the killing to the degree of manslaughter, it is incumbent upon the defendant satisfactorily to establish such defense, unless the proof thereof arises out of the evidence produced against him.<sup>4</sup>

(b) If the jury shall believe, from the evidence, beyond a reasonable doubt, that the killing of B. has been proved as charged, then any defense which defendant may rely upon in justification or excuse of the act or to reduce the killing to the grade of manslaughter, it is incumbent upon the defendant to satisfactorily establish, unless the proof arises out of the evidence against him.<sup>5</sup>

§ 4332. **Burden on Defendant to Prove Insanity or Drunkenness as an Excuse.** (a) The court instructs you that in order to sustain the defense of insanity, it is not necessary that the insanity of the accused be established by a preponderance of evidence; but, if, from all the evidence, the jury entertain a reasonable doubt as to the sanity of the accused they should find him not guilty, under the plea of insanity.<sup>6</sup>

(b) The court further instructs the jury that a man is presumed to intend what he does, or which is the immediate or necessary consequence of his act; and if the prisoner, with a deadly weapon in his possession, without any, or upon very slight, provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing extenuating circumstances, and unless he proves such extenuating circumstances or the circumstances appear from the case made by the state, he is guilty of murder in the first degree.<sup>7</sup>

4—Holloway v. People, 181 Ill. 544 (548), 54 N. E. 1030.

This has "uniformly been held to impose upon the defendant, when he assumes a burden of proof, a higher degree of proof than is required by law. Alexander v. People, 96 Ill. 96; Smith v. People, 142 Ill. 117, 31 N. E. 599; Appleton v. People, 171 Ill. 473, 49 N. E. 708."

5—Smith v. People, 142 Ill. 117 (122), 31 N. E. 599.

"This instruction is clearly wrong, and was expressly condemned in Alexander v. People, 96 Ill. 96."

The statute is: 'The killing being proved, the burden of proving circumstances of mitigation or that justify or excuse the homicide, will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.' If the proof on the part of the prosecution though clearly establishing the homicide leaves a reasonable doubt in the minds of the jury as to whether the killing is murder or manslaughter, or as to whether the

accused was justified or excused in committing the homicide, he is entitled to the benefit of that doubt, and can only be convicted of the lesser offense or acquitted. This instruction is, therefore, erroneous, not only in requiring the defendant to make satisfactory proof of the mitigation or defence, as did the condemned instruction in Alexander v. People, supra, but in putting the burden upon him, unless satisfactory proof of such mitigation or such defence arises out of the evidence on behalf of the People."

6—Porter v. State, 140 Ala. 87, 37 So. 81 (82). Citing § 4938 Ala. Crim. Code. Held erroneous because "the statute definitely and with precision imposes the burden of proving irresponsibility upon the accused."

7—State v. Davis, 52 W. Va. 224, 43 S. E. 99.

"The only objection to this instruction," said the court, "is that it does not take into consideration the alleged drunken condition of the accused at the time the offense was committed. The claim is advanced that it was the duty of the state to show that the accused was 'of sound

**§ 4333. Burden of Proof as to Inability to Retreat Is on Defendant.** The court charges the jury that if they believe from the evidence that the defendant was free from fault in bringing on the difficulty, and that the deceased at the time of the killing was attacking, or in the act of attacking, the defendant with a deadly weapon, then the defendant had a right to defend himself, even to the taking of the life of the deceased, unless the jury further believe from the evidence that the defendant could have retreated, without increasing his danger to life or great bodily harm.<sup>8</sup>

### CHARACTER EVIDENCE.

**§ 4334. Jury May Consider Defendant's Good Character in Connection with all the Other Evidence—If Reasonable Doubt is Thereby Raised, Duty to Acquit.** The good character of a defendant among his neighbors in a community in which he resides is of value, especially in doubtful cases; and if you believe from the evidence in this case that defendant bears a good character or reputation in the community in which he lives, you may consider such character in connection with all the other evidence in the case, and if the evidence in regard to his character raises a reasonable doubt in your minds as to the guilt of the defendant, then you will find the defendant not guilty.<sup>9</sup>

**§ 4335. Weight of Evidence of Good Character—Whether Depending on Strength of the Rest of the Evidence.** (a) Good character is an important factor with every man, and never more so than when he is on trial charged with an offense; and, where evidence of good character is before the jury, it is their duty to give it such weight as they think it is fairly entitled to. Evidence of good character is

mind, memory and discretion.' The burden of showing want of 'sound mind, memory, and discretion,' as an excuse for homicide to the satisfaction of the jury, is on the accused, which he may do by all the evidence and the facts and circumstances surrounding the case. *State v. Jones*, 20 W. Va. 764; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Cain*, 20 W. Va. 679. This instruction places the burden where it belongs. Intoxication is included in the words 'extenuating circumstances.' It properly propounds the law as applicable to the case, and it was not error to give it."

8—*Pugh v. State*, 132 Ala. 1, 31 So. 727 (728).

Held that this "misplaces the burden of proof as to retreat. It was an element of the defense of self-defense that the defendant could not have retreated without increasing his peril, and it was upon him to show it. Under this charge it would not have been necessary for the defendant to show that he could not have retreated without increasing his peril, but it would have been necessary for the state to prove that he could have retreated without increasing his danger."

9—*Olds v. State*, 44 Fla. 452, 33 So. 296 (298).

The court said that in *Langford v. State*, 33 Fla. 233, 14 So. 815, a like instruction was held properly refused and it was further held "that instructions telling the jury they might look to this fact or consider that fact, or are authorized to infer certain formulated conclusions from the evidence, and especially from certain specified parts of it, had often been condemned, and should never be given, although either the giving or refusal of such instructions may not be reversible error. The effect of the decision in the *Langford Case* appears to be that the court is not required to single out specially the part of the evidence relating to character and instruct on it, though according to our past rulings the court may do so if it sees proper. The proper way however is to instruct the jury that the evidence of good character must be considered in connection with all the other evidence in the case, and when considered as a whole, if the evidence raises a reasonable doubt as to guilt, they should acquit." Citing also *Scott v. State*, 133 Ala. 112, 32 So. 625; *Watkins v. State*, 133 Ala. 88, 32 So. 627.



entitled to great weight where the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong.<sup>10</sup>

(b) Evidence of good character of the defendant is always admissible in cases of this kind. Good character is a circumstance of great weight in doubtful cases, and of less weight in cases less doubtful; but in all cases, evidence on that subject is for the jury to consider, in connection with all the other evidence, and render a true verdict on the whole evidence.<sup>11</sup>

(c) Evidence has been introduced to show that prior to the transaction in question the defendant's general reputation for honesty and integrity was good in the community in which he lived. Now good character is not a defense to crime when a crime has in fact been committed. But where good character is shown it is proper to be considered in determining whether a person bearing such a character would be likely to commit the crime in question, and might be sufficient in a doubtful case to turn the scale in favor of the defendant.<sup>12</sup>

§ 4336. **Reputation in the Community for Peace and Quietude.** (a) And in this case if the jury believe that prior to the publicity of the charge upon which the defendant is on trial, the defendant had always borne a good reputation in the community in which he lived, for peace and quietude, then this is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question

10—Long v. State, 23 Neb. 33, 36 N. W. 310 (316).

The court said:

"Evidence of good character is one of value in doubtful cases, and in prosecutions for minor offenses, but is entitled to be considered when the crime charged is atrocious, and also when the testimony tends very strongly to establish the guilt of the accused. It will sometimes of itself create a doubt, when, without it none would exist. *Cancemi v. People*, 16 N. Y. 501; *Stephens v. People*, 4 Park (N. Y.) 396; *Harrington v. State*, 19 Ohio St. 264; *Maxw. Crim. Proc.* 628.

The question as to the weight of this testimony was entirely for the jury, and it was therefore error for the court to instruct them that it was entitled to little weight when the proof was strong."

See also *Vincent v. State*, 37 Neb. 672, 56 N. W. 320; *McClellan v. State*, 140 Ala. 99, 37 So. 239; *Eggleston v. State*, 129 Ala. 80, 30 So. 582, 87 Am. St. 17, and *Jarvis v. State*, 138 Ala. 17, 34 So. 1025.

11—*Johnson v. State*, 34 Neb. 257, 51 N. W. 835 (836).

The court cited *People v. Garbutt*, 17 Mich. 26; *Long v. State*, 23 Neb. 33, 36 N. W. 310, and said: "In *State v. Northrup*, 48 Ia. 583, 30 Am. Rep. 408, *Seever's, J.*, examines all of the modern cases upon the subject, and states his conclusion substantially in the language used in *Maxw. Crim. Proc.* 628, viz.: that the rule an-

nounced in *Webster's case*, 5 Cush. 295, is unsound, and has been condemned in a majority of the states. Our conclusion is that the giving of the instruction referred to is error for which the judgment of the district court must be reversed."

12—*State v. Birkby*, 122 Ia. 102, 97 N. W. 980 (981).

The court said "Under the rule heretofore adopted, and quite frequently followed by this court this instruction cannot be approved. It is true that in some states the doctrine of this instruction obtains, and evidence of good character is allowed little or no weight, except in cases of a doubtful or inconclusive character. But after examining these precedents we have distinctly declined to follow them. *State v. Northrup*, 48 Ia. 583, 30 Am. Rep. 408; *State v. Horning*, 49 Ia. 158; *State v. Jones*, 52 Ia. 150, 2 N. W. 1060; *State v. Wolf*, 112 Ia. 458, 84 N. W. 536. See also *Greenl. Ev. Par.* 25. In *State v. Gustafson*, 50 Ia. 194, the true rule is said to be that in passing upon the guilt or innocence of the accused, proof of good character constitutes an ingredient to be considered by the jury without reference to the apparently conclusive or inconclusive character of the other evidence, and it is for the jury to determine what weight such evidence of character shall have with them. The instruction under consideration appears to be clearly at variance with this rule and prejudicial to the defense."

whether the witnesses who have testified to facts tending to criminate him have been mistaken or have testified falsely or truthfully.<sup>13</sup>

(b) I instruct you as a matter of law, should you find from the evidence in this case that prior to the accident mentioned in the information, this defendant bore in the neighborhood in which he lived a good reputation for peace and quietness, and as a law-abiding citizen, that such fact, if you find that such fact is proven by the evidence in this case, may of itself be sufficient to generate in your minds a reasonable doubt upon which you may acquit the defendant.

(c) If you find from the evidence in this case that the defendant has proved good character as a man of peace and quietness and as a law-abiding citizen, the law says that such good character may be sufficient to create a reasonable doubt of guilt, although no such doubt would have existed but for such good character.<sup>14</sup>

§ 4337. **Proving Good Character for Morality and Virtue.** The jury is instructed that the accused has called witnesses to prove his good character for morality and virtue. The same is before you pertinent and proper. And the evidence that the defendant possessed a good character for virtue may be relied on to raise a doubt of his guilt sufficient to acquit him, which, without such proof would not have existed.<sup>15</sup>

13—State v. Manderville, 37 Wash. 365, 79 Pac. 977 (978).

The court said that an "instruction almost identical with this was held to constitute error in the case of State v. Walters, 7 Wash. 246, 250, 34 Pac. 938, 1098 on the ground that it was a comment upon the facts in that it, in effect, assumed and told the jury that witnesses had 'testified to facts tending to criminate him,'" and agreed with that holding but did not reverse judgment of conviction.

14—State v. Stentz, 33 Wash. 444, 74 Pac. 588 (589), homicide case.

The court said that in "so far as these instructions state that evidence of good character for peace and quietness is material to a defense where the accused is on trial for crime, they are correct. But they intimate very clearly that if the jury find the defendant had previously borne a good reputation for peace and quietness and as a law-abiding citizen, they may acquit him, even though they find from the evidence that he was guilty."

15—Sweet v. State, 106 N. W. 32 (32-33).

The court said in comment:

This "requested instruction was refused, and an exception duly taken. This ruling is assigned as error. As an abstract proposition of law, there is perhaps nothing unsound in the statement contained in the instruction. It is not to be doubted that evidence of good character weighs in favor of the accused, and may be sufficient to turn the scales in his behalf when all else has failed. It may be sufficient to generate a reasonable doubt in the minds of the jury, which would not have arisen were it not for such evidence. The same, however, may be said of most

of the evidence introduced in behalf of a defendant accused of crime, but this would hardly justify the trial court in selecting certain parts of the evidence, calling attention of the jury especially to the portion or portions thus selected, and say to it that such evidence may be relied upon to raise a doubt of the defendant's guilt sufficient to acquit him, which, without such proof, would not have existed. But it is said this instruction has been by this court approved in the case of Garrison v. People, 6 Neb. 284, in the very language as now drafted. That case hardly supports the contention of counsel that it would be error, to the prejudice of the defendant, to refuse to give such an instruction when requested in his behalf. It is true the instruction was given in that case worded as is the one under consideration. It is equally true that, if the court erred in giving the instruction in the case cited, the error was favorable to the defendant, and for the giving of the instruction he had no cause to complain. It was the defendant in that case complaining of the giving of the instruction, and not of the court's refusal to give it, as in the case at bar. The question, therefore now being considered is an altogether different one than was the question determined in the authority relied upon. A study of that opinion will reveal that the court did not approve the giving of the instruction as a correct statement of the law for the guidance of the jury. It was expressly held that, 'where evidence of good character is before the jury, it is their duty to give it such weight as they think it is entitled to. It is,' says the court, 'the province of the jury to

**§ 4338. Reputation of Defendant—No Presumption that it is Good.**

The jury are instructed that the law not only presumes that the defendant is innocent until he is proven guilty beyond any reasonable doubt, but the law also presumes that the defendant has a good character and reputation as a law-abiding, peaceable citizen until the contrary is shown by the evidence, and it is not necessary for the defendant to prove his reputation in that respect. The jury is not at liberty to consider the omission to prove good character as a circumstance against him, but must presume that he is a man of good character and reputation in that respect—and that without any proof on the subject—and should take the good character of defendant into consideration in making up their verdict.<sup>16</sup>

**§ 4339. To What Extent Character Evidence may be Considered in Raising Reasonable Doubt.**

(a) The court instructs the jury that evidence of good character is a legitimate subject for you to take into consideration, but it goes only to this extent: If an act which the law makes an offense has been actually committed, if you are satisfied beyond a reasonable doubt that the prohibited act was committed, it makes no difference what the character of the man is. It is not the subject of your investigation. But if the evidence should leave your minds in such a state that you cannot say that you are satisfied beyond a reasonable doubt, and, if you find that the defendant has borne hitherto an unblemished character—such a character as makes the act inconsistent with his history and standing—that circumstance should turn the scale in his favor. At such a time the influence of a good character ought to weigh very strongly in behalf of a person accused.<sup>17</sup>

weigh the evidence and determine the facts, and they should be left as free and untrammelled to give such weight to the evidence of good character as they are in relation to other facts.' In *Latimer v. State*, 55 Neb. 609-620, 76 N. W. 207, 211, 70 Am. St. 403, it is said: 'In the case at bar there was before the jury evidence of the prisoner's good character, and it was the province of the jury to consider this evidence, as all the other evidence in the case, and to give it such weight as they deemed it entitled, and they should have been left free and untrammelled in this respect.' 'It is held previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury, precisely as any other circumstance favorable to him, without any disparagement by the court.' It must at once become obvious that, if to disparage evidence of good character is a vice, it is equally erroneous to single out in the court's instructions a particular fact or facts and to give special prominence and emphasis to its value as evidence or the weight to be given by the jury to such proof. *Rising v. Nash*, 48 Neb. 597, 67 N. W. 460, and *First Nat. Bank v. Lowrey*, 26 Neb. 290 54 N. W. 568."

16—*Addison v. People*, 193 Ill. 405 (419), 62 N. E. 235.

"Defendant did not choose to put his reputation in issue or prove that it was good, but sought by the instruction all the benefit of an affirmative finding of such fact without proof or an opportunity to combat the claim or prove the negative. \* \* \* If the instruction were the law, a defendant need never prove good reputation, but could take the benefit of proof which perhaps he could not make. The court was right in the refusal."

17—*State v. Holmes*, 65 Minn. 230, 68 N. W. 11 (13), charge of embezzlement.

The court said: "We are unable to see it otherwise than that this instruction was erroneous, and subject to the same objection which was pointed out in *State v. Sauer*, 38 Minn. 438, 38 N. W. 355, viz. that evidence of good character is only to be considered when the other evidence leaves a reasonable doubt of defendant's guilt in the minds of the jury; in short, that it may be resorted to, to solve such a doubt, but not to establish it. The jury would naturally understand the charge in that way; and the general instructions in other parts of the charge to the effect that, in determining the guilt or innocence of the defendant, the jury should consider all the evidence in the case, did not remedy or neutralize the error."



(b) I might say to you, however, that the office of good character is not to create doubts of guilt. It is simply to assist the jury in solving doubts.<sup>18</sup>

§ 4340. **Evidence of Good Character Should be Considered With all the Other Evidence and not Apart.** (a) The court charges the jury that the rule of law is settled in this state that in all criminal prosecutions the accused may offer evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt.<sup>19</sup>

(b) Good character is admissible in this case to generate a reasonable doubt.<sup>20</sup>

(c) I charge you, gentlemen of the jury, it is the settled law of the state of Alabama that in all criminal prosecutions the defendant may give evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt of the defendant's guilt.

(d) If the defendant has proven a good character as a man of peace, the law says that such good character may be sufficient to create or generate a doubt of his guilt, although no such doubt would have existed but for such good character.<sup>21</sup>

§ 4341. **Good Character and Absence of Motive May Generate a Reascnable Doubt.** If the jury find that the defendant, at and prior to the time he killed H., was a man of good character, and the jury further find from all the evidence an utter absence of any motive defendant might or did have for taking the life of deceased unlawfully, then the jury may, in connection with all the evidence, look to such good character of the defendant; and absence of any motive on the part of defendant to take the life of deceased, and such good character and absence of motive may generate in the minds of the

18—Grabowski v. State, 126 Wis. 441, 105 N. W. 808. This was held erroneous within the ruling of the court in Schutz v. State, 125 Wis. 452, 104 N. W. 90.

19—Miller v. State, 107 Ala. 40, 19 So. 37 (39).

Held properly refused. The court said: "Good character of the accused is a fact to be considered in connection with all the other evidence, and, when so considered, may sometimes properly generate a doubt of guilt when the other evidence without it would leave no doubt. The jury should not be instructed to single out the evidence of good character, and from it alone, without considering its connection with the other evidence, reach the conclusion that a reasonable doubt of guilt exists. Goldsmith v. State, 105 Ala. 8, 16 So. 933; Springfield v. State, 96 Ala. 81, 11 So. 250, 38 Am. St. 85; Grant v. State, 97 Ala. 35, 11 So. 915."

20—Webb v. State, 106 Ala. 52, 18 So. 491 (492).

The court said that such an instruction "had a manifest tendency to mislead the jury to the conclusion that if the fact that the defend-

ant sustained a good character, taken by itself, generated a reasonable doubt of his guilt they should acquit him, though they might at the same time have found from all the evidence before them that the defendant was guilty beyond a reasonable doubt, the circumstance of his good character to the contrary notwithstanding. Pate v. State, 94 Ala. 14, 10 So. 665; Johnson v. State, 94 Ala. 35, 10 So. 667; Johnson v. State, 102 Ala. 1, 16 So. 99; Grant v. State, 97 Ala. 35, 11 So. 915; Thomas v. State, 107 Ala. 13, 18 So. 229; Goldsmith v. State, 105 Ala. 8, 16 So. 933."

21—Bankhead v. State, 124 Ala. 14, 26 So. 979 (981). Homicide case, held that there was no error in refusing the above charges, citing Springfield v. State, 96 Ala. 87, 11 So. 250, 38 Am. St. 85; Johnson v. State, 94 Ala. 35, 10 So. 667. See also Eggleston v. State, 129 Ala. 80, 30 So. 532 (533), 87 Am. St. 17; Crawford v. State, 112 Ala. 1, 21 So. 214; Goldsmith v. State, 105 Ala. 57, 16 So. 933; Scott v. State, 105 Ala. 57, 16 So. 925, 53 Am. St. 100; Watkins v. State, 133 Ala. 88, 32 So. 627 (628); Barnes v. State, 134 Ala. 36, 32 So. 670 (672).

jury a reasonable doubt of the guilt of the defendant of any crime charged in the indictment, and, if such reasonable doubt in the minds of the jury as to defendant's guilt, then the jury must acquit him.<sup>22</sup>

§ 4342. **Reputation of Drunkard—Credibility of Witnesses Testifying to Reputation.** The court instructs you that if a witness testified that defendant's reputation was good, when in fact the witness knew that defendant had the reputation of being a drunkard, or becoming frequently intoxicated, the rule should be applied to the testimony of such witness, and his testimony disregarded, unless corroborated by other credible testimony.<sup>23</sup>

§ 4343. **Court Should Not State in Instructions the Reasons for Character Evidence.** You are further instructed that good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases (and it is for you to say what weight it shall have in this case) where it becomes the man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and satisfactory cases are sometimes rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against what may otherwise appear to be proof of guilt. Good character will not only raise a doubt of guilt which may not otherwise exist, but it may bring conviction of innocence. In every criminal trial, it is a fact which the defendant is at liberty to put in evidence, and, being in, the jury have a right to give it such weight as they think it entitled to.<sup>24</sup>

§ 4344. **Evidence of the Commission of Other Crimes Must be Limited to its Legitimate Object.** The jury are instructed that in "a case like this where the parties are being tried together for one and the same offense, the fact that one of the defendants has been accused of committing other violations of the law, separate and distinct from the offense of which they are on trial, is no evidence that can be considered by the jury as bearing upon the co-defendant, or the defendant himself who is charged with such other violation; and therefore the court instructs the jury that any evidence or insinuation of the commission of other offenses than the one for which the defendants

22—*Naugher v. State*, 116 Ala. 463, 23 So. 26 (27).

"We are of the opinion that above charge requested by defendant was properly refused. It is misleading and argumentative, and was calculated to give undue prominence to certain specified facts. We are of the further opinion that, so far as it refers to an absence of motive, the charge was abstract. It was consistent with the defense of justification in self-defense."

23—*Latimer v. State*, 55 Neb. 609, 76 N. W. 207 (210), 70 Am. St. 403.

The court said that evidence of good character is "not submitted to the consideration of the jury, for the purpose of enabling them to determine whether witnesses who have testified for the state have been mistaken or testified falsely, as the court told the jury. Besides the in-

structions savor of argument in favor of the state, and their effect is to caution the jury not to let the evidence of the accused's good character have too much weight in their deliberations." Citing *Johnson v. State*, 34 Neb. 257, 51 N. W. 835; *People v. Garbutt*, 17 Mich. 9, 97 Am. Rep. 162.

24—*State v. Stentz*, 33 Wash. 444, 74 Pac. 588 (589-590), homicide; the above instruction, taken from Judge Cooley's opinion in *People v. Garbutt*, 17 Mich. 9, 97 Am. Rep. 162, was held properly refused.

The court said it was argumentative. "It not only states the correct rule, but it states the reasons for it, which are not necessary to be given to the jury. Courts in this state must declare the law. They need not give the reasons for it, or argue the law to the jury."

are on trial is absolutely no proof, and forms no circumstance that can be considered by the jury in this case.<sup>725</sup>

§ 4345. **Prosecution May Rebut Good Character, Although Not Allowed to Attack Defendant's Character in the First Instance.** While the law forbids the people to attack his [defendant's] character or bring it up in court to establish his guilt, yet it does permit him to present his good character or his standing in life in defense.<sup>26</sup>

§ 4346. **Disparaging Evidence of Good Character—Purpose of its Admissibility.** (a) The court instructs the jury that good character raises the presumption that the accused was not likely to have committed the crime with which he is charged, but the force of the presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge; and if the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, then the fact that the defendant may have proven himself to have had a good character will be unavailing and immaterial.

(b) The court instructs the jury that evidence of a person's good character is competent evidence in favor of the party accused as tending to show that he would not be likely to commit the crime charged against him. And in this case, if the jury believes from the evidence that, prior to the commission of the alleged crime, the defendant had always borne a good character among his acquaintances and in the neighborhood where he lives, then this is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question whether the witnesses who have testified to the fact tending to criminate him have been mistaken or have testified falsely or untruthfully; and if, after a careful consideration of all the evidence in the case, including that bearing on his previous good character, the jury entertain a reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. If, however, the jury believes from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question, as charged in the information, it will be your sworn duty to find the defendant guilty, even though the evidence may satisfy your

25—Roberson v. State, 40 Fla. 509, 24 So. 474 (479), 52 L. R. A. 751.

"We think the court correctly refused this charge. It had admitted evidence tending to show that subsequent to the alleged breaking R. had set fire to the building alleged to have been broken, for the purpose of destroying evidence of his alleged crime. We have held that this evidence was properly admitted, and the instruction requested would have withdrawn it from the jury. The instruction requested did not seek to limit such evidence to its legitimate object, but to withdraw it entirely from the jury. It was, therefore, properly refused."

26—People v. Marks, 90 Mich. 555, 51 N. W. 638 (640).

The court said: "The respondent having offered evidence of good reputation, the door was open to the

people to introduce evidence in contradiction of it, and to establish the fact, if they could, that the respondent's reputation for honesty was bad in that community. \* \* \* When the court, therefore, told the jury that the hands of the people were tied, they might well have understood it as an instruction from the court that, though the respondent might put in proof his good reputation, the people would not be permitted to rebut or give evidence against the respondent showing him to be a man of bad reputation. With this in mind, the jury might well say that, had the law permitted the people to contradict this testimony, the respondent might not have stood before us with so high a character for honesty and integrity. We think this was very prejudicial to the rights of the respondent."



minds that the defendant, previous to the commission of the crime, has sustained a good reputation and character.<sup>27</sup>

§ 4347. **Reputation—Limiting Its Effect and Scope.** Defendant has put his character in evidence, which he alone could do, and it may be looked to in judging of the defendant's purpose and intention at the time of the killing.<sup>28</sup>

§ 4348. **Penitentiary Sentence as Affecting Reputation as a Good Citizen.** The evidence before you relative to defendant having served a term in the penitentiary can only be considered by you as affecting defendant's reputation as a good citizen, and you will consider the same for no other purpose whatsoever.<sup>29</sup>

## CIRCUMSTANTIAL EVIDENCE.

§ 4349. **Circumstantial Evidence is Legal—Compared to Direct Evidence.** (a) The court instructs the jury that circumstantial evidence is legal evidence, and is not to be discredited merely as such. Its value, and, indeed, its necessity, in the ascertainment of truth is unquestioned. Nothing in the nature of circumstantial evidence renders it less valuable than other evidence. Indeed, it has been said that in many cases a verdict on circumstantial evidence alone is more satisfactory as being a true and just verdict than one founded on direct evidence; for witnesses may falsify, but circumstances cannot. Men may commit a perjury, but a fact cannot.

27—Howell v. State, 61 Neb. 391, 85 N. W. 289 (290).

The court said: "It was disparaging in its character and suggested to the jury that in the mind of the trial court a witness who had so testified was unworthy of belief. It invaded the province of the jury and deprived them of the right to judge of the credibility and weight to be given to the evidence of the several witnesses who had testified in the case."

28—Powers v. State, 117 Tenn. 363, 97 S. W. 815.

"The objection made is that the defendant's character was a witness in his favor upon every issue in the case, and that the trial judge should not have limited its effect 'to his purpose and intention at the time of the killings.' In Roman v. State, 1 Shan. Tenn. Cas. 470, 472, it is said: 'The defendant is always entitled to the benefit of his good character, and the jury may look to this, with the other evidence, to see if there is a reasonable doubt of his guilt.' In 4 Elliott on Evidence, § 2721, it is said: 'It is now well settled in most jurisdictions, contrary to some of the older decisions, that evidence of good character is admissible and entitled to consideration on the question of guilt along with the other evidence, not only in doubtful cases, or in cases in which the other evidence is of itself contradictory or unconvincing, but also in all proper cases, no matter whether the other

evidence, in and of itself, is apparently conclusive or inconclusive.'"

29—Holloway v. State, 45 Tex. Crim. App. 303, 77 S. W. 14 (15).

"This is objected to on the ground that such testimony could only be considered with reference to the credibility of appellant. The testimony does not appear from the record to have been introduced for this purpose, but merely in cross-examination of appellant's witnesses as to his character, which he placed in issue. However, it was not competent for the court to submit appellant's character as a good citizen to the jury, as was done in the above charge. It was a charge on the weight of the evidence, and was calling the attention of the jury directly to appellant's character as a good citizen without even undertaking to tell the jury for what purpose they could consider his character as a good or bad citizen. This testimony, pro and con, was before the jury, and, like other testimony, they could consider it for what it was worth, as shedding light on the transaction, and as indicating whether or not a person of the character appellant was shown to have borne would likely commit the offense charged against him. But it was not proper for the court to call attention to this matter, and thus to emphasize and make prominent the fact that there was evidence showing appellant had been in the penitentiary."

Persons accused have been sometimes erroneously convicted upon circumstantial evidence. But so have they been upon direct testimony. That such in either case has been true is a reason for caution, but not to discredit or disregard. The possibility of error alike exists whether the evidence be direct or circumstantial.<sup>30</sup>

(b) The court instructs the jury that circumstantial evidence is legal evidence, and in most criminal cases it becomes necessary to resort to circumstantial evidence. Criminal acts are usually performed in secrecy. Evidence should not be discredited because it is circumstantial. It is often more reliable than the direct eye-witnesses, when it points irresistibly and conclusively to the commission by the accused of the crime. A verdict of guilty in such cases may rest upon a surer basis than when rendered upon the testimony of eye-witnesses whose memory must be relied upon, and whose passions and prejudices may have influenced them.<sup>31</sup>

(c) The court instructs the jury that to justify a conviction on circumstantial evidence, it is not necessary that the circumstances be as strong as the positive testimony of a single creditable witness; that before a conviction can be had on circumstantial evidence, the evidence should be as strong as the positive testimony of a single creditable witness.<sup>32</sup>

(d) The rule of law is that, to warrant a conviction on a criminal charge upon circumstantial evidence alone, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and sufficient to exclude all reasonable doubt of the defendant's guilt. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the defendant's innocence, but be perfectly reconcilable with the supposition of his guilt. The court instructs the jury that it is an invariable rule of law that to warrant a conviction for a criminal offense upon circumstantial evidence alone, such a state of facts and circumstances must be shown as they are all consistent with guilt of the party charged, and such that they cannot, upon any reasonable theory, be true, and the party charged be innocent.<sup>33</sup>

**§ 4350. Circumstantial Evidence is of Equal Dignity with Direct, and Not Inferior.** (a) The court instructed the jury that as a matter of law circumstantial evidence is inferior to direct or positive testimony; and while they may and perhaps should convict in proper cases on circumstantial evidence, still it should be weighed with

30—State v. Crofford, 121 Ia. 395, 96 N. W. 889 (893).

"We think that none of our precedents go to the full extent of the charge here given. State v. Moelchen, 53 Ia. 315, 5 N. W. 186; Wheelan v. R. R., 85 Ia. 176, 52 N. W. 119; State v. Seymour, 94 Ia. 708, 63 N. W. 661."

31—State v. Musgrave, 43 W. Va. 672, 28 S. E. 813 (815).

These instructions, the court said, "clearly direct the jury what weight should be given to circumstantial evidence, which constituted almost the entire evidence that was before them, and in our opinion, the court invaded the province of the jury in

a manner not sanctioned by law, and in so doing committed an error prejudicial to the prisoner."

32—Buchanan v. State, 109 Ala. 7, 19 So. 410 (411).

"It is for the jury to say how strong the circumstances must be in order to satisfy their minds beyond a reasonable doubt of the defendant's guilt. Banks v. State, 72 Ala. 522."

33—In State v. Dotson, 26 Mont. 305, 67 Pac. 938 (940), citing Ryan v. State, 12 Mont. 297, 30 Pac. 78, the use of the word "nearly" made the above instruction bad, as defining the degree of strength required for circumstantial evidence.

caution and scrutinized closely, and must as a whole be so cogent and conclusive as to satisfy the jury to a moral certainty of the guilt of the defendants, before they can lawfully convict in this case.<sup>34</sup>

(b) The court instructs the jury that in this case the state relies on what is known as circumstantial evidence to establish that the defendant was concerned in, or aided and abetted the commission of the crime of larceny, if you find beyond a reasonable doubt that such crime was committed; and while circumstantial evidence is in its nature liable to produce the highest degree of moral certainty, yet experience and authority both admonish us that it is a species of evidence in the application of which the utmost caution and vigilance should be used.<sup>35</sup>

**§ 4351. Degree of Proof Required on Circumstantial Evidence.**

(a) The court instructs the jury, that all the evidence upon which the state relies for a conviction in this case is not positive, but is circumstantial, and the law requires a stronger measure of proof when the evidence is entirely circumstantial than it does when the evidence is positive, and that you must acquit the defendant unless every material ingredient in this offense is proved to your mind to a moral certainty of the defendant's guilt, and to the exclusion of every other hypothesis than that of his guilt.<sup>36</sup>

(b) To convict in a criminal case on circumstantial evidence, the jury should be so convinced that they would be willing to act upon it in matters of highest concern to their own interests.<sup>37</sup>

34—Cook et al v. State, — Miss. —, 28 So. 833 (834).

"It is not the law that circumstantial evidence is inferior to direct and positive. It is of equal dignity, and in weight and probative force may, and should in many instances surpass the other in effect upon the jury. The only restriction attached to it is that it should be received with care and caution."

35—State v. Foster, 14 N. D. 561, 105 N. W. 938 (940).

"The request was properly refused, and for two reasons: First, it erroneously assumed that the case was one purely of circumstantial evidence; and second, it discredited such evidence as matter of law. It is well settled that there is no legal distinction, so far as the weight and effect to be given it is concerned, between direct and circumstantial evidence. State v. Rome, 64 Conn. 329, 30 Atl. 57; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; Brown v. State, 23 Tex. 195; People v. Morrow, 60 Cal. 142; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. O'Brien, 130 Cal. 1, 62 Pac. 297; Wharton on Criminal Evidence (9th Ed.), § 30."

36—Morris v. State, 124 Ala. 44, 27 So. 336.

The court said this instruction is erroneous for the reason that the "law does not require a stronger measure of proof for conviction under circumstantial than under what

is termed 'positive' proof, but the same measure in each case—whether the evidence satisfies the mind of the jury of the guilt, beyond reasonable doubt. It was also otherwise bad. Banks v. State, 72 Ala. 522; Thornton v. State, 113 Ala. 44, 21 So. 356, 59 Am. St. 97; Yarbrough v. State, 105 Ala. 44, 16 So. 758; Dent v. State, 105 Ala. 14, 17 So. 94."

In Hainsworth v. State, 136 Ala. 13, 34 So. 203 (204), the court properly refused the following instruction on the ground it was a mere statement of a fact and not embodying any proposition of law that could possibly have aided the jury in their deliberations.

The court instructs the jury that 'in this case the evidence is all circumstantial.' The court said that the 'essential idea of a charge is that it is an authoritative exposition of the principles of law applicable to the case, or to some branch or phase of the case, which the jury are bound to apply in order to render the verdict, establishing the rights of the parties in accordance with the facts proved. 11 Encyc. Pl. & Pr., p. 56, and notes; 1 Bouv. Law Dic., p. 310."

37—Bowen v. State, 140 Ala. 65, 37 So. 233 (234), citing Amos v. State, 123 Ala. 50, 26 So. 524.

The court said: "The test of the sufficiency of evidence proposed in the above charge is not one recognized by law, and was not practicable on application."



(c) To justify a conviction on circumstantial evidence, the circumstantial evidence must exclude all rational probability of defendant's innocence.<sup>38</sup>

(d) Circumstantial evidence has been received in every age of common law as competent evidence, and it may rise so high in the scale of belief as to generate full conviction. When, after due caution, this result is reached, the law authorizes the jury to act on it.<sup>39</sup>

**§ 4352. Circumstantial Evidence so Strong that it is Incompatible With any Reasonable Hypothesis of Innocence.** (a) You are instructed, as a matter of law, that, where a conviction of a criminal offense is sought upon circumstantial evidence alone, the state must not only show by a preponderance of evidence that the alleged facts are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused.<sup>40</sup>

38—Bowen v. State, *supra*, citing *Gilmore v. State*, 99 Ala. 154, 13 So. 536.

"In implying that a verdict should be formed by a process of excluding probabilities of innocence, the above charge was calculated to confuse the jury."

39—Lipscomb v. State, 75 Miss. 559, 23 So. 210 (212).

The court said that "'full conviction' is not the criterion of the degree of proof necessary to a conviction. It is a loose phrase. It has no distinct legal import, and is without accuracy to the common understanding. It is vague, indefinite, and inexact. It may be the equivalent of sincere or conscientious belief. It may mean that full conviction, when the facts proven, satisfy the judgment as to the truth of the charge. There is but one rule and one law in this state as to the measure and sufficiency of proof which will warrant conviction. It is that the evidence must engender a certainty of belief, beyond a reasonable doubt. This rule has prevailed without abatement, not only in the ages of the common law, but it embodies an everlasting human right, coeval with all society. It is not enough that 'the jury should be satisfied from the evidence, as fair, reasonable, or conscientious men, of the guilt of the accused' (*Power's Case*, *supra*); or 'that they conscientiously believe him guilty' (*Burt's Case* and *Brown's Case*, *supra*; *Hammond v. State*, 74 Miss. 214, 21 So. 149). In *Williams v. State*, 73 Miss. 822, 19 So. 826, the jury were instructed that 'if, after a careful consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt, and your verdict should be guilty;' as to which the court in

that case says: 'The second instruction for that state is erroneous in attempting to define 'reasonable doubt.' \* \* \* The concluding part of the charge expressly defines reasonable doubt by telling the jury that 'abiding conviction of the guilt of the defendant, or full satisfaction of his guilt, is the equivalent of belief beyond a reasonable doubt.' This is another of the many vain attempts to compute that which is not number, and measure that which is not space. It was held one of the errors for which that case may be reversed. The hypotheses of that instruction, it will be observed, are, however, stated conjunctively. The statement is: 'If you have an 'abiding conviction' of the guilt,' \* \* \* and 'are fully satisfied of the truth of the charge.' 'Full conviction' cannot certainly mean more than 'fully satisfied,' but if, conjunctively, 'an abiding conviction of guilt' and 'full satisfaction of the truth of the charge' be erroneous, as not equivalent to a belief beyond a reasonable doubt, it must follow that 'full conviction' is in less degree such equivalent. It is error."

40—Horn v. State, 73 Pac. 705 (724), 12 Wyo. 80.

This "instruction was condemned in this jurisdiction in the case of *Cornish v. Territory*, 3 Wyo. 96, 3 Pac. 795. Mr. Justice Parks said, in the opinion in that case, that the words, 'must be absolutely incompatible with the innocence of the accused,' have been correctly defined to imply that the proof of guilt must be established beyond the possibility of a doubt; and a statement of the principle by the New York Court of Appeals in *Poole v. People*, 80 N. Y. 646, was approved, viz.: 'A jury is never required to find that it was not possible for another to have committed the crime before they can convict a prisoner on trial; or, in other words, to find that it is

(b) The court instructs the jury that in cases depending on circumstantial evidence to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation on any other reasonable theory than that of his guilt.<sup>41</sup>

(c) The court instructs the jury that the humane provisions of the law are that a prisoner charged with a felony should not be convicted on circumstantial evidence unless it shows by a full measure of proof that the defendant is guilty. Such proof is always insufficient unless it excludes to a moral certainty every other reasonable hypothesis but that of the guilt of the accused. No matter how strong the circumstances, if they can be reconciled with the theory that some other person may have done the act, then the defendant is not shown to be guilty by that full measure of proof which the law requires.<sup>42</sup>

impossible for the prisoner to be innocent. Such a degree of certainty is rarely attainable in the administration of justice. It is sufficient that all the material circumstances point to guilt, and that they are inexplicable upon the theory of innocence. The guilt must be established beyond a reasonable, not beyond a possible, doubt.' In Illinois an instruction similar to the one refused was said to be 'so broad and sweeping in its terms that, if it were given in every criminal case, dependent upon circumstantial evidence, it would have a tendency to prevent, in many instances, the conviction of guilty parties,' and the instruction was held properly refused. *Carlton v. People*, 150 Ill. 181 (191), 37 N. E. 244 (247), 41 Am. St. 346. In Missouri a charge was held sufficient which informed the jury that they must find the facts and circumstances tending to prove guilt to be not only consistent with each other and the guilt of the defendant, but that the proven facts must be inconsistent with any rational hypothesis consistent with his innocence. *State v. David*, 131 Mo. 380, 33 S. W. 28. In California the refusal of an instruction was upheld which required the hypothesis contended for by the prosecution to be established with absolute moral certainty. *People v. Davis*, 64 Cal. 440, 1 Pac. 889. And in Minnesota a request was held erroneous which stated that, if any single fact proved was inconsistent with guilt, the defendant should be acquitted. *State v. Johnson*, 37 Minn. 493, 35 N. W. 273. And the court held that it was sufficient to charge the jury that, to authorize a conviction, the circumstances should not only be consistent with the prisoner's guilt, but that they must be inconsistent with any other rational conclusion. Greenleaf states the rule as follows: 'Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's

guilt, but inconsistent with any other rational conclusion.' 1 Greenleaf Ev., ¶ 34. See, also, *State v. Rover*, 13 Nev. 24; *Smith v. State*, 133 Ala. 145, 31 So. 806."

<sup>41</sup>—*State v. Kelley*, 50 La. 597, 23 So. 543 (544).

This charge, the Supreme Court said, "tends to restrict the view of the jury to the general force of circumstantial evidence, but omits any reference to that presumption of the law which attaches to one circumstance when proved. If possession of property recently stolen is satisfactorily proved, that circumstance—i. e., of possession—gives rise to the presumption of guilt. As we read the bill, there was testimony to show that possession. The state claims it was proved by direct evidence that when the arrest was made the accused threw away a package, which was recovered, and identified by the owner as that stolen from him. Whether this was established, it was the function of the jury to determine; but, with testimony of that tendency administered, the charge would have been misleading. Possession of stolen property is but a circumstance, but that circumstance, when the property is recently stolen, and not accounted for, leads to a presumption of guilt. In the posture of the testimony when the instruction was asked and refused, it would have been erroneous to charge, in effect, that all the circumstances must be incompatible with innocence, and consist only with guilt; for, on the single circumstance alone of possession, with the other qualifications, the law founds the presumption of guilt on which the jury can act. At least the requested charge required such explanation and qualification as authorized its refusal. 1 Greenleaf Ev., ¶ 34; *Rose, Cr. Ev.*, ¶ 18; *State v. Riculfi*, 35 La. Ann. 775; *State v. Jackson*, Id. 769; *State v. Chevallier*, 36 La. Ann. 84; 2 *Thomp. Trials*, ¶ 2349."

<sup>42</sup>—In *Turner v. State*, 124 Ala. 59, 27 So. 272 (274).

**§ 4353. Guilt Must be Proven Beyond Reasonable Doubt but Not Each Circumstance.** (a) Where a conviction is sought upon circumstantial evidence only, each essential and material circumstance or circumstantial fact which is necessary to make a complete chain of well-authenticated circumstances must be established by the proof beyond a reasonable doubt. While it is not necessary that all of the circumstances which may be considered by you are to be established beyond a reasonable doubt, yet each particular fact or links in the chain of circumstances which are necessary and essential to connect the defendant with the commission of the crime must be established by the proof beyond a reasonable doubt. And if you shall fail to find all of the essential and necessary links or circumstances necessary to complete the chain beyond a reasonable doubt, you should then acquit the defendant. And also you are to find from all of the facts and circumstances the guilt of the defendant beyond a reasonable doubt, before you are warranted in returning a verdict of guilty.<sup>43</sup>

(b) The court charges the jury that if there is a missing link in the chain of circumstances connecting the defendant with the commission of the crime, the whole chain falls, and you should return a verdict not guilty.<sup>44</sup>

**§ 4354. Circumstantial Evidence Not a Chain Composed of Links.** The court charges the jury that before a conviction can be had under circumstantial evidence the circumstances must connect the defendants with the commission of the crime beyond a reasonable doubt, and the links in the chain of circumstances must not only connect the defendants with the commission of the crime, but must exclude every other reasonable hypothesis save the guilt of the accused, and if the circumstances will support any other reasonable hypothesis than the guilt of the accused you must return a verdict of not guilty.<sup>45</sup>

The court said: "As an instruction to the jury, this is calculated to mislead them to acquit upon any theory that another may have committed the act, however abstract, speculative or unreasonable the theory, so that it be reconcilable with the evidence, which they were not authorized to do." This instruction "appears to have been copied from the opinion rendered in *Ex parte Acree*, 63 Ala. 234. The case is not authority for charging the jury in the language used."

<sup>43</sup>—*Vaughn v. State*, 130 Ala. 18, 30 So. 669 (671).

The court said that this has been "too often condemned by this court to require consideration. *Tompkins v. State*, 32 Ala. 569; *Wharton v. State*, 73 Ala. 367; *Grant v. State*, 97 Ala. 35, 11 So. 915."

That mere circumstances need not be proved beyond reasonable doubt, see *State v. Lucas*, 122 Ia. 141, 97 N. W. 1003 (1007); *State v. Novak*, 109 Ia. 117, 79 N. W. 465 (473); *Mullins v. People*, 110 Ill. 42; *Leigh v. People*, 113 Ill. 372; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361.

<sup>44</sup>—*State v. Hossack*, 116 Ia. 194, 89 N. W. 1077 (1080).

The court said: "As asked, this instruction was susceptible of misapprehension. While each essential fact in a case of this kind must be proved beyond a reasonable doubt, it is not necessary that each of such essentials, standing isolated and alone, be so proven, nor that it be established by independent evidence. The material circumstances, when given their respective places in the sequence of events, may strengthen and support each other to such an extent that on a consideration of the whole case the jury may be convinced beyond a reasonable doubt of defendant's guilt. This was the substance of the instructions given by the court, and it was all that need have been said. *State v. Cohen*, 108 Ia. 208, 78 N. W. 857, 75 Am. St. 213; *State v. Hayden*, 45 Ia. 17; *State v. Novak*, 109 Ia. 717, 79 N. W. 465."

<sup>45</sup>—*Condemned in Vaughn v. State*, 130 Ala. 18, 30 So. 669 (671). Citing *Wharton v. State*, 73 Ala. 367; *Grant v. State*, 97 Ala. 35, 11 So. 915, and *Tompkins v. State*, 32 Ala. 569



§ 4355. **Conviction May be Had on Circumstantial Evidence Alone—Rule When Direct Evidence is Attainable.** The court instructs the jury that a conviction should not be had upon circumstantial evidence, if positive evidence is attainable or before the jury.<sup>46</sup>

§ 4356. **Circumstantial Evidence—No One Else Suspected.** (a) The defendant is not called upon to show the jury that some one else did or may have done the shooting. And the fact that no one else may be suspected of the shooting is not of itself sufficient to fasten guilt upon the defendant.<sup>47</sup>

(b) The court instructs the jury that if they believe from the evidence that time, place, opportunity, threats, means and motive and prisoner's after conduct all concur, beyond a reasonable doubt, as before explained, in pointing out the accused as the perpetrator of the crime, and that the evidence discloses no other criminal agent, and though no human eye witness has testified to the fatal blow or blows, yet this will be sufficient to warrant a conviction, if the jury shall believe from the evidence beyond a reasonable doubt that the accused is guilty of the offense charged. In other words, it is not all crimes where there is or can be any eye witness, and it is for the jury to say whether from all the evidence, the prisoner's guilt has been proven to their satisfaction and beyond a reasonable doubt; and whether that evidence be direct or circumstantial and in all capital cases the evidence must be carefully scanned and reviewed by them.<sup>48</sup>

(c) The court charges the jury the evidence against the defendant is circumstantial, and before you can find the defendant guilty, each individual juror must be satisfied beyond all reasonable doubt by the evidence and to a moral certainty that no other person could have done the shooting.<sup>49</sup>

§ 4357. **Circumstantial Evidence—Error to Argue in Favor of.** I charge you that circumstantial evidence, when well made out, and

(1858), where the court said: "We have found no rule of law which declares that circumstantial evidence necessarily consists of links; or which prescribes any definite number of circumstances, as necessary to the sufficiency of circumstantial proof. These may be, and are, cases where a single circumstance will justify the jury in finding the existence of an inferential fact. \* \* \* coming to the conclusion that circumstantial evidence is not necessarily a chain, or composed of links, we think the tendency of the charge was to mislead or embarrass the jury, and that it was rightly refused. Citing *Roscoe* *Crim. Ev.* 1; *U. S. v. Johns*, 1 *Wash. C. C.* 372; 4 *Doll.* 412, 26 *Fed. Cases* 61, *Case No.* 15481."

46—*Welch v. State*, 124 *Ala.* 41, 27 *So.* 307 (308).

The court said that this "is not the law, and, if it were, the charge has no place in a case like this, where the whole evidence is from the mouths of eye-witnesses to the occurrence, and goes, not circumstantially or inferentially, but di-

rect and positively, to the details of the difficulty."

47—Held argumentative and misleading. *Spraggins v. State*, 139 *Ala.* 93, 35 *So.* 1000 (1002).

48—*McBride v. Commonwealth*, 95 *Va.* 518, 30 *S. E.* 454 (456).

The court said: "The objection made by the prisoner is that the jury are told that the failure of the evidence to disclose any other criminal agent than the prisoner is a circumstance which may be considered by the jury in determining whether or not he was guilty of the crime wherewith he was charged. This is not the law. The prisoner is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point out any other criminal agent; nor is he called upon to vindicate his own innocence by naming the guilty man."

49—Held argumentative. *Spraggins v. State*, 139 *Ala.* 93, 35 *So.* 1000 (1002). Citing *Pickens v. State*, 115 *Ala.* 42 (50), 22 *So.* 551; *Crawford v. State*, 112 *Ala.* 27, 21 *So.* 214; *Amos v. State*, 123 *Ala.* 50, 26 *So.* 524.

well running together, is as good to convict on as any other kind. The great majority of cases that come into court can only be reached by circumstantial evidence. I mention this because I have heard jurors and people say that they would not convict on circumstantial evidence. The class of men that rob your houses, or steal your horses or cattle or other property, or assassinate you when no man looks, would have to go free if you refuse to convict on circumstantial evidence. This is the only way the law has to get at men.<sup>50</sup>

§ 4358. **Direction to Jury to Consider all the Surrounding Circumstances Improper.** If you should conclude from the evidence, which includes not only the sworn testimony of the witnesses who have testified, but all the circumstances surrounding the tragedy, that the deceased was killed and murdered by X., you will find the defendant guilty. If you should conclude from the evidence and all the circumstances of the case, that the deceased Y. was killed and murdered by some person or persons other than X., but that X., while the other person or persons did the killing, knew that the killing was being done and participated in it, you will find the defendant guilty.<sup>51</sup>

§ 4359. **Putting the Body of Deceased in the River.** The fact, if it be a fact, that after the homicide the defendant put the body of the deceased in the river, this is a circumstance which the jury may consider in connection with the other evidence in the case, and arriving at a conclusion; but the defendant is not indicted for putting the body in the river, and cannot be punished for that.<sup>52</sup>

§ 4360. **Criminative Circumstances Denied by Defendant.** The court instructs the jury that in a case of circumstantial evidence, where the criminative circumstances are either denied by the defendants, or are explained in such a way as to render their guilt doubtful, it is the duty of the jury to acquit the accused.<sup>53</sup>

§ 4361. **Theft Proved by Circumstantial Evidence.** Theft may be established by circumstances, if the circumstances are sufficient to establish it beyond reasonable doubt—that the defendant on trial, and no other person, took the same, if taken, from the possession of the owner.<sup>54</sup>

50—Luby v. State, 102 Ga. 633, 29 S. E. 494 (495).

The court said this states the law correctly, but is "highly argumentative, and very objectionable. \* \* \* The manner of the charge, the illustrations given, the reference to what the judge had heard people say, etc., cannot, on any ground, be supported."

51—Long v. State, 23 Neb. 33, 36 N. W. 310 (314).

"The objections to this instruction are: First, as to the first clause which says: 'If you should conclude from the evidence, which includes, not only the sworn testimony of the witnesses who have testified, but all the circumstances surrounding the tragedy, that deceased was killed,' etc. The words which we have italicized are objected to, for the reason that it is claimed the court virtually instructed the jury that they were not limited to the testimony of the witnesses before them, but that, in coming to their conclusion, all the circumstances surrounding the trag-

edy, whether testified to, or whether pertinent or not, should be considered by them. This language is perhaps objectionable, as the jury were not warranted in going outside of the testimony and proofs which had been introduced before them."

52—Dennis v. State, 118 Ala. 72, 23 So. 1002 (1003).

"Argumentative and misleading, if not wholly abstract, and properly refused."

53—Long et al v. State, 42 Fla. 612, 28 So. 775 (779).

The court said this "instruction is obviously erroneous, in that it requires the jury to acquit in all cases depending upon circumstantial evidence, where the accused denies the criminative circumstances without reference to the credibility of the denial."

54—Davis v. State, — Tex. Cr. App. —, 54 S. W. 533 (534).

The court said that "this is tantamount to no charge on circumstantial evidence."

## CHAPTER CLXIX.

### CRIMINAL—CONFESSIONS—DEFENDANT'S TESTIMONY— INDICTMENT.

See Approved Instructions, Chapter LXXXVIII, Vol. II.

#### CONFESSIONS.

- § 4362. To consider admissions as any other testimony "held erroneous."
- § 4363. Improper to instruct that confessions may be of the most satisfactory character or that they may be of the very weakest kind, giving instances.
- § 4364. Instructing that verbal confessions ought to be received with great caution.
- § 4365. Instructing that a confession freely and voluntarily made is among the best evidence known to the law.
- § 4366. To instruct that defendant's statements proven by state to be taken as true, is erroneous.
- § 4367. Jury cannot arbitrarily or capriciously accept or reject any part of a confession—Credibility for the jury.
- § 4368. Confession must be voluntary and free from the influence of threats and promises—Admissibility for the court and not for the jury to determine.
- § 4369. Confessions made under promise of immunity.
- § 4370. Confession made under influence of hope and fear—Credibility.
- § 4371. The word "confessions" should not be used in reference to statements made by defendant in explaining his conduct.
- § 4372. Evidence of declarations by defendant.
- § 4373. Confessions must be corroborated—Cannot be convicted on his own testimony alone.
- § 4374. The rights of defendant cannot be prejudiced by any admission his counsel may make.
- § 4375. Confession by inmate of insane asylum.
- DEFENDANT'S TESTIMONY—RULE IN VARIOUS STATES.
- § 4376. Weighing defendant's testimony—Rule in—Alabama.
- § 4377. Weighing defendant's testimony—Rule in—Colorado.
- § 4378. Weighing defendant's testimony—Rule in—Florida.
- § 4379. Weighing defendant's testimony—Rule in—Illinois.
- § 4380. Weighing defendant's testimony—Rule in—Indiana.
- § 4381. Weighing defendant's testimony—Rule in—Louisiana.
- § 4382. Weighing defendant's testimony—Rule in—Missouri.
- § 4383. Weighing defendant's testimony—Rule in—Nebraska.
- § 4384. Weighing defendant's testimony—Rule in—North Carolina.
- § 4385. Weighing defendant's testimony—Rule in—Pennsylvania.
- § 4386. Weighing defendant's testimony—Rule in—South Dakota.
- § 4387. Weighing defendant's testimony—Rule in—Texas.
- § 4388. Weighing defendant's testimony—Rule in—Wisconsin.
- § 4389. Unsworn statement of defendant—Georgia.
- § 4390. Defendant's failure to testify—Court should not mention it—Kentucky.
- § 4391. Conviction of another offense admitted to affect credibility.

#### INDICTMENT.

- § 4392. Indictment does not raise a presumption of guilt.
- § 4393. Sufficiency of indictment not for jury.



## CONFESSIONS.

§ 4362. **"To Consider Admissions as Any Other Testimony" Held Erroneous.** The court instructs the jury as a matter of law that, if you believe, from the evidence in this case, beyond a reasonable doubt, that any voluntary admissions or declarations were made by the defendant upon matters material to the issue in this case prior to and after his arrest, then it is the duty of the jury to consider such declarations or admissions as any other testimony, and hence if the jury believe all of the admissions and declarations to be true, they will act upon the whole as true. But the jury may believe that which charges the prisoner, and reject that which is in his favor if they see sufficient grounds in the evidence or any inherent improbability in the statement itself. The jury are at liberty to judge of it like any other evidence, by all of the circumstances in the case<sup>1</sup>

§ 4363. **Improper to Instruct that Confessions may be of the Most Satisfactory Character or that They May be of the Very Weakest Kind—Giving Instances.** (a) Certain admissions claimed to have been made by both the relatrix and also by the defendant are in evidence. Such admissions are competent evidence, and may be of the most satisfactory character, or they may be of the very weakest kind of testimony, depending upon the surrounding circumstances. If you can see from the evidence that the alleged admissions were clearly and understandingly made, that they are precisely identified, that the language is correctly remembered, and accurately repeated by the witness,—then such testimony is entitled to great weight. On the other hand, if the person making the admission may not have expressed his or her own meaning clearly and understandingly, or if the witness may have misunderstood him or her, or if the witness had no reason or motive for remembering the exact language used, or if, from lapse of time, it is seen that the witness is liable to be mistaken, or if, from interests, bias, or prejudice, the admission appears to be unreasonable, or colored, and exaggerated,—then but little reliance should be placed upon this class of testimony.<sup>2</sup>

1—Marzen v. People, 173 Ill. 43 (60.) 50 N. E. 249.

"The instruction may well be treated as erroneous because it is not based upon the evidence, but if it be not incorrect for this reason it is too broad in its language and omits necessary and proper qualifications. The plaintiff did not testify as a witness, the proof of his verbal admissions consisted of statements made by other witnesses as to such verbal admissions. As a general rule, the statements of a witness as to verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake. Greenleaf in his work on Evidence, says (sec. 200), 'With respect to all verbal admissions it may be observed that they ought to be received with great caution.' Allen v. Kirk, 81 Ia. 670, 47 N. W. 906; Kelsoe v. State, 47 Ala. 599; Cousins v.

Jackson, 52 id. 264; Rogers v. Thornton, 24 Neb. 331; Bragg v. Geddes, 93 Ill. 39; Schwachtgen v. Schwachtgen, 65 Ill. App. 127.

Where the admissions are deliberately made and precisely identified the evidence afforded by them is of a satisfactory character. The instruction, however, does not contain this qualification. The instruction leaves it to the jury to receive and act upon such admissions whether they do so with caution or not, and without a reference to the question whether such admissions were deliberately made or not. (Allen v. Kirk, supra; 1 Greenleaf on Evidence, sec. 200.)"

2—Unruh v. State, 105 Ind. 117. 4 N. E. 453 (454) a bastardy case, condemns the above which is taken from 1 Greenleaf Ev. sec. 300.

Speaking of substantially this same instruction the court in Davis v. Hardy, 76 Ind. 272, said: "To

(b) Where it is sought to show that admissions have been made by a party to this cause, the rule of law is that you ought to receive such admissions with great caution. Among the reasons given why you should exercise caution are that the witness may not have correctly understood the admissions, or may not have recollected them; a change of words may alter the meaning, or words may have been omitted. For these and other reasons, the law requires you to exercise caution in receiving the evidence of admissions.<sup>3</sup>

**§ 4364. Instructing that Verbal Confessions Ought to be Received with Great Caution.** With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.<sup>4</sup>

**§ 4365. Instructing that a Confession Freely and Voluntarily Made is Among the Best Evidence Known to the Law.** (a) The court instructs you that a confession freely and voluntarily made is among the best evidence known to the law, and, if the jury believe, from the evidence in this case, that the defendant did make such a confession, then they are authorized to consider this, in connection with the other evidence in the case, and if, from all the evidence, they believe he did take, steal, and carry away the mare, they should find the defendant guilty.<sup>5</sup>

give it in a charge as written would, in this state, be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence. It is proper matter of argument that such evidence is subject to imperfections and discredit for the reasons suggested, and the court may direct the jury's attention to the subject. But it is not for the court to say, as a matter of law, in reference to evidence of this kind, given in a particular case, that it is subject to much imperfection; or that it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did say, or that, when the omission is deliberately made and precisely identified, the evidence is often of the most satisfactory nature. These are matters of fact, experience and argument, but not otherwise the subject of legal cognizance."

It was also condemned in *Finch v. Bergins*, 89 Ind. 360; *Castleman v. Sherry*, 42 Tex. 59.

To like effect see also *Commonwealth v. Galligan*, 113 Mass. 202; *Manro v. Platt*, 62 Ill. 450; *Newman v. Hazelrigg*, 96 Ind. 73; *Koerner v. State*, 98 Ind. 7; *Lewis v. Christie*, 99 Ind. 377; *Morris v. State*, 101 Ind. 560; 1 N. E. Rep. 70.

3—In *Morris v. State* 101 Ind.

560, 1 N. E. 70 (71), a bastardy case, the above instruction in reference to the prosecuting witness was held erroneous for the same reason as the previous instruction.

4—*People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (176).

The court said this went far beyond the code provision "that the jury is to be instructed upon all proper occasions 'that the testimony of an accomplice ought to be received with distrust, and the evidence of the oral admissions of a party with caution,' and was practically the same instruction held to be erroneous in *Kauffman v. Maier*, 94 Cal. 269, 283, 29 Pac. 484, 18 L. R. A. 124, as being in violation of the constitutional provision that 'judges shall not charge juries with respect to matters of fact.' Const. art. 6 par. 19. See, also, *People v. Rodley*, 131 Cal. 240, 258, 63 Pac. 351. The cases cited by defendant, viz.: *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *People v. Strybe*. — Cal. — 36 Pac. 3, and *People v. Silva*, 121 Cal. 668, 54 Pac. 146, were all cases where the proposed instruction was limited to the language of the statute."

5—*Thompson v. State*, 73 Miss. 584, 19 So. 204.

The court said that "we have never perceived upon what principle the trial courts have acted in singling out particular portions of the evidence in a cause and telling

(b) The court instructs you that in this case the state relies in part upon what is known in law as confessions. Confessions are among the highest grade of evidence, because it is presumed that no man will confess a crime that he is not guilty of. It is not human nature for a man to confess to something that he is not guilty of, and for that reason the law makes confessions among the highest grades of evidence.<sup>6</sup>

§ 4366. **To Instruct that Defendant's Statements Proven by State to be Taken as True, Is Erroneous.** The court instructs the jury that if you believe any statements of the defendant have been proven by the state, and not denied by the defendant, they are to be taken as true.<sup>7</sup>

a jury that it ought or might consider this, that, or another part of the evidence, in connection with the other evidence in reaching a verdict. By admitting the evidence the court has declared its competency, and the jury should be left to its function of determining the weight and effect to be given it. Instructions, however, which do no more than this cannot be said to be erroneous, although it would be by far the better and safer practice to refrain from giving them. *Cheatham v. State*, 67 Miss. 335, 7 So. 204, 19 Am. St. 310. But when the court not only singles out particular evidence, but proceeds further, and informs the jury that it is of a class most highly esteemed by the law,—that is of the highest or the best or the strongest character,—this is a clear invasion of the province of the jury, and is expressly prohibited by the law. The statute expressly provides that 'the judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence but at the request of either party he shall instruct the jury upon the principles of law applicable to the case.' Code par. 732.

The instruction given in this case has been repeatedly condemned by this court. *Brown v. State*, 32 Miss. 433; *Hogsett v. State*, 40 Miss. 522." 6—*Luby v. State*, 102 Ga. 633, 29 S. E. 494 (1895).

"The language quoted is not happy in expression. It classifies the evidence as to weight, which ought not to have been done. It is argumentative in its character, and therefore inappropriate. One of the objections to it was that it assumes that a confession was made. On this ground we overrule the objection, because the brief of evidence clearly shows that beyond all doubt confessions were freely and voluntarily made; and so far as the subject of the charge is concerned, the court was right to charge the law of confessions. It is objected to that it is argumentative. This is true, and in this the charge was erroneous. While argumentative charges are generally erroneous, they are not always prejudicial, nor will they in all cases authorize the

grant of a new trial. As to the main proposition charged, viz.: that confessions are among the highest grades of evidence, such has been held by this court to be the general rule. See *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *Eberhart v. State*, 47 Ga. 609.

This rule, however, could in no event be treated as sound unless the confession was clearly proved, and shown to be absolutely free and voluntary."

7—*State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483 (1887).

The court said: "The accused is not called upon to establish his innocence, but the burden rests upon the state throughout the trial to prove his guilt, and never shifts to the defendant. That this instruction required the accused to take the stand and deny the several statements of the witnesses against him is too plain for argument. That in so doing it violated the settled law of the state is equally undeniable. No such obligation rested upon him. He had a perfect right to sit still and decline to testify at all, and no presumption of the truth of the evidence against him would arise from his failure to do so; and his silence would not authorize or justify the court in instructing the jury that, as a matter of law, his failure to deny the evidence against him raised a presumption that such evidence was true. By this instruction, the court invaded the province of the jury, and decided for them the weight of the evidence and the credibility of the witnesses, whereas, under our constitution and laws, it is the exclusive right and duty of the jury to pass upon the witnesses and the weight of testimony. That there are presumptions of law which the court may properly call to the attention of the jury may be conceded, but nowhere, at the common law, or under our system in Missouri, is there a presumption that any witness has testified truthfully, nor that his evidence must be accepted as true, merely because the accused does not take the witness stand and deny the evidence against him categorically. *Coffin v. U. S.*, 156 U. S. 432, — L. Ed. —, 15 Supt. Ct. 394."



**§ 4367. Jury Cannot Arbitrarily or Capriciously Accept or Reject Any Part of a Confession—Credibility for the Jury.** The court instructs the jury that the law in regard to admissions or confessions, where such have been satisfactorily proven to have been made by a party charged with the commission of a crime, and to which such confessions and admissions relate, that it is your duty to consider the whole statement, admission or confession proven to have been made, and that you may believe the whole to be true, or a part of it to be true, and the balance of it untrue, or you may disbelieve the whole of the same. Where an admission or confession of guilt is proven to have been freely and voluntarily made by a person charged with the offense, who is of sound mind, then such admission or confession of guilt of the crime charged is to be received as evidence of guilt of such person on the well-known principle that it is not reasonable to presume that a person of sound mind would confess or admit a thing or things to be true that might or would imperil their safety, or be prejudicial to them on a trial if such admission or confession was in fact false.<sup>8</sup>

**§ 4368. Confession Must be Voluntary and Free from the Influence of Threats and Promises—Admissibility for the Court and Not for the Jury to Determine.** (a) The court instructs the jury that if they believe from the evidence that the defendant, B., made a confession of guilt in this cause, and that such confession was made or signed by him while he was in custody of the officers of the law on such charge, before the jury should consider such confession as evidence against him they must believe and be satisfied from the evidence adduced in the case that such confession was voluntarily made; that is to say, that it was made without the defendant being influenced thereto by threats, promises, or by hope of leniency for so doing.<sup>9</sup>

<sup>8</sup>—*Gantling v. State*, 40 Fla. 237, 23 So. 857 (859).

The court said this instruction tested by "our previous decisions, was erroneous because calculated to impress the jury with the idea that they could arbitrarily or capriciously accept or reject any part of a confession. In *Metzger v. State*, 18 Fla. 481, this court approved an instruction to the effect that confessions, when made without any effort to obtain them, either from fear or promises of reward in any manner, or when made freely, without inducement or threat, are strong evidence against a party when unexplained or not denied; but such an instruction could have no application to the facts of this case, because the defendant denied making the confessions sought to be proved against him. It is true that pertinent confessions, when freely and voluntarily made, are evidence tending to prove guilt, to be considered by the jury with all the other evidence given on the trial. The jury are to determine the credence which shall be attached to the confession, and every part thereof. They are to give a fair and unprejudiced consideration. The confession should be taken as a whole.

The time and circumstances of its making, its harmony or inconsistency in itself or with the other evidence in the case, the motives which may have operated on the party in making it, should all be fairly considered by the jury, and then they should give effect to such parts as they find sufficient reason to credit, and reject all that they find sufficient reason to reject; but they should not give effect to any part or reject any part arbitrarily or capriciously. This is the rule laid down by us in *Marshall v. State*, 32 Fla. 462, 14 So. 92, and tested by this rule, the instruction under consideration was erroneous."

<sup>9</sup>—*State v. Brennan*, 164 Mo. 487, 65 S. W. 325.

The court said in comment that having "judicially determined that the confession was admissible, the jury were not authorized to exclude it; but after it was in evidence the defendant had the right to have the jury told that they might consider the circumstances under which the confession was obtained in the exercise of their exclusive prerogative of determining the credibility of the evidence in making up their verdict. Such we understand to be the effect

(b) If the confession of the defendant, as narrated by the witnesses, R. and W., was obtained from the defendant by a threat on their part, or by a promise to release the defendant from the dark cell, if he was there confined, then you cannot consider that evidence.<sup>10</sup>

§ 4369. **Confessions Made Under Promise of Immunity.** You are instructed that, before a confession of guilt is proper for you to consider, you must find that the confession of guilt was made voluntarily, and without any promise of leniency or threat, and if you find that defendant confessed to taking this money from O. in consideration of a promise from L. that, if he would confess that he took the money from O., he would not be prosecuted, you will find the defendant not guilty.<sup>11</sup>

§ 4370. **Confession Made Under Influence of Hope and Fear—Credibility.** The court charges the jury that if they find from the evidence that a confession would not have been made but for the influence of hope or fear excited in the mind of defendant, held out or made by a person or persons in authority, they may look to these circumstances under which such confession was made to aid them in the conclusion as to its truth. The court charges the jury that if, in view of all the evidence, they are not satisfied that a confession was made freely, voluntarily, or intelligently, or if it is not harmonious and consistent with the other evidence, it should be rejected as wanting in credibility, or as not entitled to weight in determining the question of guilt or innocence. The court charges the jury that, before they can convict the defendant upon a statement made by him, they must believe that he made said statements, that it is true in fact, that it is consistent with the other evidence, and was voluntarily and intelligently made.<sup>12</sup>

§ 4371. **The Word "Confessions" Should Not be Used in Reference to Statements Made by Defendant in Explaining His Conduct.** In this case, if you believe from the testimony and the circumstances that the defendants' confessions were correctly and understandingly

of the decisions of this court already adverted to, and such is the settled law in a number of our sister states. *Redd v. State*, 69 Ala. 255; *Burton v. State*, 107 Ala. 108, 18 S. 284.

<sup>10</sup>—*Brown v. State*, 124 Ala. 76, 27 So. 250 (251).

"The above instruction has been often adjudged bad by this court, as in effect submitting to the jury the question of the admissibility of confessions. *Bob. v. State*, 32 Ala. 560; *Matthews v. State*, 55 Ala. 65; *Redd v. State*, 69 Ala. 255; *Young v. State*, 68 Ala. 569; *McGuff v. State*, 88 Ala. 147, 7 So. 35, 16 Am. St. 25."

<sup>11</sup>—*Chezem v. State*, 56 Neb. 496, 76 N. W. 1056 (1057).

"It would have been rank error, to to have given this instruction in its entirety as requested. The fact that the defendant may have made a confession of guilt under a promise of immunity, would not alone entitle him to an acquittal, as the court was asked to charge the jury, since there is ample evidence in the

record, aside from the confessions of the prisoner, to justify a conviction, which the instruction sought to have the jury ignore and disregard."

<sup>12</sup>—*Smith v. State*, 37 Ala. 22, 34 So. (396) 396.

The court held the first one of the above instructions to be argumentative. "It is in the terms of other charges that have been condemned by decisions of this court. See *Amos v. State*, 123 Ala. 50, 26 So. 524; *Rogers v. State*, 117 Ala. 9, 22 So. 666." In holding the other instructions erroneous the court said: "The jury is not required to pass on the credibility or truth of statements made by one who is subsequently examined as a witness, and which are given in evidence merely by way of contradicting, and thereby impeaching, his credibility as a witness."

See also *Galson v. State*, 124 Ala. 8, where instructions on confessions were held erroneous.

made by the defendants, and that the language is correctly remembered and accurately given in evidence by the witness, then such confessions are entitled to weight the same as other evidence.<sup>13</sup>

§ 4372. **Evidence of Declarations by Defendant.** The jury are instructed that the credit and weight to be given to statements or declarations of the defendant depend very much upon what the statements or declarations are. If the crime itself, as charged, is proven by other testimony, and if it is also proven that the party charged with committing the crime was so situated that he had the opportunity to commit the crime, and his statements or declarations are consistent with such proof, and corroborative of it, and the witness or witnesses who swear to the statements or declarations is or are apparently truthful, honest and intelligent, these statements or declarations so made may be entitled to great weight with the jury.<sup>14</sup>

§ 4373. **Confessions Must be Corroborated—Cannot be Convicted on His Own Testimony Alone.** (a) The state has introduced testimony to prove the confession of defendant made before the grand jury, and other confessions of defendant, and you are charged that the law is that a defendant cannot be convicted of a crime on his own confession alone. Therefore, if you should find and believe defendant's confessions so introduced in evidence show the commission of the offense charged in the indictment, yet unless you find and believe

13—State v. Heidenreich, 29 Ore. 381, 45 Pac. 755.

Speaking of the word "confessions," the court said: "Bouvier, in his Law Dictionary, defines it as follows: 'A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency of participation which he had in the same.' Greenleaf in his work on Evidence, (section 170), in distinguishing between 'admissions' and 'confessions', says: 'In our law, the term "admission" is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term "confession" being generally restricted to acknowledgments of guilt.' If a person charged with or suspected of the commission of a crime voluntarily admits to another his agency or participation therein, with a criminal intent, such admission is denominated a 'confession'; but if such person details the circumstances of and his connection with the commission of the act for the purpose of explaining his conduct, so as to rebut the inference of a criminal intent, such statement is not a confession of his guilt. People v. Strong, 30 Cal. 151; People v. Parton, 49 Cal. 457; People v. LeRoy 65 Cal. 613, 4 Pac. 649.

We have examined the evidence, contained in the bill of exceptions, in vain to find that either of the defendants ever made an acknowledgment of a criminal intent to appropriate the property in question to his own use without the consent of the owner thereof. It is true, each

defendant freely communicated to other persons the circumstances connected with their possession of the cow and steer, and, as witnesses in their own behalf, testified that the property was purchased by them from one E. T., who represented that he was the owner thereof, and that they believed him to be such owner. They also detailed the manner in which they obtained the possession of the property, but these statements and this evidence were made and given in explanation of an honest purpose, and to rebut the inference of a criminal intent, and cannot be construed as a confession of guilt."

14—Carleton v. State, 43 Neb. 373, 61 N. W. 699 (713).

"We can hardly defend the policy of giving instructions of this character, but we think this instruction had a tendency directly the opposite to that conceived by the defendant. There were in evidence statements made by the defendant, hereinbefore referred to, to the effect that he had shot a tramp, and implying, at least, that the act was on his part willful. The court by this instruction cautioned the jury that they should weigh such statements in connection with the proof of other facts, and the credibility of witnesses testifying to such facts, and that, if the statements were consistent with such proof, and corroborative of it, they might be entitled to great weight. This was, in effect, a charge that the statements were not entitled to great weight unless corroborative of the testimony in every particular. The instruction was favorable to the prisoner instead of unfavorable."



from the evidence, beyond a reasonable doubt, that the state has corroborated said confession by other evidence, both as to the commission of the offense and the defendant's connection therewith, and that all the evidence taken together proves to your satisfaction, beyond a reasonable doubt, every material allegation in the indictment, you will find defendant not guilty.<sup>15</sup>

(b) The court instructed the jury that the confession of either of the defendants will not warrant a conviction against the defendant making the confession, unless accompanied with other proof that such an offense was committed.<sup>16</sup>

(c) The court instructed the jury that said pretended confessions are not corroborated by other circumstances sought to have been proven, or vice versa; and that said circumstances do not corroborate the said alleged confession.<sup>17</sup>

**§ 4374. The Rights of Defendant Cannot be Prejudiced by Any Admission His Counsel May Make.** The jury are instructed, as a proposition of law, that statements made by counsel for the defendant, in their presence and in the conduct of the trial, as to the commission by the defendant of the offense alleged in the indictment, in so far as they are admissions against the defendant, are to be considered by the jury in regard to the question as to whether or not the defendant is responsible, in this case, for the commission of the offense alleged against him in the indictment.<sup>18</sup>

**§ 4375. Confessions by Inmate of Insane Asylum.** Any statement, declaration or admission of the defendant that may have been introduced in evidence by the State, made while he was an inmate of the Indiana Hospital for the Insane must be regarded and held by you in your consideration thereof as the statement, declaration or ad-

15—*Barnes v. State*, 46 Tex. Cr. App. 513, 81 S. W. 735 (736).

This instruction was held erroneous in assuming that "the statements made before the grand jury, as well as other statements, are confessions of guilt."

16—*Gilbert v. Commonwealth*, 111 Ky. 793, 64 S. W. 846 (847).

The court said in comment that under "the plain language of the Code, and the *Patterson* and *Wiggington* cases (*Patterson v. Com.* 86 Ky. 321, 5 S. W. 390, *Wiggington v. Com.*, 92 Ky. 289, 17 S. W. 636), the jury is the sole judge as to whether the defendant should be convicted on confessions where the corpus delicti has been proven. It is unlike a case where the conviction is sought upon the testimony of an accomplice alone, because the Code expressly provides that it requires other testimony, tending to show the guilt of the accused, in addition to that of an accomplice, to authorize a conviction. Under the testimony in this case, it would have been misleading to the jury and prejudicial to the defendant to have given the instruction in question, because the jury might have inferred that the court was of the opinion that the appellant had

made a confession. *Spicer v. Com.* 21 Ky. Law Rep. 528, 51 S. W. 802."

17—*Gantling v. State*, 40 Fla. 237, 23 So. 857 (862).

The court said that a "more glaring violation of the rule which prohibits the judge from charging in the facts, or as to the weight and sufficiency of the evidence, than that presented by this instruction, can scarcely be imagined."

18—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664 (670).

The court said: "We know of no authority to support this instruction, nor do we think any can be found. It is a fundamental rule, as we understand it, that the rights of a defendant cannot be prejudiced by any statement made by his council or any admissions he may attempt to make. Indeed, the law is so careful of the rights of a party charged with crime that even admissions made by himself to an officer cannot be used against him, unless it be satisfactorily shown that such statements or admissions were made entirely voluntarily, and without any hope of reward or promises of immunity from the officer. *Nels v. State*, 2 Tex. 280; *Williams v. State*, — Tex. Cr. App. —, 44 S. W. 1103; *Clayton v. State*, 4 Tex. App. 515."

mission of a person of unsound mind, and allowed no weight whatever against the defendant unless the evidence in this case proves to your satisfaction beyond a reasonable doubt that the defendant was of sound mind when he made such statements, admissions or declarations.<sup>19</sup>

# DEFENDANT'S TESTIMONY—RULE IN VARIOUS STATES.

## § 4376. Weighing Defendant's Testimony— Rule In—Alabama.

(a) The defendant is authorized under the statute to testify in his own behalf, and the jury have a right to give full credit to his own statements.<sup>20</sup>

(b) The court charges the jury that they should not capriciously reject the testimony of the defendant simply because he is interested, but, unless the jury have good reasons to believe, under all the circumstances, that the defendant has sworn falsely, then the jury should believe his testimony, and consider it along with all the other testimony in the case in making up their verdict.<sup>21</sup>

(c) The defendant is a competent witness in his own behalf, and it is your duty to give it such weight as you think it is entitled to, in connection with all the evidence, if any, which tends to corroborate his statement.<sup>22</sup>

§ 4377. Colorado. You are further instructed that while defendant has been permitted to testify what his intention was in doing any of the acts charged against him, yet you are not to take his statements as to what his intentions were as conclusive, but you are to weigh them in connection with other circumstances connected with the perpetration of the offense; and if the circumstances connected with the perpetration of the offense convince you that the statements of the defendant as to what his intentions were in shooting at C. are opposed to the circumstances connected with the perpetration of the

19—Goodwin v. State, 96 Ind. 555 (561). Homicide case.

The court said: "It assumes that the fact that the appellant was confined in the hospital is *prima facie* evidence of insanity, and this is an assumption the court had no right to make. The question was one for the jury upon all the evidence. It would have been error for the court to have singled out the commitment to the hospital and to have affirmed that it proved insanity. On a question very similar to that before us, the Supreme Court of Ohio said: 'Ordinarily such inquisitions are not conclusive, but only *prima facie* evidence of insanity. . . . but on a question like that in issue here, it is manifest they cannot be regarded as even *prima facie* evidence.' Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372. It is maintained with much force in Legate v. Clark, 111 Ill. Mass. 308, that the evidence is incompetent, and we are not prepared to say this is not a correct rule. The statute did not intend to do more than provide a method of procedure limited and restrained to a single purpose, and

there is much reason for declaring that the judgment of the commission is not evidence in a civil action or a criminal prosecution."

20—The above instruction was disapproved in Horn v. State, 102 Ala. 145, 15 So. 278 and Bryant v. State, 116 Ala. 445, 23 So. 40 (41).

21—In Bodine v. State, 129 Ala. 106, 29 So. 926 (928) the above charge was held to be "argumentative, and also to invade the province of the jury in instructing them as to what they should believe."

22—Dennis v. State, 118 Ala. 72, 23 So. 1002 (1003).

Held properly refused. "Objectionable upon several grounds, the chief of which is that it requires the jury to weigh it, in connection with all the testimony which tends to corroborate it, instead of with all the evidence. The evidence in the case is not wholly circumstantial. The corpus delicti was clearly established, and defendant's confession betrayed the guilty agent. If credited by the jury beyond a reasonable doubt, they alone were sufficient to require a conviction. The circumstances were additional proof of his guilt."

offense, then it will be your duty to find that his intentions in so shooting were, as manifested by the circumstances, to the exclusion of what he may say his intentions are.<sup>23</sup>

§ 4378. **Florida.** (a) The prisoner's statement should be weighed by you like all other testimony, and you may, if you see fit, base your verdict on it alone.<sup>24</sup>

(b) That the jury have no right to disregard the testimony of the defendant L., on the ground alone that he is the defendant, and stands charged with the commission of a crime. The law presumes the defendant innocent until he is proven guilty, and the law allows him to testify in his own behalf; and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case, and if, from all the evidence, the jury have any reasonable doubt as to the guilt of the defendant they should give him the benefit of that doubt and acquit him.<sup>25</sup>

§ 4379. **Illinois.** (a) Under our present statute, parties on trial for criminal offenses are permitted to testify in their own behalf in all cases, but the law makes the jury the sole judges of the credibility of the testimony, and if they should deem it untrustworthy they may disregard it altogether, except such portion of it as may be corroborated by other creditable testimony.<sup>26</sup>

23—*Lynch v. People*, 33 Colo. 128, 79 Pac. 1015 (1016). Homicide.

"The court substantially said: 'Accept circumstances, whether you believe them true or false, if only they oppose defendant's statements, which you may believe to be true.' It is too clear for argument that this was a harmful instruction to the defendant."

24—*Green v. State*, 40 Fla. 191, 23 So. 851.

The court said: "The first clause of this instruction, notwithstanding the use of the word 'statement' (*Lester v. State*, 37 Fla. 382 (text, 389), 20 So. 232), might with entire propriety have been given; but the second clause to the effect that the jury might, if they saw fit, base their verdict upon the defendant's statement alone, was misleading. Aside from the fact that this instruction singled out and gave prominence to the testimony of a particular witness, it did not require the jury to believe the testimony of the defendant to be true in order to base a verdict upon it, but authorized them, if they saw fit, to discard all other evidence in the case, however credible, and base a verdict upon defendant's evidence, however incredible. No jury is authorized to arbitrarily or capriciously disregard or accept the testimony of any witness, or to base their verdict upon the testimony of a particular witness, without reference to other credible evidence before them. It is their duty to consider, compare, and weigh all the evidence in the case, reconciling conflicts, if they can, and, at all events, to base their verdict upon that portion of the evidence which they believe to be true,

discarding that only which they do not believe to be true. *Hicks v. State*, 25 Fla. 535, 6 So. 441."

25—*Long v. State*, 42 Fla. 612, 28 So. 855 (857).

"Under statutes like ours, giving an indicted person the status of a witness, at his option (chapter 4400, Acts 1895; *Hart v. State*, 38 Fla. 39, 20 So. 805) questions have arisen in other courts as to the extent the trial judge can go in charging the jury in reference to the attitude of a defendant when testifying in his own behalf. *Allen v. State*, 87 Ala. 107, 6 So. 370; *Wilkins v. State*, 98 Ala. 1, 13 So. 312; *State v. Cook*, 84 Mo. 40; *State v. Wells*, 111 Mo. 533, 21 S. W. 31; *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *State v. Hobbs*, 117 Mo. 620, 23 S. W. 1074; *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Lang*, 104 Cal. 363, 37 Pac. 1031; *Mueley v. State*, 31 Tex. Cr. App. 155, 18 S. W. 411, 19 S. W. 915.

In some of these states where the appellate court has sanctioned the right of the trial court to call the attention of the jury to the fact that the witness was the party prosecuted, and that fact might be taken into consideration in weighing his testimony, suggestion was made that this be omitted in charges for the reason that it singles out and emphasizes too much the testimony of one witness in the case."

26—In *Padfield v. People*, 147 Ill. 660 (662), 35 N. E. 469, the above instruction was criticized as not being as full and accurate as it should have been but was held not to justify reversal.



(b) The court instructs the jury as a matter of law that in this state the accused is permitted to testify in his own behalf; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct on the witness stand, and the jury may also take into consideration the fact, if such is a fact, that he or they have been contradicted by other credible witnesses.<sup>27</sup>

(c) The court further instructs you, that while the defendant is by law a competent witness in his own behalf in this case, yet his credibility and the weight to be given to his testimony are matters exclusively for the jury to pass upon; and while they should not disregard his testimony through mere caprice, yet the jury are not bound to believe him, nor are they bound to treat his testimony the same as the testimony of other witnesses, but they may take into consideration the fact that he is the defendant and his interest in the result of the case as such, and give his testimony such weight as, under all the facts and circumstances in evidence in the case, they may think it is entitled to.<sup>28</sup>

(d) The court instructs the jury as a matter of law that in this state the accused is permitted to testify in his own behalf; that when he does so testify, he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution as well as his demeanor and conduct on the witness stand and during the trial; and the jury are also to take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses. And the court further instructs the jury that if, after considering all the evidence in the case, they find that the accused or any other witness has willfully and corruptly

<sup>27</sup>—*Gorgo v. People*, 100 Ill. App. 130.

The court said: "No other instruction was given to the jury as to the credibility of any of the other witnesses in the case, although it appears that at least one witness, besides the prosecutor was interested in the result of the prosecution. We think that only the State's instruction on this point having been given, the jury was liable to be misled into the belief that they were to consider the defendant's credibility alone to the exclusion of other interested witnesses."

Compare *Housh v. State*, 43 Neb. 163, 61 N. W. 571 (573); *Territory v. Taylor*, 11 N. M. 588, 71 Pac. 489 (493).

<sup>28</sup>—*Hellyer v. People*, 186 Ill. 550 (553), 58 N. E. 245.

"This instruction told the jury they were not bound to treat the

testimony of the defendant the same as the testimony of other witnesses, which, on the rulings of this court, is not the law. While the jury when the defendant testifies in his own behalf may rightfully take into consideration his interest in the result of the suit as affecting his credibility, the law does not authorize the court to place him in a special and inferior class from all other witnesses by telling the jury they are not bound to treat his testimony the same as the testimony of other witnesses . . . If they are not to treat it the same as the evidence of other witnesses, how are they to treat it? The instruction is in conflict with *Chambers v. People*, 105 Ill. 409; *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381 and under the evidence in this case constitutes reversible error."

See also *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058.

testified falsely to any fact material to the issue in this case, they have the right to entirely disregard their testimony, except in so far as their testimony is corroborated by other credible evidence in the case.<sup>29</sup>

§ 4380. **Indiana.** (a) The defendant has testified in his own behalf. In weighing his testimony, the fact that he is the defendant, and therefore deeply interested in the result of the prosecution, should not be overlooked; but it does not follow that because of his interest you should disregard his testimony, or refuse to give him credit. Innocent men are sometimes charged with the commission of grave offenses. If the defendant's testimony, when compared with all other facts and circumstances in evidence, is consistent and harmonious, it may have a controlling weight in deciding the case, but the weight it shall have is a matter left wholly to your consideration and judgment.<sup>30</sup>

(b) The relatrix and defendant have testified, and they are both interested in the event of the suit. This fact should be considered in weighing their evidence, in connection with the other facts and circumstances which I have indicated apply to witnesses generally.<sup>31</sup>

29—*Purdy v. People*, 140 Ill. 46 (49), 29 N. E. 700.

The court said: "It is to be noted by this instruction the jury were told that in determining the degree of credibility that should be accorded the testimony of the defendant, they had a right to take into consideration not only his demeanor and conduct while on the witness stand but also his demeanor and conduct during the trial. The jury were sworn to try the issues submitted to them according to the law and the evidence, and most assuredly the demeanor and conduct of the defendant during the progress of the trial and while he was not a witness upon the stand were no part of the evidence in the case. Evidence may be introduced which was not anticipated; a witness may greatly exaggerate a trifling circumstance or may deliberately make a misstatement; a witness may fail to testify to the fact which the defendant fully believed was within the knowledge of such witness and would be stated by him; exaggerated denunciations may be indulged in by attorneys; the presiding judge may decide contrary to the anticipations of the defendant in respect to the admissibility of certain evidence or may rule a point of law against him. Under these and other like circumstances, a prisoner, and especially in a case where his life is at stake, might frequently, and especially so if he was not a hardened criminal, demean himself while under the influence of his disappointment, fears and feelings, in such a manner as that an observer would regard his conduct and demeanor as indicative of guilt. It would be illogical and unjust under circumstances such as stated to deduce a conclusion unfavorable to the defendant."

For comment on this case see *Boykin v. People*, 22 Colo. 496, 45 Pac. 419, where a like instruction was held sufficient.

30—*Bird v. State*, 107 Ind. 154, 8 N. E. 14, (15).

The court said: "This instruction cannot be sustained. Very clearly it discredits the testimony of appellant. It is equivalent to telling the jury that it was their duty to keep in mind the fact that appellant was the defendant, and that his testimony for that reason could not be taken as of controlling weight unless consistent with all the facts and circumstances in evidence. The other facts and circumstances, doubtless, were inconsistent with his testimony; otherwise his testimony would not have been material to him; and otherwise, doubtless, he would not have been convicted. \* \* It is true, the jury were also instructed that they were the judges of the credibility of the witnesses, including appellant; but, as to him, that must be limited by the portions of the above instruction above commented upon. From them the jury would understand that, while they might judge of his credibility, it was under the injunction to keep in mind that he was the defendant, and 'deeply interested in the result of the prosecution,' and that his evidence could not be of controlling weight unless consistent with the facts and circumstances in evidence against him. \* \* \* Citing—*Hartford v. State*, 96 Ind. 461, 49 Am. Rep. 185; *Nelson v. Vorce*, 55 Ind. 455; *Woolen v. Whitacre*, 91 Ind. 502; *Pratt v. State*, 56 Ind. 179; *Veatch v. State*, Id. 584; 26 Am. Rep. 44; *Unruh v. State*, 105 Ind. 117, 4 N. E. 453, and cases there cited."

31—*Unruh v. State*, 105 Ind. 117, 4 N. E. 453 (455).

The court said: "It very clearly

§ 4381. **Louisiana.** (a) If you find that the state has but one witness who swears to the guilt of the accused, and the accused, by their own testimony, contradict the state witness, and swear to their innocence, in such case the facts are uncertain, and leave their guilt in doubt.

(b) Facts are doubtful in criminal cases where there are only two witnesses, one for the state and one for the accused. The one for the state swearing to the existence of a fact, and the witness for the accused to its nonexistence, leaves the facts uncertain and doubtful.<sup>32</sup>

§ 4382. **Missouri.** The court instructs the jury that the defendant is a competent witness in her own behalf, and that you should not reject her testimony merely because she is the defendant. But the fact that she is the defendant, testifying in her own behalf, should be taken into consideration by you in determining what weight you will give her testimony.<sup>33</sup>

§ 4383. **Nebraska.** You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction.<sup>34</sup>

discredits the parties named because they are interested in the event of the suit. The charge is that it was the duty of the jury to consider the fact that the parties were interested in the event of the suit. The jury would not understand that, on account of that interest, greater weight was to be given to the testimony of the interested parties. Very clearly, they understood that they were to give less weight to that testimony. In speaking of a similar charge, it was said, in the case of *Dodd v. Moore*, 92 Ind. 397: "The jury have the right in all cases, in weighing and settling conflicts in testimony, to consider the interest which the witnesses may have in the result of the litigation; and it is proper to instruct them that they may exercise that right. It may be that in many cases witnesses unconsciously warp and color their testimony by reason of interest, and it may be that in many instances witnesses purposely testify falsely by reason of such interest; but whether such is the fact in any given case is a question of fact to be left to the jury. Surely, the courts cannot say, as a matter of law, that because a witness may have an interest in the litigation, less weight should be given to his testimony."

"The reasons that condemned the instructions in that case condemn the above instruction in this case. See, also, as in point, *Wollen v. Whitacre*, 91 Ind. 502, and cases there cited; *Nelson v. Vorce*, 55 Ind. 455; *Greer v. State*, 53 Ind. 420; *State v. Sutton*, 99 Ind. 300; *Hartford v. State*, 96 Ind. 461; *Thompson Charge*, Jur. 58, 59.

"Here, again, the instruction applies alike to the relatrix and to appellant, but that in no way cures the error. But for the instructions

casting discredit upon appellant's testimony because of his interest, the jury might have given full credit to his testimony, and rendered a different verdict."

<sup>32</sup>—*State v. Johnson*, 48 La. Ann. 87, 19 So. 213.

The court said that this was a comment on the facts and added: "The facts in a criminal case are not necessarily uncertain, nor the guilt of the accused necessarily left in doubt, because a single witness testifies to the guilt of the accused, and the accused, by his own testimony contradicts the state's witness and swears to his innocence."

<sup>33</sup>—In *State v. Austin*, 113 Mo. 538, 21 S. W. 31, and in *State v. Miller*, 162 Mo. 253, 62 S. W. 692, (693, 694), 85 Am. St. 498.

The above instruction was disapproved in form as in effect instructing the jury that accused's evidence should be rejected for some reason, but not alone for the reason that she is the defendant.

<sup>34</sup>—*Denner v. State*, 72 Neb. 263, 100 N. W. 305 (306).

"The state to support the instruction, cites the case of *Carlton v. State*, 43 Neb. 273, 61 N. W. 699, where the trial court charged the jury as follows: The jury are instructed that they have no right to disregard the testimony of the defendant on the ground alone that he is a defendant and has been charged with the commission of a crime, nor are the jury required to blindly receive the testimony of the defendant as true, but the jury are to fully and fairly consider whether it is true and made in good faith, and for these purposes the jury have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proved guilty by the evidence be-



· § 4384. **North Carolina.** (a) The testimony of witnesses interested in the event of an action, as the defendants are in this case, is to be regarded with suspicion, and carefully scrutinized by the jury; but the character which has been proved for them is also to be considered, and given such weight as the jury may think it deserves. The defendants are interested in the verdict to be rendered in this cause and in keeping themselves from being sentenced to imprisonment in the penitentiary, which the law affixes as a punishment for the crime with which they are charged in this indictment. You will weigh their testimony as that of persons having such an interest in the event of this action, and also consider the good character proved for them, and you will give their testimony such weight as you may think it entitled to under all the circumstances.<sup>35</sup>

(b) It is the duty of the jury, in passing upon the evidence of the prisoner himself, and of his near relatives who testified for him, to scrutinize their evidence with great caution, considering their interest

yond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the evidence in the case, and if from all the evidence, the facts and circumstances proved, the jury have any reasonable doubt of the guilt of the defendant as charged in the information, then the jury should give the defendant the benefit of the doubt and acquit him. The court, after much discussion, in which it was said that 'true' and 'made in good faith' were synonymous terms, reluctantly approved of the foregoing instruction; but it will be observed that the instruction complained of in this case is much broader in its terms, goes farther, and is more prejudicial to the accused than the one above quoted. In that instruction it was not suggested that the testimony of the accused might have been given in bad faith and for the purpose of avoiding a conviction, while this one goes to that extreme length. We are unwilling to go any farther in approving instructions of this kind than the rule announced in the Carlton Case. No case has been called to our attention and we have not been able to find one, which seems to justify us in so doing. Indeed, common experience teaches us that juries are prone to view the evidence of one is on trial for a criminal offense with suspicion, and the court should not, by his conduct or instructions, in any manner disparage the evidence of the accused."

35—State v. Graham, 133 N. C. 645, 45 S. E. 514 (517).

The court said: "In State v. McDowell, 129 N. C. 523, 532, 39 S. E. 840, 843, the court instructed the jury to scrutinize the evidence of the prisoner's relations with great caution, considering their interest in the result of the verdict, and after so considering, the jury will give it such weight as they may

deem proper. This was held by this court to be erroneous, following the rule laid down in State v. Collins, 118 N. C. 1203, 24 S. E. 118. In State v. Holloway, 117 N. C. 730, 23 S. E. 168, the instruction was that the jury 'had a right to scrutinize the testimony of the defendants and receive it with grains of allowance on account of their interest in the event of the action.' This, upon exception, was held erroneous, the court saying that: 'This charge is capable of misleading the jury into the impression or belief that the evidence of interested parties is to be to some extent discredited, although the jury may think the witness is honest and has told the truth. His honor should have gone further, and explained to the jury, after having called their attention to the interested relation of the witness, that, if they believed the witness to be credible, they should give to his testimony the same weight as other evidence of other witnesses. A charge conforming to this rule, in State v. Byers, 100 N. C. 512, 6 S. E. 420, was approved by this court. Also in State v. Boon, 82 N. C. 637. In State v. Lee, 121 N. C. 544, 28 S. E. 552, this court disapproved the following strong and significant language: 'The wife is a competent witness in behalf of her husband, but in view of the close relationship between them, and the cloud of suspicion cast upon her testimony, the law says the jury should scrutinize her testimony with great severity.' In State v. Apple, 121 N. C. 584, 28 S. E. 469, the court approved the instruction to the jury: 'It was their duty to scrutinize the testimony of near relations, but they could not reject it on that account; and that, after thus scrutinizing their testimony, if they believed they had sworn the truth, they should give it the same weight as if they were not related to the defendant. His honor's instruction upon this point is not in accord with the rule laid down by this court.'"

in the result of the verdict, and, after so considering, the jury will give to it such weight as they may deem proper.<sup>36</sup>

§ 4385. **Pennsylvania.** The defendant is, of course, most deeply interested in your determination; and just so far as he fails in being substantiated and corroborated by other testimony in the case, or facts in the case, and that interest and feeling would bias him or prejudice him in giving his testimony, so far would you be warranted in discrediting that testimony. But notwithstanding the interest of any witnesses, if they are corroborated by the testimony of other witnesses and other testimony in the case, then you cannot disregard it simply because of their feeling or interest in the case. It is only a matter for you to take into consideration in passing upon the amount of credibility you are to give the testimony of every witness.<sup>37</sup>

§ 4386. **South Dakota.** You are instructed that under the statutes of this state a defendant in a criminal case may be a witness in his own behalf. But you are further instructed that it is your duty to take into consideration, in weighing his testimony, the fact that he stands charged with the commission of the crime; that the result of the case under consideration is to him of the most vital importance; and, bearing this in mind, you are to give to his evidence such weight and credence as, in your sound judgment, you may consider it entitled to. And the proof in support of it is such as is furnished by co-defendants, and relatives and friends of the defendant or his co-defendants. It is the duty of the jury to take into consideration the interest of the defendant and his co-defendants, and the natural interest or sympathy of his relatives, or the relatives of his co-defendants, or his and their friends.<sup>38</sup>

<sup>36</sup>—State v. McDowell, 129 N. C. 523, 39 S. E. 840 (842).

"In the above prayer, which was given, the court, after instructing the jury to scrutinize the evidence of the prisoner's relations with great caution, considering their interest in the result of the verdict; and, after so considering, the jury will give to it such weight as they may deem proper. This charge is a very common one, and when applied to witnesses on both sides, and properly applied by the jury, many do no harm. But the scrutiny referred to is for the purpose of aiding the jury in determining the credit of the witnesses, as the jury are to pass upon that, whether the witness is interested or not. If they find the witness to be credible and that he has sworn the truth, his testimony should have the same weight as if he was not interested; and it was error in the court, when charging the jury upon the subject of interest not to so have charged the jury."

<sup>37</sup>—Commonwealth v. Pipes, 158 Pa. St. 25, 27 Atl. 839 (840), 22 L. R. A. 353.

The court said: "While it was entirely proper to call the jury's attention to the prisoner's interest as effecting his credibility, and while the terms in which the learn-

ed judge did so might be correctly understood by him, and by members of the bar familiar with legal distinctions, the general effect of the charge on this point was to discredit the prisoner as a witness and to lead the jury to throw out his testimony, except where it was corroborated. This is the usual rule as to accomplices, not as to defendants; and, in a case where the prisoner was necessarily the only witness as to the actual circumstances of the shooting, it put upon him a greater burden than the law imposes."

<sup>38</sup>—In State v. Smith, 8 S. D. 547, 67 N. W. 619 (621).

The Supreme Court criticized this instruction as follows: "It is always proper for trial courts to remind jurors of their duty in this respect, but we cannot commend the manner in which it was done in this case. They should have been directed to consider the interest, if any, as shown by the evidence, of each witness, without specifying any particular person or class of persons, and to give to the testimony of each such weight as the jurors believed it entitled to, in view of all the evidence. The testimony of each witness should be subjected to the same test, and the court should studiously avoid any expression calculated to discredit any par-

§ 4387. **Texas.** You are further instructed in this cause that defendant is a competent witness in his own behalf, and you are the sole judges of his testimony, and you should judge and weigh it as you would the testimony of any other witness.<sup>39</sup>

§ 4388. **Wisconsin.** Under the law of this state, the defendant is a competent witness in his own behalf. In considering the weight of his testimony, you have the right to bear in mind his interest in the result of the trial, and the temptation that exists under the circumstances to testify falsely, and everything bearing upon his credibility, and then give his evidence such weight as the jury believes it entitled to receive.<sup>40</sup>

§ 4389. **Unsworn Statement of Defendant—Georgia.** In criminal cases, the defendant is not allowed to be sworn as a witness for himself. It would, in important cases, be too great a temptation to commit perjury. But, while not permitted to swear, the law will not absolutely close his mouth in his own defense but it permits him to make an unsworn statement as to the whole transaction.<sup>41</sup>

§ 4390. **Defendant's Failure to Testify—Court Should not Mention It—Kentucky.** The jury are instructed that they shall not comment

ticular portion of the testimony. However, we are satisfied, from a careful inspection of the record, that, whatever departure there may be in the foregoing parts of the charge from what we regard as good form, such departure did not prejudice, or tend to prejudice, defendant in respect to any substantial right, and therefore presents no reversible error."

39—Tardy v. State, 46 Tex. Cri. App. 214, 78 S. W. 1076 (1077).

It was held that it is "never proper for the court to single out the testimony of any witness and give a charge similar to this one asked."

40—Schutz v. State, 125 Wis. 452, 104 N. W. 90.

"An instruction directing the jury's attention to the peculiar interest of a party in weighing his testimony has generally been held proper, but it should always be qualified by the further instructions that considerations of interest, appearance, manner, etc., apply to him in common with all other witnesses. Whether the omission to state that qualification in immediate connection with the instruction itself will be held cured by a general direction elsewhere in the charge to apply the test of interest to all witnesses may be doubtful. Such question ought not to come to this court, for an instruction prepared by the judge in a spirit of judicial fairness to the accused would hardly omit such cautionary qualification. Its absence here may probably be accounted for by the fact appearing by the record that the instruction assailed was framed and requested by the prosecuting attorney, perhaps rather from the point of view of zealous advocacy than of judicial care for

the interests of both parties. Emery v. State, 101 Wis. 627, 657, 78 N. W. 145; Kavanaugh v. Wausau, 120 Wis. 611, 620, 98 N. W. 550; Strasser v. Goldberg, 120 Wis. 621, 98 N. W. 554; Hellyer v. People, 186 Ill. 550, 554, 58 N. E. 245."

41—Alexander v. State, 114 Ga. 266, 40 S. E. 231 (232).

Held error. The Supreme Court said: "Exception is taken to the phrase, 'it would in important cases, be too great a temptation to commit perjury.' We think that in using this expression the court committed grave error. Undoubtedly, this was an important case. Indeed it was one involving the very life of the accused. The jury were therefore, in substance, instructed that in such a case the accused ought not to be permitted to swear as a witness, because he would be under too great a temptation to commit perjury. Necessarily this also carried the idea that the accused would be under an equal, if not greater, temptation to speak falsely when availing himself of his privilege of making an unsworn statement to the jury. It is true that the judge followed the language above quoted with appropriate instructions with respect to the right of the jury to accept or reject the statement of the accused, as they saw proper; but, unfortunately, these instructions were prefaced with a warning to the effect that the jury should be extremely cautious in believing what the accused said. It would have been far better, as this court has often remarked, to give in charge to the jury the statute law upon this subject, leaving them free to consider the statement, and give to it whatever weight they saw proper."



upon the failure of the defendant to testify; neither shall they draw any presumption of his guilt from his failure to testify.<sup>42</sup>

§ 4391. **Conviction of Another Offense Admitted to Affect Credibility.** (a) The court instructs you that the evidence of the defendant that he had within the last three months been prosecuted and convicted in E. county for the offense of adultery with M., was offered and admitted before you for the purpose only of impeaching the defendant as a witness in the case; and you will consider said evidence for the purpose for which it was admitted before you, and for no other purpose.<sup>43</sup>

(b) The jury are instructed that they can only consider the evidence of conviction of defendant of grand larceny as going to his credibility as a witness, and that you cannot consider it for any other purpose.<sup>44</sup>

(c) The court instructs the jury that you are not to consider any other trials or convictions of this defendant as having and bearing on this case. It is your duty to consider no other matters except the evidence and the instructions of this court.<sup>45</sup>

## INDICTMENT.

§ 4392. **Indictment Does Not Raise a Presumption of Guilt.** The court instructs you that the mere fact that a grand jury has returned an indictment against the accused does not raise any presumption that the accused has been guilty of any crime, and you must not take the filing of the indictment as raising any such presumption. Until you, and each of you, are satisfied beyond a reasonable doubt, by the evidence here introduced before you, without reference to the nature of the indictment, that the accused is guilty of some of the grades of homicide covered by this indictment, there can be no conviction.<sup>46</sup>

<sup>42</sup>—*Tines v. Commonwealth*, 25 Ky. 1233, 77 S. W. 363 (364).

"The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the commonwealth's attorney could have been more injurious to his interest than was done by this instruction. The court, by the instruction in question, did appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf." Subsection 1, par. 223, Cr. Code."

<sup>43</sup>—*Counts v. State*, Tex. Cr. App. 89 S. W. 972.

"Several objections were urged to this charge—among others, that it was on the weight of the evidence. We think this exception is well taken. Without going into a discussion of the matter, we think this charge comes within the rule laid down in *Stull v. State*, 84 S. W. 1059, 12 Tex. Ct. Rep. 230."

<sup>44</sup>—*McQueen v. State*, 108 Ala. 54, 18 So. 843 (844).

The court held this instruction erroneous. The purpose of the introduction of the record of the former

conviction of the defendant for larceny does not appear to have been avowed at the time of its introduction. Except for the statute (Code § 2766) it was not admissible as evidence for the state; and the presumption must be that it was introduced for the only purpose for which the statute renders it admissible—that of affecting the credibility of the defendant as a witness. The instruction to the jury gave it a scope and latitude as evidence, larger than that which the statute attaches to it. Besides, at the utmost, it could only be evidence of a specific act or fact inadmissible and irrelevant to the pertinent inquiry of the good repute of the defendant for honesty, the trait of character the accusation particularly involved which he had introduced evidence, without objection, tending to prove."

<sup>45</sup>—*People v. Wood*, 145 Cal. 659, 79 Pac. 367 (369).

This was held erroneous in asking the jury in this case not to consider evidence of other trials and convictions.

<sup>46</sup>—*Aszman v. State*, 123 Ind. 347, 24 N. E. 123 (127), 8 L. R. A. 33.

§ 4393. **Sufficiency of Indictment Not for Jury.** The jury must decide, first, whether the indictment charges the crime of forgery under the law; second, whether the state has proven all the essential allegations of the indictment.<sup>47</sup>

The court held it no error to refuse this charge as unnecessary under all the instructions given and as self evident. "It must be assumed that jurors are men of ordinary intelligence that they are possessed of the information common to well-informed citizens."

<sup>47</sup>—State v. Woods, 112 La. 617, 36 So. 626 (629).

The court, in holding the above

instruction erroneous, said that "the question of the sufficiency of the indictment is never presented to the jury for its determination. It is a pure question of law to be decided on the face of the indictment or information. The province of the jury is to determine the question of the guilt or innocence of the accused on the law and evidence as a whole."

## CHAPTER CLXX.

### CRIMINAL—INSANITY—INTOXICATION.

See Approved Instructions, Chapter LXXXIX, Vol. II.

#### INSANITY.

- § 4394. Insanity defined—Burden of proving on defendant.
- § 4395. Presumption of sanity—Burden of proof does not shift in criminal cases.
- § 4396. Presumption of sanity overcome by showing insanity to be probable.
- § 4397. Distinguishing right from wrong—Matters which acquit stated conjunctively.
- § 4398. Insanity—Power to intend but not to deliberate.
- § 4399. Insanity—Want of motive—No evidence of.
- § 4400. Insanity not necessarily inconsistent with guilt.
- § 4401. Insanity—Not enough that defendant "acted under" impulse.
- § 4402. Insanity—Temporary, when no defense.
- § 4403. Insanity — Irresistible impulse no defense.
- § 4404. Irresistible impulse—Defendant able to distinguish, but not to choose, between right and wrong.
- § 4405. Insanity—Need not be proven beyond a reasonable doubt.
- § 4406. Insanity — Defendant need only raise a reasonable doubt.
- § 4407. Insanity—Presumption as to continuance.

- § 4408. Insanity from blow on the head—Telling exaggerated stories, etc.—Commenting on evidence.
- § 4409. Insanity of defendant's mother must be considered.

#### INTOXICATION.

- § 4410. Intoxication—When excuse for crime—Degree of.
- § 4411. Where specific intent is necessary to constitute a crime, drunkenness which affects the mind so such intent is not possible, will excuse.
- § 4412. Intoxication to such an extent as to prevent the formation of the intent required by law.
- § 4413. Intoxication and specific intent.
- § 4414. Intoxication as showing lack of premeditation.
- § 4415. Drunkenness occasioned by fraud, contrivance or force.
- § 4416. Intoxication from liquors or morphine—Temporary insanity—Homicide.
- § 4417. Delirium tremens.
- § 4418. Intoxication—Error to take from the jury evidence in relation to.
- § 4419. Intoxication—Error to belittle defense of, by saying "There is some evidence."

#### INSANITY.

§ 4394. **Insanity Defined—Burden of Proving, on Defendant.** In this case insanity is interposed as an excuse for the charge in the information. This defense is recognized by the law, and, should insanity be proven by the evidence in this case to your reasonable satisfaction, it will be your duty to acquit. Insanity is a physical disease located in the brain, which disease so prevents and deranges one or more of the mental faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong, in reference to the particular act charged against him, and incapable of understanding that particular act in question was a violation of the



law of God and of society. The law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary be shown. So, in this case, where insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the act complained of must, before you can acquit him upon that ground, be established by the evidence to your reasonable satisfaction, and the burden of proving this fact rests on the defendant.<sup>1</sup>

**§ 4395. Presumption of Sanity—Burden of Proof Does Not Shift in Criminal Cases.** You are instructed that the law presumes every one to be sane and responsible for his acts until the contrary appears from the evidence; but if there is evidence in the case tending to rebut this assumption, and sufficient to raise a reasonable doubt on the issue of insanity, then the burden of proof is upon the state to show by the evidence, beyond a reasonable doubt, that the defendant was sane, as explained in these instructions, at the time the alleged offense was committed.<sup>2</sup>

**§ 4396. Presumption of Sanity Overcome by Showing Insanity to be Probable.** In considering this question of the insanity of the accused, you are to bear in mind that the presumption of the law is that he was sane. The burden is upon him to establish that at the

1—State v. Coats, 174 Mo. 396, 74 S. W. 864 (870).

Approved as to form but held inapplicable where there was no evidence to establish insanity of the defendant. A like instruction was approved in State v. Privitt, 175 Mo. 207, 75 S. W. 457 (460).

2—Snider v. State, 56 Neb. 309, 76 N. W. 574.

The court held that "this instruction was erroneous, in that it shifted the burden of proof until such point as the evidence should be sufficient to raise a reasonable doubt. The rule is that the burden does not shift in a criminal case. In the absence of any evidence tending to show insanity, the presumption of sanity satisfies the requirements of the law; but, as soon as there is any evidence tending to show insanity, then the state must convince the jury of sanity, as of every other element of guilt. It is not necessary that there must first be evidence sufficient to raise a reasonable doubt.

"The only case cited as sustaining it is Com. v. McKie, 1 Gray, 61, 61 Am. St. 410. In that case there was no issue of insanity. It was a prosecution for assault and battery, and the trial judge had instructed that, if the bare fact of the battery had been proved, the burden was upon the defendant to show justification. This was held bad because it shifted the burden, the court adding to its discussion: 'There may be cases where a defendant relies on some distinct substantive ground of defense to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance), in

which the burden of proof is shifted upon the defendant. But in cases like the present and we do not intend to express an opinion beyond the precise case before us \* \* \* the burden of proof does not change.' It will seem that this is not even an *obiter dictum* in support of such an instruction; it is only an effort by the court to prevent an inference to be drawn either way. Nevertheless, the same court a little later (Com. v. Eddy, 7 Gray 583), did hold that, while the burden is throughout on the commonwealth, it is satisfied as to sanity by the presumption thereof; and, if insanity be a defense, the defendant must prove it by a preponderance of the evidence, a conclusion directly opposed to the uniform rule in this state. The court, by such an instruction, in effect says that the jury is not to look constantly to see if the state has proved guilt, but, if insanity is a question, it must first look at the case from the standpoint of guilt, and see if there is affirmative evidence of insanity sufficient to acquit, and only then recur to the proper point of law. That it is erroneous is shown by many of our decisions. They are reviewed in Peyton v. State, 54 Neb. 188, 74 N. W. 597, 11 Am. Cr. Rep. 47.

"In that case an instruction contained a similar vice, and, while it related to an alibi, it is in point, because, as shown by the cases there cited, this court has always refused its assent to the doctrine that as to the burden of proof there is a distinction between essential elements of the offense and what the Massachusetts court styles a 'distinct, substantive ground of defense.'"

time of the killing of said I. M. T., if he did kill her, he was in such a state of insanity as will excuse the act. And if the evidence goes no further than to show that such a state of mind was possible, or even probable, it is not sufficient. It must be sufficient to overcome the legal presumption of sanity, and satisfy you by a fair preponderance of the evidence that he was insane. The defense of insanity is one which should be thoughtfully, thoroughly, and dispassionately considered by you. You should indulge in no prejudice against it, but you should give it a candid and fair consideration, with an honest design to reach the very truth of the matter.<sup>3</sup>

**§ 4397. Distinguishing Right from Wrong—Matters Which Acquit Stated Conjunctively.** If, from all the evidence in the case, you believe beyond a reasonable doubt that the respondent committed the crime of which he is accused as charged in the indictment, and that at the time of the commission of such crime the respondent knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting the crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged. But, on the other hand, if you believe from the evidence that at the time the respondent committed the crime, if you find he did commit it, he was so far affected in his mind and memory that he was not able to distinguish right from wrong and had no knowledge and understanding of the character and consequences of his act and (no) power of will to abstain from it, then he was not a legally responsible being, and you should find him not guilty by reason of insanity.<sup>4</sup>

**§ 4398. Insanity—Power to Intend but not to Deliberate.** The court instructs the jury that the defendant may be of sufficient mind as to intend the murder of the deceased, and at the same time be not of such understanding and control of his mind and mental powers as to coolly deliberate said murder; and if you so find from the evi-

3—State v. Thiele, 119 Ia. 659, 94 N. W. 256 (257-8).

The court said: "In saying he was not entitled to an acquittal if the evidence proved him probably insane, there was error. \* \* \* Sanity is the normal condition, and the presumption that it exists goes no farther than the assumption, for the purpose of the trial, that the accused is not different in this respect from other men. The law does not undertake to measure the precise amount of evidence which, when undisputed, will rebut this assumption and justify the conclusion that a person is abnormal, save that it must be enough to convince the understanding. The peculiar vice of the instruction is that it tells the jury that evidence showing that insanity is probable does not overcome the presumption of sanity. The jurors might have construed the above logically and as it was written."

Citing State v. Jones, 64 Ia. 349,

17 N. W. 911, 20 N. W. 470, where a like instruction was condemned. Davis v. U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499; State v. Trout, 74 Ia. 545, 38 N. W. 405, 7 Am. St. 499; Kelch v. State, 55 Ohio St. 146, 45 N. E. 6, 39 L. R. A. 737, 60 Am. St. 680.

4—State v. Kelley, 74 Vt. 278, 52 Atl. 434 (435-6).

The court said: "The jury would naturally treat the two parts as equivalent statements of the same rule, the only difference being that one was in the positive form and the other in the negative, and if either part is unsound they may have been misled. Then it follows that they may have understood that, to constitute a defense, the respondent must have been unable to distinguish right from wrong, and have had no knowledge and understanding of the character and consequences of his act and no power of will to abstain from it; for the three clauses are stated conjunctively."

dence you will find the defendant guilty of murder in the second degree.<sup>5</sup>

§ 4399. **Insanity—Doubt of Motive no Evidence of.** It is proper, therefore, for you, as bearing upon the soundness or unsoundness of defendant's mind at the time of the commission of the alleged crime, to consider what reason, if any, the defendant had for committing the crime charged against him in this case. It is for you to say whether the absence of a motive to commit the crime is not a persuasive circumstance in favor of the defendant's plea of unsoundness of mind.<sup>6</sup>

§ 4400. **Insanity not Necessarily Inconsistent with Guilt.** (a) If any individual juror, after considering all the evidence in the case is satisfied that the defendant was insane at the time he committed the homicide, the jury cannot convict the defendant.<sup>7</sup>

(b) Under the law of this state certain persons, including lunatics and insane persons, are incapable of committing crimes. Accordingly, if you find that, at the time of doing the acts charged in the information against the defendant, he was an insane person, it is your duty to acquit him on the ground of insanity.<sup>8</sup>

§ 4401. **Insanity—Not Enough that Defendant "Acted Under" Impulse.** If the jury believe that the accused acted under an insane, irresistible, homicidal impulse, even though he was able to distinguish between right and wrong, he is entitled to an acquittal.<sup>9</sup>

§ 4402. **Insanity—Temporary, When no Defense.** (a) If the jury believe from the evidence that the defendant at the time of the killing was temporarily insane, and not responsible for his conduct, he should be acquitted.<sup>10</sup>

5—State v. Holloway, 156 Mo. 222, 56 S. W. 734 (735).

The court said: "If sane, defendant was indubitably guilty of murder in the first degree; if insane, of nothing. No halfway house exists, in a case of this sort, between murder in the first degree and any minor degree of that crime. Defendant, if sane, could coolly deliberate said murder; if insane, he could neither deliberate nor premeditate, and consequently was guiltless of the crime charged, and of any degree of that crime; and defendant's counsel, in their zeal for their client, do not insist that the crime so long delayed was done in hot blood."

6—Held error because, *inter alia*, sane men commit crime without motive. Blume v. State, 154 Ind. 343, 56 N. E. 771 (774). Citing Sumner v. State, 5 Black (Ind.) 579, 36 Am. Dec. 561; Wharton & S. Med. Jur., 405 Whart. Cr. Ev. 734.

7—Porter v. State, 140 Ala. 87, 37 So. 81 (82). Citing Parsons v. State, 81 Ala. 596, 597, 2 So. 854, 60 Am. Rep. 193; Gunter v. State, 83 Ala. 109, 3 So. 600; Boswell v. State, 63 Ala. 307 (316), 35 Am. Rep. 20.

Held erroneous because defendant, though insane, might have known it was wrong to take the life of the deceased. "If he had this knowledge in order to relieve him of criminal responsibility, two conditions

must occur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if at the same time, the alleged crime was so connected with such mental disease in the relation of cause and effect, as to have been the product of it solely."

To the same effect Copenhaver v. State, 160 Ind. 540, 67 N. E. 453 (457).

8—State v. Keerl, 29 Mont. 508, 75 Pac. 362 (366).

"After the words 'an insane person,' the court should have explained the meaning of the term 'insanity,' as it is regarded in the criminal law, either by direct definition or by reference to other parts of the charge. It is not sufficient to give the statute without explanation, because it is not every form of insanity which will excuse the defendant of the act committed."

9—Erroneous because he might, still, have known the difference between right and wrong, and had power to choose between them. State v. Lyons, 113 La. 959, 37 So. 890 (903); Commonwealth v. Wireback, 190 Pa. 138, 42 Atl. 542, 70 Am. St. 625.

10—Copeland v. State, 41 Fla. 320, 26 So. 319 (320).



(b) The laws of the state of California do not recognize transitory mania or temporary insanity as a defense to crime.<sup>11</sup>

(c) If the jury believe from the evidence that the defendant at the time of the killing was temporarily insane, and not responsible for his conduct he should be acquitted.<sup>12</sup>

Held properly refused. The court said: "Insanity as affecting accountability for criminal action has given rise to much judicial discussion and in America there is considerable conflict of opinion or confusion on the subject. It is conceded to be an intricate and difficult question. It was held by the judges of England, in 1843, that if the accused was conscious that the act was one which he ought not to do, and the act at the time was contrary to law, he was punishable. It was ruled that in all such cases the jury ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. It was also held that, notwithstanding a party accused did an act which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he was nevertheless punishable if he knew at the time he was acting contrary to law. *McNaghten's Case* 10 Clark & F. 200. The rule stated is what is known as the 'right and wrong test,' and has not been regarded as entirely correct by some American judges and text writers. It seems to be the settled English rule, and has not been much departed from that we have been able to find. Many authorities might be cited, but we refer to only two which, among many, undertake to review the subject. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *Parsons v. State*, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193. Some decisions maintain the view that, although an accused may know the nature and quality of the act he does, and that it is wrong, or contrary to law, yet, if he committed the act under an irresistible impulse he should be held unaccountable. This is the so-called 'moral insanity rule' and it seems to recognize the fact that a man may have sufficient mental capacity to know what he is doing and that it is wrong, yet not sufficient to be responsible to the law for his acts. The English rule proceeds upon the theory that, if a man knows the nature and quality of his act, and that it is wrong, he has sufficient

mental capacity to be responsible for not properly controlling his actions. By statute in this state the common law of England in relation to crimes, except as to the modes and degrees of punishment, is of full force in this state, where there is no existing provision by statute on the subject. It is not our purpose now to make any definite announcement as to what is the correct rule in instructing juries on the subject of insanity, when the facts properly call for such instructions, as the present case does not, in our judgment demand it. No appellate court, so far as we have found, whether proceeding upon the right-and-wrong test or the moral-insanity theory, has gone so far as to hold that a person of sound mind who commits a criminal act, should be held irresponsible on the ground that it was done under such an impulse of resentment, jealousy and revenge as temporarily to dethrone the reason. Heat of passion or feeling produced by motives of anger, hatred or revenge, is not insanity, and the law holds the person who acts criminally under such impulses responsible for his crime. *People v. Foy*, 138 N. Y. 664, 34 N. E. 396; *Williams v. State*, 50 Ark. 511, 9 S. W. 5; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Sanders v. State*, 94 Ind. 147; *Goodwin v. State* 96 Ind. 550; *State v. Graviotte*, 22 La. Ann. 587."

11—*People v. Ford*, 138 Cal. 140, 70 Pac. 1075.

"This statement was repeated in substance in a formal instruction then given by the court, in addition to the instructions formerly given upon the subject, and then re-read to the jury. Temporary insanity, as a defense to crime, is as fully recognized by law as is permanent insanity. As an attempt to lay down a rule of law, the instruction was unquestionably unsound."

12—*Copeland v. State*, 41 Fla. 320, 26 So. 319 (320).

Held that the evidence would support no instruction as to insanity where it showed merely "that the defendant slew the deceased, with whom he was greatly enamored, and with whom he had lived illicitly for a year or more, because he discovered that she was associating with another man. There is no testimony tending to show insanity before the killing, except that the accused became worked up to a high state of passion and frenzy on seeing the deceased come to her own home at a late hour of the night with a man, and hearing her invite him to share her bed during the night."

§ 4403. **Insanity—Irresistible Impulse no Defense, When.** (a) If some controlling disease was in truth the acting power within him, (the prisoner,) which he could not resist, or if he had not a sufficient use of his reason to control the passion which prompted the act complained of, he is not responsible.<sup>13</sup>

(b) To establish the proposition that he was insane in the legal sense and therefore not criminally responsible, the respondent must prove that at the time of doing the act he was afflicted with mental disease of such character or extent that he had not then the mental capacity sufficient to distinguish between right and wrong as to the particular act he was doing; or, in other words, that he had not knowledge, consciousness, or conscience enough to know that the act he was doing was wrong and criminal, and one for which he would be liable to punishment; or, in still other words, that he was so afflicted by mental disease as not to know the nature and quality of the act he was doing, or, if he did know that much, he yet did not know that the act was unlawful and wrong. If he does prove that much, it establishes the proposition that he was legally unsound; insane, in the legal sense. Again, whatever was the character or extent of his mental disease, if any he had, if he yet had sufficient mental capacity to understand and know the situation, to understand and remember the nature and quality of the act he was doing, that it was unlawful and wrong, he was not then "insane" in the legal sense of that term. He must show then first, the existence at that time of some mental disease; secondly, that the disease was of such character or extent that it deprived him at that time of the usual mental capacity necessary to understand the nature and quality of the act he was doing, its character and consequences; in other words, the mental capacity to distinguish between right and wrong as to that particular act. He must show the connection between a mental disease, if there was one, and this unhappy result by the reduction of his mental capacity to the state which I have described. If both are shown, namely, the existence of the mental disease and its extent to the point I have described, then he was insane in the legal sense, and the killing was simply the unfortunate result of mental disease; otherwise, the killing must be held to be the result of the man's vicious acts, for which he is responsible.<sup>14</sup>

13—Held erroneous in *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584 (589). Citing *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 730, where the court said: "Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime, and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law."

14—*State v. Knight*, 95 Me. 467, 50 Atl. 276 (277-80).

"It is not in controversy that the instructions actually given to the

jury were in entire harmony with the intellectual test of criminal responsibility approved in *State v. Lawrence*, 57 Me. 574, and cases there cited, and that the refusal to give the requested instructions was fully justified by the doctrine of that case. But it is earnestly contended by the learned counsel for the defendant that an uncontrollable insane impulse to commit a criminal act may co-exist with full knowledge of the wrongfulness of the act, and that the legal test of responsibility for crime afforded by the knowledge of the right and wrong, respecting the act committed, has proved to be insufficient and unsatisfactory. It is accordingly insisted that the time has now arrived when this criterion of respon-

**§ 4404. Irresistible Impulse—Defendant Able to Distinguish, But Not to Choose, Between Right and Wrong.** The standard of accountability is this: Had the defendant, at the time of the commission of the act, sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? Did he know that it was prohibited by the laws of this state, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed and is to be judged accordingly.<sup>15</sup>

sibility can be safely modified by incorporating into the rule the element of irresistible impulse presented in the defendant's requests. In *State v. Erb*, 74 Mo. 199, a requested instruction that if the accused 'was incapable of distinguishing right from wrong, or of exercising control or will power over his actions, or was unconscious at times of the nature of the crime he was about to commit,' he should be acquitted, was held to have been properly refused, and this decision was reaffirmed in *State v. Pagels*, 92 Mo. 300, 4 S. W. 931, the court saying in the opinion in the latter case: 'It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts.' In a very elaborate discussion of the subject by the supreme court of appeals in *State v. Harrison*, 136 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224, the authorities are critically examined and compared, and the doctrine of 'irresistible impulse' emphatically repudiated. In the opinion it is said: 'For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse and not criminal design and guilt? I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override the reason and judgment and obliterate the sense of right as to the act done, and deprive the accused of the power to choose between them. This impulse is born of the disease, and when it exists capacity to know the nature of the act is gone. This is the sense in which 'irresistible impulse' was defined in *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231, and *Dacey v. People*, 116 Ill. 556, 6 N. E. 165.

"See also, *State v. Felter*, 25 Ia.

67; *State v. Mewherter*, 46 Ia. 88; *State v. Nixon*, 32 Kas. 205, 4 Pac. 159; *Ortwein v. Com.*, 76 Pa. 414, 18 Am. Rep. 420; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *U. S. v. Guiteau*, — D. C. —, 10 Fed. 195.

"Can it be said that a person so situated knows that his act is wrong? I think not, for how does anyone know that any act is wrong except by comparing it with general rules of conduct which forbid it? And if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong. . . . If the words 'know' and 'wrong' are construed as I should construe them, I think this is a matter of no importance, as the absence of the power of self control would involve an incapacity of knowing right from wrong. . . . All that I have said is reducible to this short form: Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."

15—*State v. Keerl*, 29 Mont. 508, 75 Pac. 362 (363).

"Defendant's counsel especially object to this instruction, because it does not recognize that the defendant may have acted under an irresistible impulse caused by mental disease. It seems to be demonstrated by modern investigation, beyond cavil, that many insane persons, while having the mental capacity to distinguish between right and wrong, are not able to choose between doing what is right and doing what is wrong. The lower court recognized this in instructions 34, 38, 49, 53, 54 and 55. As illustrative of this, we quote a portion of 38: 'If, by reason of disease affecting his mind, his mental faculties were so impaired or perverted as that he was unable to distinguish between right and wrong as to the particular act with which he is charged; or if he was able to recognize that it was wrong, and yet was impelled by some impulse, originat-



**§ 4405. Insanity—Need Not Be Proven Beyond A Reasonable Doubt.** (a) Where the proof of evidence leaves the question of sanity in doubt, then the jury ought to find against him on this question. If insanity is not proved beyond a reasonable doubt, he cannot have the benefit of this defense.<sup>16</sup>

(b) Where insanity is relied upon as a defense, the burden of proof is on the defendant. The proof must be such in amount that, if the single issue of the insanity or sanity of the defendant should be submitted to the jury in a civil case, it must find that he was insane. In other words, insanity must be clearly established by satisfactory proof.<sup>17</sup>

**§ 4406. Insanity—Defendant Need Only Raise a Reasonable Doubt.** The court instructs the jury that every man is presumed to be sane until his insanity is established.<sup>18</sup>

**§ 4407. Insanity—Presumption as to Continuance.** (a) Where the insanity is of a permanent type or continuing nature, or possesses

ing in disease, to the commission of the act, and was unable by reason of the diseased condition of his mind, enfeebling his will or otherwise, to refrain from its commission—he should be acquitted by reason of insanity.’ This proposition was also recognized in *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. 529, in which the court, speaking through Mr. Justice Brantly, says: ‘One may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control, by the overwhelming violence of mental disease, that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong.’ Instruction 52 is based upon what is called the right and wrong test, which does not recognize that the accused may have been involuntarily impelled to the commission of an act from which he was mentally unable to refrain, and therefore is in conflict with instructions 34, 38, 49, 53, 54 and 55, which are based upon the right and wrong test as modified by the irresistible impulse test. In the *Peel* case, the court suggests that, in a case where the party cannot control his own actions, it may be proper to apply the right and wrong test. We thus see that the lower court gave to the jury two different tests by which the defendant’s responsibility for crime might be determined as the test to be followed by them. These tests are based upon different theories, and consequently upon different states of fact, and the two are irreconcilable. If instructions 34, 38, 49, 53, 54 and 55 were applicable to the facts in the case, 48, 51 and 52 could not be; the three latter excluded from the jury any consideration of the question whether, under the evidence, the defendant acted under an insane, ir-

resistible impulse. When instructions are conflicting upon a material issue, the judgment cannot stand. *State v. Rolla*, 21 Mont. 582, 55 Pac. 523; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. 529; *State v. McClellan*, 23 Mont. 532, 59 Pac. 924, 75 Am. St. 558.”

<sup>16</sup>—*Genz v. State*, 58 N. J. Law 482, 34 Atl. 816.

The court said: “This is directly at variance with the rule announced by this court in *Graves v. State*, 45 N. J. Law 203, and affirmed in the court of error, *Id.* 347. The defense of insanity must be proved to the satisfaction of the jury, and it may be established by the preponderance of proof. There can be no question as to the harmful influence of such an instruction by the court, which, not having been distinctly withdrawn and corrected, must have misled the jury, and that it is error which works a reversal of this judgment.”

<sup>17</sup>—*People v. Wells*, 145 Cal. 138, 78 Pac. 470 (472). Citing *People v. Wreden*, 57 Cal. 393; *Commonwealth v. Webster*, 5 Cush. (Mass.) 320, 52 Am. Dec. 711; *People v. Allender*, 117 Cal. 81, 48 Pac. 1014. The court said that the phrase “clearly established by satisfactory proof” was the equivalent to “proved beyond a reasonable doubt.” And the law requires no such degree of proof that defendant is insane.

<sup>18</sup>—*Caffey v. State*, — Miss. —, 24 So. 315.

The court said: “This instruction for the state is erroneous as applied, as here, to a criminal trial, where the defense is insanity. The defendant is not required to ‘establish his insanity,’ but merely to raise, by the testimony, a reasonable doubt as to his sanity, at the time of the commission of the alleged crime.” *Ford v. State*, 73 Miss. 739, 19 So. 665, 35 L. R. A. 117; *Hawthorne v. State*, 58 Miss. 787.”

all the characteristics of a confirmed disorder, such a condition, proved to have once existed, is presumed to have continued until the time of the commission of the criminal act.<sup>19</sup>

(b) Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity, and creates a legal presumption of continued insanity.<sup>20</sup>

19—*Binyon v. United States*, 4 Ind. Ter. 642, 76 S. W. 265 (269).

Held properly refused in a case where "The proof failed to show any permanent condition of insanity at any time before the killing." Quoting *Buswell on Insanity*, 190, the court said: "The rule only applies to general or habitual insanity as in cases of chronic or permanent standing. If the malady is occasional or intermittent in its nature, the presumption does not arise, and he who relies on insanity proved at another time must prove its existence, also, at the time alleged. When insanity appears as the result of some special or temporary cause and experience shows that, the cause being removed, the effect will probably disappear, the presumption does not prevail. Thus, it does not apply to temporary insanity caused by a violent disease, and in such case the party alleging it in avoidance of an act must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at one certain period."

20—*State v. Austin*, 71 Ohio St. 317, 73 N. E. 218-219.

"Whether the instruction so asked by defendant is a proper instruction and correctly states the rules of law upon the propositions involved therein, and should therefore have been given to the jury in the form requested, is the question presented here for our determination. It must now be taken as the well-established rule of law in this state, because of the numerous and uniform decisions of this court upon that subject, that in a criminal case, when the insanity of the defendant is pleaded or relied on as a defense, such defense is affirmative in character, and the burden of maintaining or establishing the same by a preponderance of the evidence rests with the defendant. *Loeffner v. State*, 10 Ohio St. 598; *Bond v. State*, 23 Ohio St. 349; *Bergin v. State*, 31 Ohio St. 111; *Kelch v. State*, 55 Ohio St. 146, 45 N. E. 6, 39 L. R. A. 737, 60 Am. St. 680.

"The authorities would seem also to be in entire accord upon the proposition that where a person is indicted and prosecuted for the commission of a crime, in order to make the insanity of the accused available and effective to him as a defense, such insanity must be shown to exist at the very time of the commission of the act complained of.

The law requires that the insanity proved, in order that it may be defensive, shall relate to the time of the commission of the alleged criminal act, and proof of the insanity of the defendant at a time prior thereto cannot of itself exempt him from punishment or acquit him of criminal responsibility. While it is entirely competent in a criminal case, where the sanity of the accused is put in issue, to show his mental condition both before and after the time of the commission of the alleged criminal act, yet from such evidence of his previous or subsequent mental condition no legal presumption arises that he was insane at the time he committed the criminal act, and such evidence is proper for the consideration of the jury only in so far as it reflects or throws light upon, or may aid the jury in determining, the question of whether in fact the insanity of defendant existed at the time of the alleged criminal act. It appears from the record in this case that the defendant in error was adjudged insane, and on June 18, 1900, was committed to the State Hospital for the Insane at M. Va., and was discharged therefrom on Sept. 1, 1900. He was afterwards re-admitted to the same institution July 29, 1901, and discharged therefrom as restored on Dec. 21, 1901, almost two years prior to the time of the alleged homicide. The nature of his disease or malady was, as testified by the physicians, that of 'recurrent insanity or recurrent mania with suicidal and homicidal tendencies.' While other evidence was introduced on the trial for the purpose of showing the conduct and actions of the defendant prior and up to the time of the homicide, yet it is upon the proof made of these prior adjudications of defendant's insanity that counsel predicate the claim that the special instruction requested by them in this case was correct, and should have been given to the jury in the form requested. It is their contention that such proof of prior insanity established for the accused a status which overthrew and defeated the legal presumption of his sanity, and created a legal presumption of his continued insanity, thereby imposing upon the state the burden of proving that the act charged was committed by him during a lucid interval. In support of such contention, and as sustaining the correctness of the instruction asked by them, they cite us to a charge found

**§ 4408. Insanity From Blow on the Head—Telling Exaggerated Stories, etc.—Commenting on Evidence.** (a) The court instructs the jury that if they believe from the evidence in this case that T.'s mind was measurably impaired by a blow on his head, and that, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose the power of distinguishing between right and wrong and that he was laboring under such disorder at the time of firing the fatal shot, and magnified, through a delusion, the danger to which he was exposed, and without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of G., fired the fatal shot, then the jury will acquit T.<sup>21</sup>

(b) You should not find the defendant insane on the ground alone that he had been in the habit of telling exaggerated stories, or that he has manifested symptoms of melancholy, moroseness, mental exaltation, or depression, or for any mere mental eccentricity or peculiarity.<sup>22</sup>

**§ 4409. Insanity of Defendant's Mother Must Be Considered.** If the jury believe that the defendant's mother, in her lifetime, was insane, and that insanity is hereditary, they may take that fact into consideration in determining the question of defendant's insanity at the moment of shooting.<sup>23</sup>

## INTOXICATION.

**§ 4410. Intoxication—When Excuse for Crime—Degree of.** (a) It is claimed on the part of the defense, and there has been some testimony offered tending to show, that the defendants at the time and place charged were intoxicated, and on this question of intoxication you are instructed that voluntary intoxication is no defense to a crime actually committed; that is, one cannot of his own free will become intoxicated and successfully plead intoxication in court as a defense to a crime committed when in that condition. But in case where the intent forms a portion of the offense necessary to be found for the jury, intoxication may be taken into consideration by the jury.

(b) If you should find from the evidence and circumstances surrounding the alleged commission of the offense that the defendants

in a footnote appended to the opinion of the court in the case of *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481. This charge, ascribed to Judge Birchard, has, in one particular at least, viz., in so far as it defines or prescribes a rule as to the quantum of evidence requisite to establish the defense of insanity, been expressly disapproved and overruled by this court in *Kelch v. State*, supra, and we are now clearly of the opinion that said charge is equally objectionable and erroneous in the effect it ascribes to the proof of prior insanity in criminal cases. The doctrine announced, and the rule prescribed by this charge upon that subject, is so out of harmony with the clear weight of authorities upon that proposition that we cannot admit its correctness."

21—*Tidwell v. State*, 84 Miss. 475, 36 So. 393 (394).

Held that this fell "within the condemnation of the statute which prohibits the jury being charged as to the weight of the evidence." Besides "the record contains no testimony upon which to base the theory of partial or temporary insanity sought to be availed of on behalf of the appellant."

22—Held error as a comment on the evidence. *Steward v. State*, 124 Wis. 623, 102 N. W. 1079 (1082).

23—*People v. Tuczkewitz*, 149 N. Y. 240, 43 N. E. 548 (553).

Held that the trial court erred in substituting "may" for "must" because "it was the duty of the jury to take into consideration all of the facts established by the evidence, and it had no option to disregard such facts in part."



or either of them, at the time and place charged were in such a condition from the use of spirituous liquors, that they, or either of them, were incapable of forming an intent to deprive the complaining witness, L., of his property, and of his ownership of the same then you may consider the question of intoxication. The question simply is, were the defendants, or either of them at the time—before you consider the question of intoxication at all,—were they or either of them, at the time in such a condition mentally as to be incapable of forming the intent feloniously to deprive the complaining witness, L., of his property and his ownership of the same? But gentlemen, you will remember that every person who is sober enough to plan and execute a crime is in law, sober enough to be responsible for his acts.<sup>24</sup>

§ 4411. **Where Specific Intent is Necessary to Constitute a Crime, Drunkenness Which Affects the Mind so such Intent is not Possible, Will Excuse.** (a) You are further instructed that drunkenness is no excuse for the commission of any crime or misdemeanor, unless such drunkenness was occasioned by fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense. And where the act of a defendant would be criminal if committed when he was sober, the fact that he committed such act while intoxicated will constitute no defense unless his intoxication was caused by some other person for the purpose above stated,—and this is the rule even where such intoxication is so extreme as to make such defendant unconscious of what he was doing.<sup>25</sup>

24—Collins v. State, 115 Wis. 596, 92 N. W. 266 (268).

The court said: "An examination of the charge however, discloses that it wholly failed to inform the jury of the effect upon their verdict of a finding of such a degree of intoxication as to render the accused incapable of a criminal intent. If they found such degree of intoxication, or indeed if the evidence raised a reasonable doubt whether it did not exist, their duty was to acquit and the court was requested to so instruct. That he did not do. It will be noticed that his only instruction to the jury is, that if they find there was a condition such as to render him incapable of forming the criminal intent then they 'may consider the question of intoxication.' This is not enough. It did not give to the accused the benefit of the true rule of law on the subject. We are aware that the instruction given in this case on the subject of intoxication is substantially identical with that considered in *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009, as appeared from the briefs filed in that case, though not fully in the opinion, and that it was there said to be accurate. We think the remark unfortunate as applied to the whole instruction which is very confusing; apparently directing the jury that they must find mental incapacity from intoxication before they can consider at all whether intoxication existed. The particular defect which we now point out however, was not there

urged, and the omission was not emphasized by a correct and accurate request for instruction that acquittal must follow the incapacity to entertain criminal intent. In the *Bernhardt* case the matter under discussion was rather the definition of the degree and mental effect of the intoxication and in that respect doubtless, the instruction given by the court was more nearly accurate than that requested by the counsel. We cannot avoid the conclusion that in the instant case error was committed, prejudicial to the plaintiff in error in failing to embody, when requested, the clear and definite direction to acquit in case the jury found incapacity to form the criminal intent by reason of intoxication, or entertained reasonable doubt of the existence of such incapacity."

25—Schwabacher v. The People, 165 Ill. 618 (629), 46 N. E. 809.

The precise instruction here reviewed was condemned in *Crosby v. People*, 137 Ill. 325, 27 N. E. 49, in an indictment for an assault with intent to murder, and the judgment was reversed solely for the error in giving the instruction. \* \* \* It was there further said that the statute has not changed the common law, and that 'the question of intent and existence of the particular intent was one of fact to be determined by the jury, and the defendant had under the indictment the right to have that matter submitted to and passed upon by the jury.' This case must be governed by the same rule."

(b) The court instructs the jury that if from all the evidence in this cause you are satisfied beyond a reasonable doubt that the defendant, at the time and place, manner and form, set forth in the information, assaulted said A. and shot at him, as set forth in the information, then, and in that event, the burden will rest upon the defendant to satisfy you by evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind either to kill, murder, or wound said A. You are to determine this matter from all the evidence in the case. Drunkenness in itself is no defense unless the drunkenness is of such a character that it dethrones the reason or understanding to such an extent that he is unable to discriminate between right and wrong, or unable to form an intent in his mind to commit the crime.<sup>26</sup>

§ 4412. **Intoxication to such an Extent as to Prevent the Formation of the Intent Required by Law.** I charge you that a person intends the ordinary consequences of his voluntary act, and that an unlawful act was done with an unlawful intent; and the question here would be, was the condition of the defendant with reference to his intoxication such as to overcome and do away with any intent to commit the crime charged? And in connection with this, I will say that you are to investigate all the evidence with reference to the surrounding circumstances, and ascertain whether he was so intoxicated as to prevent the formation of the intent required by law.<sup>27</sup>

§ 4413. **Intoxication and Specific Intent.** (a) You are instructed that intoxication or drunkenness is no defense to the commission of a crime, and no excuse therefor, nor does it relieve the person intoxicated from any responsibility for the consequences which are actually committed by him while intoxicated; and this is true without regard to the extent to which he is intoxicated when such acts are done. But you are instructed that in the crime of assault with intent to commit murder, both malice aforethought and the specific intent to kill are essential ingredients thereof, and hence if you find that this defendant was so drunk at the time it is alleged such crime was committed that he was incapable of forming the specific intent to kill, or of entertain-

<sup>26</sup>—Howell v. State, 61 Neb. 391, 85 N. W. 289 (290).

The court said that "by this instruction the jury were told that, in case they found beyond a reasonable doubt that the assault was committed as charged in the information, it was incumbent on the defendant to satisfy them by the evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind either to kill or to wound the person upon whom the assault was alleged to have been committed. It cast the burden upon the defendant to satisfy them of this fact by a preponderance of the evidence, or beyond a reasonable doubt. This is contrary to the rule as frequently announced in this court and is prejudicial to the rights of the defendant. A correct instruction at the request of the state was given substantially as in the case of Ford v. State, 46 Neb. 390, 64 N. W.

1082, which, though not unreservedly approved by this court, was held to be not prejudicially erroneous."

<sup>27</sup>—State v. O'Malley, — N. D. —, 103 N. W. 421.

"This instruction told the jury that, if they believed all the other elements of the crime charged were established by the evidence, then the intent to steal was conclusively presumed, as a matter of law, unless it appeared that by reason of intoxication the defendant was incapable of forming an intent. In short, the only evidence which the jury could consider on the question of intent was that relating to intoxication. This is clearly erroneous, because the intent to steal, like every other element of the crime charged, was a fact to be established to the satisfaction of the jury from all the evidence before them. See State v. Koerner, 8 N. D. 292, 296, 78 N. W. 981, 73 Am. St. 752."

ing malice aforethought, then you cannot find him guilty of such crime, unless it be by reason of aiding and abetting others therein, as heretofore explained, or as the originator and leader of a conspiracy as hereafter explained.

(b) You are also instructed that the same rule will apply with reference to intoxication, in determining whether or not there was an intent to kill, in determining the guilt or innocence of the defendant of the crime of assault with intent to commit manslaughter because the intent to kill is an essential element of that crime unless you find defendant guilty thereof by reason of aiding and abetting others therein, as hereinafter explained, or as the originator and leader of a conspiracy as hereafter explained.

(c) If however, you find that an assault was made with intent to murder G. W. H., was made on him by one or more of the codefendants to the indictment, as charged therein, or an assault with intent to commit manslaughter was made on said H. by one or more of the codefendants thereto as charged in the indictment, and you further find that this defendant was actually present, aiding and abetting such codefendant or defendants therein, then he would be responsible therefor, even though he was so drunk that he was incapable of forming an intent to kill or of entertaining malice aforethought.

(d) The burden is on the defendant to show that he was so drunk as to render him incapable of forming an intent to kill or of entertaining malice aforethought, which he must show by the weight or preponderance of the evidence.<sup>28</sup>

**§ 4414. Intoxication as Showing Lack of Premeditation.** (a) The jury are instructed that voluntary intoxication or drunkenness is no excuse for crime committed under its influence; nor is any state of

28—State v. Pasnaw, 118 Ia. 501, 92 N. W. 682 (683).

"These [four] instructions in so far as they relate to drunkenness are correct when construed with reference to the two degrees of crime mentioned, but clearly incorrect in that they do not include an assault with intent to inflict a great bodily injury, the degree of crime of which defendant was convicted. Wrongful intent is just as essential to this degree as to the more serious ones to which the court made reference, and if defendant was so drunk as to be incapable of forming this intent, he should in the absence of evidence that the crime was the result of a conspiracy formed when defendant was sober, have been acquitted of this offense. There was error therefore in denying the request embodying this proposition of law. State v. Bell, 29 Ia. 316; State v. Donovan, 61 Ia. 369, 16 N. W. 206; State v. Garvey, 11 Minn. 154 (Gil. 95). The mere fact that a great bodily injury was in fact inflicted upon H. does not change the rule, for it is the unlawful intent which the law aims at. State v. Clark, 80 Ia. 517, 45 N. W. 910; State v. Debolt, 104 Ia. 105, 73 N. W. 499. These instructions are further er-

roneous, in that under them the jury might have found the defendant guilty because of aiding and abetting in the commission of the offense, although he may have been so drunk as that, had he himself committed the crime, he should have been acquitted on the ground of drunkenness. In other words under these instructions, intoxication was no defense, if defendant aided and abetted another in the commission of the crime. There is a manifest distinction between aiding and abetting another in the commission of a crime, and participation in that crime as a conspirator. 'The guilt of a person who aids and abets in the commission of a crime must be determined upon the facts which show the part he had in it, and does not depend upon the degree of another's guilt.' State v. Smith, 100 Ia. 1, 69 N. W. 269. Whereas in cases where the crime is the result of a conspiracy, all are liable for the act, although that particular harm was not in the minds of the conspirators. State v. McCahill, 72 Ia. 116, 20 N. W. 553, 33 N. W. 599; State v. Munchrath, 78 Ia. 268, 43 N. W. 211; State v. Shelledy, 8 Ia. 505. This line of distinction was not observed by the learned trial judge."



mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act.<sup>29</sup>

(b) The jury may look to the fact, if it be a fact along with the other evidence, that, at the time of the killing, defendant was intoxicated, in determining whether he had at the time of the killing the mental capacity to entertain the malice, deliberation and premeditation, which, with unlawfully taking of human life, constitute murder in the first degree.<sup>30</sup>

(c) You are further instructed that if you believe from the evidence that, at the time defendant shot and killed W. D. M., he was intoxicated to that extent that he was temporarily insane from the recent use of liquor; if you believe he did drink liquor as aforesaid, that he did not drink the same for the purpose of fabricating a defense to any crime that he might commit; that by reason of the above facts his mind was not sedate and deliberate at the time he did the shooting as aforesaid,—then, if you believe so, you will not consider murder in the first degree, but will find him guilty of murder in the second degree.<sup>31</sup>

**§ 4415. Drunkenness Occasioned by Fraud, Contrivance or Force.** You are further instructed that drunkenness is no excuse for the commission of any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, contrivance or force of some other person for the purpose of causing the perpetration of an offense; and where the act of a defendant would be criminal if he committed it when sober, the fact that he committed such act while intoxicated, will constitute no defense, unless the intoxication was caused by some other person for the purpose above stated,—and this is the rule, even where the intoxication is so extreme as to make such defendant unconscious of what he is doing.<sup>32</sup>

29—*Latimer v. State*, 55 Neb. 609, 76 N. W. 207 (209), 70 Am. St. 403. "The doctrine of this court is that while voluntary intoxication is not, of itself, a complete defense for one who is charged with the commission of a crime, still the evidence that the accused was intoxicated when it is alleged he committed the crime, is admissible as a circumstance tending to show that the act of the accused was not premeditated. *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Head v. State*, 43 Neb. 30, 61 N. W. 494; *Ford v. State*, 46 Neb. 390, 64 N. W. 1082; *Debney v. State*, 45 Neb. 856, 64 N. W. 446, 34 L. R. A. 851."  
30—*Gilmore v. State*, 126 Ala. 20, 28 So. 595 (601).

The court said that this instruction "is bad in that it does not define the degree of intoxication, and that it was such a degree of drunkenness as would render the defendant incapable of premeditation and deliberation, since a man may be intoxicated and yet not be so drunk as to render him incapable of deliberation and premeditation. *Morrison v. State*, 84 Ala. 405, 4 So. 402. Moreover the whole testimony in the case shows that the defendant was not so intoxicated as to be incapable of deliberation and premeditation."

31—*King v. State*, — Tex. Cr. App. —, 64 S. W. 245 (248).

"The court correctly refused this charge. It would seem this charge intended to present the statute with reference to drinking for the purpose of fabricating a defense, and not to his condition in regard to the crime. The court gave a correct charge upon the question of drunkenness produced by the voluntary use of intoxicants, in accordance with the statute as interpreted or construed by this court. See article 41, Pen. Code, and collation of decisions in *White's Ann. Pen. Code*, pars. 60-65, inclusive."

32—In *Crosby v. People*, 137 Ill. 325 (340), 27 N. E. 49, the above instruction was held erroneous and conviction of assault with intent to murder was reversed because it was given.

The Illinois statute provides that "drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person for the purpose of causing the perpetration of an offense." The court said that this statute did not change the rule at common law.

"Drunkenness was at common law as under our statute no excuse for

§ 4416. **Intoxication from Liquors or Morphine—Temporary Insanity—Homicide.** You are charged that intoxication produced by the voluntary recent use of ardent spirits constitutes no excuse for the commission of crime; however, in a case where the defendant is accused of murder, as in the case before you, you may take into consideration the mental condition of the defendant for the purpose of determining what penalty, if any, should be found against him. You are therefore charged, if you believe beyond a reasonable doubt that the defendant killed the deceased, as charged in the indictment, unless you believe from the evidence that he was insane as a result of the use of intoxicating liquor and morphine and by the indulgence of other practices, or was of such low order of mind, to the extent that he did not know the difference between right and wrong as to the particular act charged against him, as explained in the next preceding paragraph of this charge, even though you should believe from the evidence that the defendant was intoxicated from the recent use of ardent spirits, that fact cannot be considered by you in mitigation of the penalty, unless the said intoxication, if any, went to the extent of producing temporary insanity at the time of the commission of the offense, if any; and, if you believe that the said intoxication, if any, did go to the extent of temporary insanity, you must then consider the same in determining the penalty that you assess, if any.<sup>33</sup>

§ 4417. **Delirium Tremens.** If the jury are reasonably satisfied from the evidence that at the time the fatal shot was fired the defendant was suffering from delirium tremens, or from acute alcohol-

crime, but where the nature and essence of the defense is by law made to depend upon the state and condition of the mind of the accused at the time and with reference to the acts done and committed, drunkenness as a fact affecting the control of the mind is proper for the consideration of the jury, for, if the act must be committed with a specific intent to constitute the crime charged, and the defendant is incapable of forming any intent whatever, the offense has not been committed. But drunkenness is no excuse for any act done or committed. The defendant may be punished for the consummated offense whatever it may be, and the want of intent operates not by way of excuse for crime committed but renders the accused incapable of committing the graver offense. *Commonwealth v. Hagenlock*, 140 Mass. 125, 3 N. E. 36; *Pirtle v. State*, 9 Humph. 663; *Swan v. State*, 4 Humph. 136; *Moonney v. State*, 33 Ala. 419; *State v. Garvey*, 11 Minn. 154."

33—*Phillips v. State*, — Tex. Cr. App. —, 98 S. W. 868.

"This charge is objected to, because it was not a clear and affirmative charge on the subject, is confused and misleading. Under article 41, Pen. Code 1895, and the decisions interpreting the same, appellant was entitled to a charge on

insanity produced by the recent use of ardent spirits. Appellant having been acquitted of murder in the first degree, it would only go in mitigation of the penalty that the jury might assess against appellant if they found him guilty of murder in the second degree or manslaughter. This was not a clear enunciation of the law. Besides this, appellant was entitled to a charge on insanity produced by morphine, or by the combined use of morphine and ardent spirits. In such case, as we understand the law, if he was insane from the use of morphine or from the combined use of whiskey, and morphine to such an extent that he did not know what he was doing at the time of the alleged homicide, or did not know what he did was wrong, he would be entitled to an acquittal. The charge given was a conglomeration and not a clear and affirmative charge upon any of the subjects above indicated, but was calculated to confuse and mislead the jury. It certainly did not give them a clear measure in the premises. For a discussion of insanity produced by the use of morphine or morphine and ardent spirits in combination, see *Edwards v. State*, 38 Tex. Cr. App. 386, 43 S. W. 112; *Burton v. State*, 46 Tex. Cr. App. 493, 81 S. W. 742."

ism, or from a lesion of the brain, it will be your duty to find the defendant insane at the time of the commission of the offense.<sup>34</sup>

**§ 4418. Intoxication—Error to take from the Jury Evidence in Relation to.** (a) The court instructs the jury that if they believe from the evidence that the prisoner, willfully, maliciously, deliberately, and premeditatedly killed the deceased, they should find the said defendant guilty of murder in the first degree, although he was intoxicated at the time of the killing.

(b) The court instructs the jury that the prisoner at the bar, whether he be a habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of the killing of J. R., and yet he is responsible. He may be incapable of express malice, but the court instructs the jury that the law implies malice in such a case from the weapon used, the absence of provocation, and other circumstances under which the act is done.<sup>35</sup>

**§ 4419. Intoxication—Error to Belittle Defense of, by Saying "There is Some Evidence."** There is some evidence tending to show that the defendant at the time of the commission of the alleged crime was to some extent under the influence of intoxicating liquors. If, from the evidence, you find that the defendant was to any extent under the influence of intoxicating liquor, you are instructed that unless the intoxication of the defendant was, at the time of the commission of the act, so great as to deprive him of the power to deliberate and form a guilty intent, it is no excuse or palliation for the act. This question of intoxication can only be considered by you in determining whether or not the defendant is guilty of murder. It cannot affect the question of his being guilty of the crime of man-

34—Parrish v. State, 139 Ala. 16, 36 So. 1012 (1017).

Holding this and other requested instructions as to insanity to have been properly refused, the court said quoting Sommerville, J. in Parsons v. State, 81 Ala. 596, 2 So. 866, 60 Am. Rep. 193: "The inquiries to be submitted to the jury, then, in every criminal trial, where the defense of insanity is interposed, are these: First. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane? Second. If such be the case, did he know right from wrong, as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible. Third. If he did have such knowledge, he may nevertheless not be legally responsible, if the two following conditions concur: (1) If, by reason of the dures of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency

was at the time destroyed. (2) And if at the same time the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely."

35—State v. Hertzog, 55 W. Va. 74, 46 S. E. 792 (795).

The court said: "Above instructions are good as abstract principles of law, and were applicable to the facts proved in Robinson's case, supra [State v. Robinson, 20 W. Va. 740, 43 Am. Rep. 799], but, standing alone in this case, they, in effect, take from the consideration of the jury the evidence given in the case tending to prove the intoxication of the defendant at the time of, and shortly before, the homicide. It is the object and office of instructions to define for the jury, and to direct their attention to, the legal principles which apply to and govern the facts proved or presumed in the case. The instructions should simply develop the rules of law governing the particular facts (all the facts, not a part only) which the evidence tends to establish; and they (the instructions) are to be in-



slaughter, and it is entirely immaterial whether or not deceased furnished the liquor drank by defendant.<sup>36</sup>

terpreted and judged of, not in any abstract way, but with reference to those facts. *State v. Dodds*, 54

W. Va. 289, 46 S. E. 228."

<sup>36</sup>—*State v. Dorland*, 103 Ia. 168,

72 N. W. 492 (494), Citing *State*

*v. Donovan*, 61 Ia. 369, 16 N. W. 206.

Held erroneous because by using the word "some" the court expressed an opinion as to the quantity and sufficiency of the evidence as to drunkenness.

## CHAPTER CLXXI.

### CRIMINAL—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

See Approved Instructions, Chapter XC, Vol. II.

#### PRESUMPTION OF INNOCENCE.

- § 4420. Presumption of innocence—Instruction imposing too great a burden of proof upon state.
- § 4421. Presumption of innocence—Instruction held argumentative.
- § 4422. Presumption of innocence—Self-defense — Reasonable doubt.
- § 4423. Doubted whether presumption of innocence is to be regarded as evidence.
- § 4424. Duty of the jury to construe the evidence favorable to defendant.
- § 4425. Defendant not entitled to most favorable aspect of the evidence.
- § 4426. Presumption of innocence—Inconsistent acts construed accordingly.
- § 4427. Disregarding the whole or part of testimony unless corroborated—Duty to reconcile evidence with defendant's theory of innocence.
- § 4428. Defendant relying upon a failure of the state to prove a case against him.
- § 4429. Presumption of innocence—Attends accused throughout the trial.
- § 4436. Circumstantial evidence should be so strong as to exclude every reasonable hypothesis of defendant's innocence.
- § 4437. Reasonable doubt of each link.
- § 4438. When there is one fact proved inconsistent with guilt.
- § 4439. Applying the doctrine of reasonable doubt to subsidiary facts.
- § 4440. Reasonable doubt of the material facts.
- § 4441. Degree of proof required in criminal cases.
- § 4442. Requiring too high a degree of proof on the part of the state.
- § 4443. Same kind of doubt interposed in the "graver transactions of life."
- § 4444. A jurymen to use all the reason, prudence and judgment which a man would exercise in the most important affairs of life.
- § 4445. A conscientious belief of guilt is not sufficient to convict.
- § 4446. It is usually error to tell the jury that they are not at liberty to doubt as jurors if they believe as men.
- § 4447. Where belief of the jury authorizing conviction held error—Satisfaction beyond a reasonable doubt required.
- § 4448. "A rational possibility of defendant's innocence" held erroneous.
- § 4449. A high degree of probability of guilt will not justify conviction.
- § 4450. The term "fully satisfied" does not express the meaning of "believe beyond a reasonable doubt."
- § 4451. It is insufficient that evidence necessarily lead to a "conclusion" of guilt.

#### REASONABLE DOUBT.

- § 4430. Defining reasonable doubt.
- § 4431. Reasonable doubt defined—Not necessary to put finger on particular evidence is erroneous.
- § 4432. Object of law—Reasonable doubt.
- § 4433. The doubt to acquit defendant must be reasonable.
- § 4434. Instructing that a reasonable doubt is one having a reason for its basis derived from the evidence.
- § 4435. Jury unable to find in the whole evidence any reason for not finding defendant guilty.

- § 4452. A "well-founded" doubt of defendant's guilt "of any offense" will not prevent conviction.
- § 4453. Jury may convict although the act may be surrounded in a degree by doubt.
- § 4454. Instructing that certain specific facts, if proven, are sufficient to raise a reasonable doubt.
- § 4455. Leaving the mind of jury in state of confusion.
- § 4456. Defendant need not prove facts inconsistent with his guilt in order to raise a reasonable doubt.
- § 4457. It is error to charge that the state must furnish evidence sufficient to convict, it is enough if such evidence is furnished by the defense.
- § 4458. "Slightest" reasonable doubt.
- § 4459. A reasonable doubt arising out of a part of the evidence does not acquit defendant.
- § 4460. Reasonable doubt may arise by reason of lack of evidence.
- § 4461. The abiding conviction of guilt must arise from the evidence and not from the lack of evidence.
- § 4462. If a single juror has a reasonable doubt, the jury cannot convict.
- § 4463. A reasonable doubt arising from the argument of counsel should not acquit defendant.
- § 4464. Definition of "moral certainty."
- § 4465. Intimation that burden of proof shifts from state to defendant—held to deprive defendant of the benefit of a reasonable doubt.
- § 4466. Doubt whether defendant or another was the guilty agent.
- § 4467. Exclusion of every hypothesis but that of innocence.
- § 4468. "Wholly inconsistent with every other rational conclusion than guilt."
- § 4469. Hypothesis of innocence—Reconciliation of testimony with.
- § 4470. It is error to charge that circumstances in mitigation of a killing must be proven beyond a reasonable doubt.
- § 4471. Not necessary that jury should have all the facts and circumstances before them.
- § 4472. Establishing self-defense beyond a reasonable doubt.
- § 4473. An instruction on reasonable doubt should not be involved and confusing.

## PRESUMPTION OF INNOCENCE.

§ 4420. **Presumption of Innocence—Instruction Imposing too Great a Burden of Proof upon State.** Every one charged with the commission of an offense against the law is presumed innocent until his guilt is established, and evidence sufficient to convict should not be a mere preponderance of probabilities, but should be so convincing as to lead the mind to the conclusion that the accused cannot be guiltless.<sup>1</sup>

§ 4421. **Presumption of Innocence—Instruction Held Argumentative.** If you find from the evidence that the actions of the accused present a double aspect,—one free from crime, and the other criminal,—and your minds are in doubt on this matter, you are bound under the law, to lean to that construction and interpretations of the acts

<sup>1</sup>—Bonner v. State, 107 Ala. 97, 18 So. 226 (229).

"This charge given at defendant's instance, might well have been refused. Thomas v. State, 107 Ala. 13, 17 So. 460."

In Golson v. State, 124 Ala. 8, 26 So. 975 (978), the court said that this instruction "has been too often repudiated to require further attention," citing Bonner v. State, supra; Thomas v. State, supra; Webb v.

State, 106 Ala. 53, 18 So. 491; McKleroy v. State, 77 Ala. 95.

In Webb v. State, supra, the court says of this instruction that, "the jury need never find that the defendant cannot be innocent, but, if they believe his guilt beyond a reasonable doubt, they should convict, although it may be he is innocent, and although they cannot affirm that he cannot be guiltless."

See also Sherrill v. State, 138 Ala. 3, 35 So. 129 (130).



of the accused which would make their acts honest and non-criminal; for the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. This presumption of innocence is an instrument of proof created by the law in favor of one accused, whereby his innocence is established, until sufficient evidence is introduced to overcome the proof which the law has created. Every reasonable doubt or presumption arising from the evidence must be construed in favor of the accused.<sup>2</sup>

§ 4422. **Presumption of Innocence — Self-Defense — Reasonable Doubt.** The court instructs the jury that it is their duty to presume the defendant, F., not guilty. That it is the duty of the jury to give the defendant the benefit of this presumption throughout the trial *until evidence shall have been introduced which, to the minds of the jury, is sufficient to establish the guilt of the defendant beyond all reasonable doubt, and if such evidence be not introduced then defendant should have the benefit of such presumption through all stages of the trial.* And further, it is the duty of the jury to explain the evidence offered against the defendant upon the hypothesis that the defendant acted in self-defense, if they can reasonably and consistently do so in the light of the whole evidence.<sup>3</sup>

§ 4423. **Doubted Whether Presumption of Innocence Is to be Regarded as Evidence.** The legal presumption of innocence attaches to the defendants at every stage of the trial, and this legal presumption must be regarded by you as a matter of evidence to the benefit of which the accused are entitled; and, as a matter of evidence, this presumption attends the accused until their guilt is by the evidence established beyond a reasonable doubt.<sup>4</sup>

2—State v. Nichols, 50 La. 699, 23 So. 980 (1933). "The requested charge is, we think, argumentative, —that is, goes beyond the statement of legal principle; proposes to guide the jury in the application of the principle they are to make of the presumption under hypothetical phases of the testimony."

3—Flynn v. People, 222 Ill. 303, 78 N. E. 617 (618).

"The words in the above instruction, which we have italicized were inserted by the court in lieu of the words, 'and when they shall have retired to consider their verdict,' which were contained in the instruction as requested."

"This modification was erroneous. The jury were thereby authorized, upon consideration of the evidence for the prosecution, if they deemed that evidence sufficient to establish the guilt of the defendant beyond all reasonable doubt, to then take away from the defendant the benefit of the presumption of innocence and consider the evidence offered in his behalf without any regard to that presumption. The defendant is entitled to the benefit of the presumption of innocence through all the steps of the trial and during the consideration of all the evidence by the jury after they have been instructed by the court, and until they

determine from a consideration of all the evidence, that the guilt of the defendant has been established beyond a reasonable doubt. The presumption of innocence attends the accused at every stage of the proceedings until the jury agree upon a verdict. Everett v. People, 216 Ill. 478, 75 N. E. 188; Cochran v. U. S., 157 U. S. 300, 15 S. Ct. 628, 39 L. Ed. 704; Kirby v. U. S. 174 U. S. 55, 19 S. Ct. 574, 43 L. Ed. 890, 11 Am. Cr. Rep. 330."

4—Long v. State, 42 Fla. 612, 28 So. 775 (780).

"We shall not at this time approve or disapprove this instruction as the judgment is reversed upon other grounds. There can be no doubt that an accused person is presumed to be innocent until his guilt is proven beyond a reasonable doubt, and that he has a right to have the jury so instructed (Reeves v. State, 29 Fla. 527, 10 So. 901), but whether this presumption is to be regarded as a matter of evidence, or not we do not deem it necessary in this case to determine. Upon another trial the court can instruct the jury as was done in Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819, that the law presumes every man innocent until he is proven guilty by proper legal

§ 4424. **Duty of the Jury to Construe the Evidence Favorable to Defendant.** The court charges the jury that it is a well settled rule of law that, if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to a party charged with crime, it is the duty of the jury to give that which is favorable, rather than that which is unfavorable to the accused party.<sup>5</sup>

§ 4425. **Defendant Not Entitled to Most Favorable Aspect of the Evidence.** As a matter of law, if you believe from an examination of the evidence in certain of its aspects that the defendant is guilty, and if you further believe from an examination of other aspects of the evidence that the defendant is not guilty, then you should adopt that view of the evidence which will lead to the acquittal of the defendant rather than that view which leads to his conviction, if that view of the evidence leading to his acquittal is as reasonable as that which leads to his conviction.<sup>6</sup>

§ 4426. **Presumption of Innocence—Inconsistent Acts Construed Accordingly.** (a) Whenever any act done by the defendant is capable of two constructions, one consistent with his innocence, and the other tending to establish his guilt, it is the duty of the jury to put upon the act the construction consistent with his innocence.<sup>7</sup>

(b) If there is much or more evidence showing innocence than there was showing guilt, then there would be a probability of the defendant's innocence.<sup>8</sup>

§ 4427. **Disregarding the Whole or Part of Testimony Unless Corroborated—Duty to Reconcile Evidence with Defendant's Theory of Innocence.** If you believe that any witness has willfully sworn falsely to any material matter, you are at liberty to disregard the whole or any part of the testimony of such witness, unless it is corroborated by other testimony which you believe to be true. If after carefully applying these tests, you still entertain a reasonable doubt as to the defendant's guilt, it would be your duty to acquit him. But if, on the other hand, you are unable to reconcile all the evidence with the theory of the defendant's innocence, and are satis-

evidence beyond a reasonable doubt, which in connection with the charge given in this case on reasonable doubt will under the authority of that decision, justify the court in denying the thirteenth instruction if requested again."

Compare, *Harris v. State*, 123 Ala. 69, 26 So. 515 (516); *Amos v. State*, 123 Ala. 50, 26 So. 524 (525).

5—*Porter v. State*, 140 Ala. 87, 37 So. 81 (82).

"This charge," said the court, "invaded the province of the jury. *Fonville v. State*, 91 Ala. 43, 8 So. 688."

6—*Parsons v. People*, 218 Ill. 386 (396), 75 N. E. 993.

"There is no error in refusing this instruction, inasmuch as one aspect of the evidence might have been that all the testimony on behalf of the People was false and perjured, and another aspect might have been that all the testimony

on the part of the plaintiff in error was true, and the jury would be obliged to find the defendant not guilty. Substantially a similar instruction was condemned by this court in *Adams v. People*, 109 Ill. 444."

7—*Miller v. State*, 107 Ala. 40, 19 So. 37 (39).

"This charge requested by defendant was ruled bad in *Smith v. State*, 88 Ala. 23, 7 So. 103; *Fonville v. State*, 91 Ala. 39, 8 So. 688."

Compare, *Bryant v. State*, 116 Ala. 445, 23 So. 40 (41).

8—*Boyett v. State*, 130 Ala. 77, 30 So. 475 (477), 89 Am. St. 19.

"That part of the court's oral charge excepted to, wherein the court undertook to explain to the jury the meaning of the expression 'probability of innocence,' was too favorable to the defendant."

fied beyond a reasonable doubt that he is guilty, it will be your duty to return a verdict of guilty as charged in the indictment.<sup>9</sup>

**§ 4428. Defendant Relying upon a Failure of the State to Prove a Case Against Him.** The defendant here sets up no affirmative defense, and no matters in extenuation. He relies wholly upon the denial of his guilt, and upon his anticipation of a failure by the state to prove a case against him.<sup>10</sup>

<sup>9</sup>—Territory v. Baca, 11 N. M. 559, 71 Pac. 460.

"It is the universal law in the United States that the burden of proof is never upon the defendant in a criminal case. The presumption of innocence is a matter of evidence in favor of the defendant, and continues throughout the trial until he shall have been found guilty by the evidence beyond a reasonable doubt. The learned court instructed the jury to apply the test to the evidence as directed in his instruction, and that if, after applying this test, they still entertain a reasonable doubt of defendant's guilt, it would be their duty to acquit him, and then adds: 'But if, on the other hand, you are unable to reconcile all the evidence with the theory of the defendant's innocence,' etc., they shall find him guilty as charged. Indeed this instruction eliminates from the consideration of the jury the presumption of innocence which is a matter of evidence. It will be seen that this instruction applies the test only to the witnesses upon the stand. The jury are told to apply this test to the witnesses and from that test determine the guilt or innocence of the accused, entirely ignoring the legal evidence produced by the presumption of innocence. In Coffin v. U. S., 156 U. S. 461, 15 Sup. Ct. 405, 39 L. Ed. 481, the matter of the weight of the legal evidence arising from the presumption of innocence is carefully considered, and wherein an instruction was given that if, after weighing all the proofs, and looking only to the proofs, you impartially and honestly entertain the belief,' etc. concerning which the court says: 'The proofs and the proofs only' confined them to those matters which were submitted to their consideration by the court, and among the elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend to him. It is true that twice in a very short space the court instructs the jury that, if they are satisfied beyond a reasonable doubt that they shall find the defendant guilty. What is the effect and the meaning of the expression 'if on the other hand, you are unable to reconcile all the evidence with the theory of the defendant's innocence?' It is to direct the jury to weigh the evi-

dence, and to ascertain whether or not it is inconsistent with his innocence, and if it is inconsistent with his innocence, and the jury are satisfied beyond a reasonable doubt that he is guilty they should so express it in their verdict. It goes without saying that there are many facts and circumstances concerning a transaction which could not be reconciled with the innocence of a party, and yet there would not be facts and circumstances enough to warrant the belief of his guilt beyond a reasonable doubt. It is not for the jury to find whether the evidence is reconcilable with his innocence, but that the evidence must be inconsistent with any hypothesis of the innocence of the defendant. It may be contended that the expression 'if you are unable to reconcile all the evidence with the theory of the defendant's innocence' is cured by the sentence preceding and the one following the instruction. But it is easy to see how the jury called upon and directed to weigh the testimony for the purpose of reconciling it with the defendant's innocence, being unable to do that, would be materially aided in finding there was no reasonable doubt of his guilt. In other words it calls upon the defendant to do something to have his innocence so clear and evidence so positive concerning his innocence, that all the evidence could be reconciled with his innocence. The jury is never called upon to investigate the defendant's innocence but to investigate his guilt. The presumption of his innocence stands out as a bulwark against the evidence of guilt until the evidence rises to such a degree as not only to surmount this bulwark, but to rebut it so plainly as to leave no reasonable doubt of his guilt. *McNair v. State*, 14 Tex. App. 78; *Slade v. State*, 29 Tex. App. 381, 16 S. W. 253; *Trogdon v. State*, 123 Ind. 1, 32 N. E. 725; *People v. McWhorter*, 93 Mich. 64, 53 N. W. 780; *People v. Millard*, 53 Mich. 70, 18 N. W. 562. This portion of the court's instruction, given on the court's own motion, was clearly erroneous and prejudicial to the defendant."

<sup>10</sup>—*State v. Cater*, 100 Ia. 501, 69 N. W. 880 (883).

"It occurs to us that the thought of the instruction is that the defendant knows he is guilty, has no defense, but hopes to escape justice by reason of the inability of the



§ 4429. **Presumption of Innocence Attends Accused Throughout the Trial.** For the purpose of this trial and before you had heard any evidence, a presumption of the innocence of the accused arose. Independent of evidence he was presumed by you to be innocent. This presumption of innocence, arising at the outset, attends him throughout the trial and until you have finally determined upon your verdict. You are not to forget it in weighing the testimony.<sup>11</sup>

### REASONABLE DOUBT.

§ 4430. **Defining Reasonable Doubt.** The court charges the jury that by a reasonable doubt is meant, not a mere speculative doubt, or vague conjecture, mere supposition or hypothesis, but such a doubt as reasonably arises out of the testimony in this case,—a doubt for which a reason can be given, in view of the testimony or want of satisfactory testimony.<sup>12</sup>

§ 4431. **Reasonable Doubt Defined—“Not Necessary to Put Finger on Particular Evidence” Is Erroneous.** Gentlemen of the jury, all you know about this case, since you knew nothing about it at the beginning, you have learned from the legitimate evidence in the trial. All your impressions and beliefs must have been derived from the same source. Now, what do you honestly believe about the case from the evidence? What is your belief with reference to the guilt or innocence of the defendant? Do you have a firm, fixed, and abiding belief that he is guilty as charged, or do you not? If you have such a firm, fixed belief that the defendant is guilty amounting to an abiding conviction to a moral certainty, then you should convict. If not, then you should not convict. If you have a belief that the defendant is guilty, from the evidence, then is your understanding convinced and directed and your reason and judgment satisfied that defendant is guilty? If so, you are satisfied to a moral certainty or beyond a reasonable doubt which impressions are here used (to) denote the same state of mind. If you are not thus satisfied, you should acquit the accused. If you are, you should convict him. If you are so satisfied of defendant's guilt, it is not necessary for you to be able to put your finger on, or point out, the particular evidence that convinces you, and it is also true that, if you are not so satisfied, it is not necessary that you should be able to point out the particular matters giving rise to your mental conditions in that respect.

state to show his guilt. The instruction impresses us as pregnant with insinuation of the guilt of the defendant, and manifestly unfair in its phraseology.”

11—*People v. Maughs*, 149 Cal. 253, 86 Pac. 187 (191).

“This instruction by no means filled the measure of the defendant's right in this regard. ‘Independent of evidence,’ says the court, ‘he was presumed by you to be innocent.’ What the jurors may have understood by this language we cannot say; but it is certainly open to the construction that if they were disposed to presume him innocent they could do so, and if they were not they need not. Nothing can be

gained and much may be sacrificed by such uncalled for departures from the plain letter of the statute, and from the oft-repeated and oft-approved language in construing it.”

12—*Harris v. State*, 155 Ind. 265, 58 N. E. 75 (76).

“This instruction, considered as an entirety, does not fully measure up to the test given in a long line of cases like *Bradley v. State*, 31 Ind. 492; *Jarrell v. State*, 58 Ind. 293; *Knight v. State*, 70 Ind. 375; *Garfield v. State*, 74 Ind. 60; *Behymer v. State*, 95 Ind. 140; *Brown v. State*, 105 Ind. 385, 5 N. E. 900; *Farley v. State*, 127 Ind. 419, 26 N. E. 898; and others which might be cited.”

It is enough to convict that on the whole case you are legally satisfied of guilt. I am very anxious, gentlemen, for you to reason together honestly, conscientiously, and considerately on this case, and for you to see if you cannot come to a conclusion. It is not intended to force you to abandon honest conviction, but to give you ample opportunity to exercise the high qualities of manhood becoming jurors in an important case like this. You should have no pride of opinion that would induce you to adhere to an expressed opinion if, upon further consideration, you no longer honestly entertain that opinion. Be true to yourselves, to your consciences, and to the law, and strive earnestly and honestly to reach a just conclusion, remembering that it is the truth we seek, and the truth only. When you have found the truth, then unhesitatingly pronounce the truth in your verdict.<sup>13</sup>

**§ 4432. Object of Law—Reasonable Doubt.** On the trial of persons charged with the commission of murder in the first degree, if the jury find such person guilty of any offense whatever, they, in their verdict, are required to state the degree of homicide of which they find such person guilty. Where one being arraigned has pleaded not guilty, as in the case at bar, and such person is on trial for the alleged offense to justify a verdict of guilty of any offense, the minds of the jurors trying such case should be satisfied of the guilt of the accused from the evidence beyond a reasonable doubt, or they should find a verdict of not guilty. The humane provisions of the law are designated to protect innocent persons who are wrongfully charged with the commission of crime from being unjustly convicted, and are not designed to enable persons to escape punishment who are guilty of the commission of the crime, if they are shown to be guilty by the evidence.<sup>14</sup>

13—Bell v. State, 81 Ark. 16, 98 S. W. 705.

"This instruction assumes that the jury might be justified in believing that defendant was guilty beyond a reasonable doubt although at the same time they were not able to put their finger on, or point out, any evidence that convinced them of that fact. A rule of law that permitted either a court or a jury to impose the death sentence on one without being able to point out the evidence on which the conviction rested, would be as dangerous as it would be novel. Such a rule would be antagonistic to the fundamental principles of law that there must be some substantial evidence of guilt before conviction and punishment. If it was within the prerogative of a jury to find the defendant guilty without being able to put their finger on, or point out, the evidence that convinced them, then the same rule would apply to the court, and it might follow that one could be convicted and executed for crime where neither the judge nor the jury were able to name the evidence that showed his guilt. The mere statement of such a rule seems sufficient to condemn it as unsound."

14—Gantling v. State, 40 Fla. 237, 23 So. 857 (859).

"The language embraced in that portion of the above charge to the effect that the humane provisions of the law were designed to protect innocent persons wrongfully charged with crime from being unjustly convicted, and not to enable guilty persons to escape punishment for crime if they were shown to be guilty by the evidence, following immediately after and in connection with the instruction as to reasonable doubt, was calculated to impress the jury with the idea that there was a qualification to the rule given them upon the subject of reasonable doubt; and that, if they believed from the evidence that defendant was guilty, he was not entitled to the benefit of that rule. It is a positive legal right, appertaining to every accused person, whether guilty or innocent, that he shall not be condemned for a criminal offense in a judicial trial until and unless the evidence produced against him shall be legally sufficient to prove his guilt beyond a reasonable doubt. \* \* \* It matters not that the rule was designed in order to protect innocent persons; it is general in its operation, embracing every person accused of and on trial for a crime; and the courts have no right to qualify this rule, or disparage it in

§ 4433. **The Doubt, to Acquit Defendant, Must be Reasonable.** (a) The court charges the jury that they are to take and consider all the evidence in the case in the light of their experience as reasonable, fair-minded men, and upon such fair and reasonable consideration to doubt defendant's guilt means to acquit him.<sup>15</sup>

(b) The court instructs the jury that if the testimony is so conflicting that, after weighing it all, the jury is still in doubt as to whether the defendant did or did not sell the whiskey, they must acquit.<sup>16</sup>

§ 4434. **Instructing that a Reasonable Doubt Is One Having a Reason for Its Basis Derived from the Evidence.** (a) You are instructed that by a reasonable doubt is meant such a doubt as naturally arises in the mind of a juror, from a consideration of the testimony, as would cause him to pause and hesitate before acting in the most important affairs of life. It is a doubt, having a reason for its basis derived from the testimony, and a doubt for the having of which the juror can give a reason derived from the testimony. To be convinced beyond a reasonable doubt is to have the judgment, the reason and the understanding satisfied of the truth of the facts, so that an ordinarily reasonable and cautious man would unhesitatingly act by the proof in the most vital and important affairs of human life. And unless in this case your judgment and reason and understanding is so convinced by the testimony of every fact necessary to constitute any of the degrees of the crime as defined in these instructions, you must acquit the defendant.<sup>17</sup>

the estimation of juries, by instructing them that it was designed for the benefit of innocent and not guilty men. The object of the law is to furnish every man a fair and impartial trial, according to general and uniform rules; and in such trials and the application of its principles the law knows no distinction between the innocent and the guilty until guilt of the latter has been ascertained by that quantum of evidence which satisfies beyond a reasonable doubt."

15—In *Thayer v. State*, 138 Ala. 39, 35 So. 406 (408), the above was held bad for using the word "doubt" without qualifying it as "reasonable."

16—In *McClellan v. State*, 117 Ala. 140, 23 So. 653 (655), the above instruction was held bad because leaving out the word "reasonable" as expressive of the doubt required.

17—*Carr v. State*, 23 Neb. 749, 37 N. W. 630 (631).

"While not couched in exactly the same language, this instruction is in substance the same as the third instruction given to the jury and referred to in *Cowan v. State*, 22 Neb. 519, 35 N. W. 405.

The clause contained in the instruction in that case which induced this court to reverse the judgment was: 'It is a doubt for having which the jury can give a reason based upon the testimony.' In the case at bar, the language is: 'It is a doubt having a reason for its basis, derived from the testimony, and a doubt for the having

of which the jury can give a reason derived from the testimony.' We have again examined the question, and are not satisfied with the holding in *Cowan v. State*. In the text Greenleaf says: 'But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate a full belief of the fact to the exclusion of all reasonable doubt.' The note consists in part of an extract from the very able charge of Chief Justice Shaw, given to the jury on the trial in the case of *Com. v. Webster*, 5 Cush. 320, 52 Am. Dec. 711, as well as a number of extracts from decisions in other cases. While the rule stated by Chief Justice Shaw was applied to a case depending upon circumstantial evidence, yet in the main we think it is applicable to all cases where the issue of the guilt or innocence of the accused is presented. The reasonable doubt is 'that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.' All pre-



(b) By a "reasonable doubt" as herein instructed, is meant such a doubt as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for.<sup>18</sup>

(c) You are instructed that by a reasonable doubt is meant such a doubt as naturally arises in the mind of the jury, from a consideration of the evidence, as to cause them to pause and hesitate, and act as in the most important affairs of theirs. It is a doubt for having which the jury can give a reason based upon the testimony. To be convinced beyond a reasonable doubt is to have the judgment and the reason of the jury satisfied so they would go forward unhesitatingly and act under like circumstances of their own.<sup>19</sup>

(d) The court instructs you that the doubt which should induce a jury to withhold a verdict of guilty must be a reasonable one, must be a doubt for which a reason can be given, which reasonable doubt arises out of all the evidence in the case or the want of evidence.<sup>20</sup>

sumptions of law, independent of evidence, are in favor of innocence. Every person is presumed to be innocent until he is proved guilty. The burden of proof is upon the prosecution, not only to remove this presumption, but to satisfy the minds and consciences of the jurors, beyond all reasonable doubt, of the guilt of the accused, upon the whole case. They must feel satisfied to a moral certainty of his guilt, or they must acquit, at least of the degree wherein this want of certainty exists."

18—State v. Cohen, 108 Ia. 208, 78 N. W. 857 (858), 75 Am. St. 213.

The court said: "The last clause is the one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached. Sberry v. State, 133 Ind. 677, 33 N. E. 681; Cowan v. State, 22 Neb. 519, 35 N. W. 405; Morgan v. State, 48 Ohio 371, 27 N. E. 710; Carr v. State, 23 Neb. 749, 37 N. W. 632. In People v. Stubenvoile, 62 Mich. 329, 28 N. W. 883, a similar instruction was disapproved, but it was held in view of the rule of that state, dispensing with any definition of the term,

of no practical consequence in the case. We are still quite content with the definition contained in State v. Ostrander, 18 Ia. 458, and the long line of cases following it.

In Harvey v. State, 125 Ala. 47, 27 So. 763 (764), a charge in the words quoted in the text was held to be misleading and therefore properly refused. On the other hand, a charge "that a reasonable doubt is a doubt for which a reason can be given," was held good in Walker v. State, 117 Ala. 42, 23 So. 149 (151). In that case the court said: "This was held good in Hodge v. State, 97 Ala. 37, 12 So. 164, 38 Am. St. 145. The phraseology of the charge is different from that passed on in Peagler v. State, 110 Ala. 11, 20 So. 363; and as the case in 97 Ala. 37, 12 So. 164, 38 Am. St. 145, was not referred to or departed from, we presume it was the intention of the court to overrule that case."

See also Wallace v. State, 41 Fla. 547, 26 So. 713 (723), to like effect reviewing many cases; however, Walker v. State, supra, was overruled in Avery v. State, 124 Ala. 20, 27 So. 505.

19—In Cowan v. State, 22 Neb. 519, 35 N. W. 405 (408), the above instruction was disapproved. But this case was overruled upon this point, in Carr v. State, 23 Neb. 749, 37 N. W. 630 (631).

20—Klyce v. State, 78 Miss. 450, 28 So. 827 (828).

"Definitions of reasonable doubt should not be risked on criminal trials. Reasonable doubt is purely and simply a reasonable doubt. It is its own complete definition, and the accused is entitled to the verdict of 12 men, each of whom, on the whole evidence, must be free from any reasonable doubt in his own mind, not the mind of the

(e) A "reasonable doubt" does not mean every doubt that may flit through your mind in a consideration of this case, but a doubt for which you could give a reason if called upon to do so. If, after carefully considering the evidence and the law as given you, you find a doubt which leaves your mind unsatisfied, that will be a doubt to which the defendant is entitled the benefit; but he is not entitled to the benefit of any doubts which may not have a reasonable foundation in the evidence and in the circumstances of the case.<sup>21</sup>

§ 4435. **Jury Unable to Find in the Whole Evidence Any Reason for Not Finding Defendant Guilty.** The court charges the jury that they must have not only justifying reasons for a conclusion of guilt,—not only must they be able to say upon reason that the defendant is guilty—but this conclusion must impress itself upon the minds of the jury with such convincing clearness and force that they are unable to find in the whole evidence any reason for a contrary conclusion.<sup>22</sup>

§ 4436. **Circumstantial Evidence Should be So Strong as to Exclude Every Reasonable Hypothesis of Defendant's Innocence.** (a) A person charged with a felony should not be convicted unless the evidence excludes to a moral certainty, every reasonable hypothesis but that of his guilt. No matter how strong the circumstances may be, they do not come up to the full measure of proof which the law requires if they can be reasonably reconciled with the theory that the defendant may be innocent.<sup>23</sup>

prosecutor or the court; and he should not be under any legal compulsion to have to give, or be able to formulate and state, the reason which may raise a reasonable doubt in his mind and conscience. Suffice it to say that if he, in fact, have any, the accused is entitled absolutely to his vote on the verdict."

In *Caddell v. State*, 136 Ala. 9, 34 So. 191 (192), the instruction, "A reasonable doubt is a doubt arising out of the evidence, for which you can give a reason or cause," was held to be misleading but not to require reversal. Citing *Avery v. State*, 124 Ala. 20, 27 So. 505.

In *Siberry v. State*, 133 Ind. 677, 33 N. E. 681 (683), it was held error to charge that "a reasonable doubt is such a doubt as the jury are able to give a reason for." The court said: "A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers if you have a reasonable doubt of the defendant's guilt, give a reason for your doubt; and under the instruction given in this cause the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case. Citations: *Rhodes v. State*, 128 Ind. 381, 27 N. E. 866, 25

Am. St. 429; *Cross v. State*, 132 Ind. 65, 31 N. E. 473; *Brown v. State*, 105 Ind. 381, 5 N. E. 900; *Carr v. State*, 23 Neb. 749, 37 N. W. 630.

21—*Darden v. State*, 73 Ark. 315, 84 S. W. 507 (508).

The court said: "If this be a defect, which we think it was, it should have been reached by a specific objection. It is one the court would have doubtless readily remedied if its attention had been called to it. The objection extended to the whole instruction, consisting of four paragraphs, and, one or more of these being sufficient, it should not have been sustained. See *St. L. I. M. & S. Ry. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550."

The same ruling was made in *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493 (495).

22—*Mitchell v. State*, 129 Ala. 23, 30 So. 348 (351).

The court said: "The mere fact that in the whole evidence some reason might have been found for doubting defendant's guilt, without regard to whether such reason was a substantial one, or to what extent it was outweighed by other reasons so found, did not, as a matter of law, prevent a verdict of conviction, as was, in substance, asserted by charge 4."

23—*Thomas v. State*, 106 Ala. 19, 17 So. 460 (461).

The court said: "After stating the true rule the charge went further, and in its closing statement asserted that the full measure of proof required was not complied with if the circumstances could be

(b) I charge you, gentlemen of the jury, that the humane provision of the law is that upon circumstantial evidence there should not be a conviction unless such evidence excludes to a moral certainty, and beyond all reasonable doubt, every other reasonable hypothesis than that of the guilt of the accused; and no matter how strong may be the circumstances, if they can be reconciled with the theory that the offense has not been committed, or if committed, that some other person did it, then the guilt of the defendant is not shown by the full measure of proof which the law requires and your verdict must be for the defendant.

(c) The humane provision of the law is that upon circumstantial evidence there should not be a conviction unless to a moral certainty it excludes every other reasonable hypothesis than that of the guilt of the accused.<sup>24</sup>

(d) The court charges you, gentlemen of the jury, that circumstantial evidence justifies a conviction only when it is inconsistent with every reasonable theory of innocence, and you should be so convinced by it that each of you would be willing to act on the decision in the matters of the highest concern to yourselves or you should not convict this defendant.<sup>25</sup>

§ 4437. **Reasonable Doubt of Each Link.** The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, but in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt, of each link of the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together as a whole, you are satisfied beyond a reasonable doubt of the guilt of the defendant.<sup>26</sup>

reasonably reconciled with the theory that 'the defendant may be innocent,' that is, as we construe the language, and as we think it was calculated to impress the jury, if it could be reasonably reconciled with the theory that the defendant might possibly be innocent. The law does not require that the jury should be satisfied to absolute certainty of the defendant's guilt, or beyond a possibility of the defendant's innocence. This measure is greater than beyond a reasonable doubt. To say the least of it the charge was calculated to mislead the jury. The court did not err in refusing the instruction." Citing *Pate v. State*, 94 Ala. 14, 10 So. 665.

24—*Oakley v. State*, 135 Ala. 15, 33 So. 693 (694); charge of rape.

The above were held properly refused upon the authority of *Bohlman v. State*, 135 Ala. 45, 33 So. 44.

25—*Goodlett v. State*, 136 Ala. 39, 33 So. 892 (894), homicide case, holds the above instruction properly refused for being misleading. Citing *Thompson v. State*, 131 Ala. 18, 31 So. 725; *Amos v. State*, 123 Ala. 50, 26 So. 524; *Rogers v. State*, 117 Ala. 9, 22 So. 666, 67 Am. St. 157.

26—In *State v. Young*, 9 N. D. 165, 82 N. W. 420 (421), charge of arson, the court said:

"It has been given in several cases, and has been the subject of considerable discussion, and we believe it is now universally con-

demned. It was given in *Bressler v. People*, 117 Ill. 422, 3 N. E. 521, 8 N. E. 62; and the language was expressly approved on page 528. An examination of the cases there cited to support the ruling will disclose the fact that they all fall far short of the position. The case was evidently reconsidered, because it is again reported in 8 N. E. 62, and the instruction is there held to be inaccurate, but harmless in that particular case, because there was no evidence in the case to which it could be applied. The case seems to have been reported but once in the official reports. It appears in 117 Ill. 422, and shows that the opinion was twice filed with an interval of some months. As there reported, it corresponds with the report in 8 N. E. 62, so that the official reports of that state give no support whatever to the instructions. The same instruction was given in *Clare v. People*, 9 Colo. 122, 10 Pac. 799, and was expressly disapproved; and again in *Graves v. People*, 18 Colo. 170, 32 Pac. 63. In this case, the authorities are extensively and critically reviewed, and it is shown that the instruction stands without support of any adjudicated case, and it is strongly condemned upon principle. The same instruction was given and expressly disapproved in *Marion v. State*, 16 Neb. 349, 20 N. W. 289, 57 Am. Rep. 825; *Leonard v. Terri-*



§ 4438. **When There Is One Fact Proved, Inconsistent with Guilt.**

The jury are instructed that if there is any one fact proved to the satisfaction of the jury by a preponderance of the evidence which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and the jury should acquit such defendant as to whom such fact has been proved.<sup>27</sup>

§ 4439. **Applying the Doctrine of Reasonable Doubt to Subsidiary Facts.**

(a) The jury are instructed that if there is any conflict of testimony as to whether or not the defendant, O., was a party to any of the conspiracies charged in this case at any time during the eighteen months prior to the 2nd day of April, A. D. 1887, the said defendant O. is entitled to the presumption of innocence, and to the benefit of every reasonable doubt from the jury in passing upon such conflicting testimony; and if after considering the whole of the testimony on

tory, 2 Wash. T. 381, 7 Pac. 872; State v. Gleim, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. 655, 10 Am. Cr. Rep. 46; State v. Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. 262; State v. Cohen, 108 Ia. 208, 78 N. W. 857, 75 Am. St. 213. The vice of the instruction is manifest. Where a conviction is sought upon circumstantial evidence, and the circumstances are interdependent, and the relevancy and probative force of each circumstance depend upon the truth of one or more other circumstances, so that the metaphor of a chain can with any propriety be used, then it is clear that each circumstance must be established beyond reasonable doubt, because if any one link or circumstance be lacking, the evidence ceases to be a chain, and is simply fragments of a chain. If any one circumstance or link be weak, the whole chain must be weak, because a chain cannot be stronger than the weakest link. The instruction in such a case could not be otherwise than prejudicial."

In State v. Cohen, 108 Ia. 208, 78 N. W. 857, 75 Am. St. 213, arson, the court in condemning the same instruction said: "In State v. Hayden, 45 Ia. 17, the following instruction was held to have been properly refused: 'As the evidence in the case is wholly circumstantial, you must be satisfied beyond reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt.' In State v. Stewart, 52 Ia. 285, 3 N. W. 99, an instruction was condemned which advised the jury that it would be sufficient if one of the material averments of the indictment were 'fully and clearly proven.' In State v. Hennessy, 55 Ia. 301, 7 N. W. 642, the court did not instruct that certain facts must be established beyond reasonable doubt, and it is said: 'If the jury, in considering the whole case, have reasonable doubt upon any essential ingredient of the offense, this entitles a defendant to an acquittal because it generates a doubt of

guilt; and the general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the facts of the case.' In State v. Clark, 104 Ia. 691, 72 N. W. 296, an instruction authorizing the jury to base the finding of certain facts on a preponderance of the evidence was held erroneous, though in another portion of the charge the court directed that all the material allegations of the indictment must be established beyond reasonable doubt. An examination of these cases demonstrates that this court has gone no further than to hold that the jury should not be required to pass on the essential facts separately, and that the general instruction with reference to the finding of guilt beyond reasonable doubt is sufficient. See *Tompkins v. State*, 32 Ala. 569."

See also *Graves v. People*, 18 Colo. 170, 32 Pac. 66; *Clare v. People*, 9 Colo. 122, 10 Pac. 799. Compare *Morgan v. State*, 51 Neb. 672, 71 N. W. 788 (795), homicide, where giving this instruction was held not to require reversal of the judgment.

In State v. Johnson, 14 N. D. 288, 103 N. W. 565 (566), in discussing a similar instruction the court said: "This court passed upon an instruction in substantially the same language, in State v. Young, 9 N. D. 165, 82 N. W. 420, and held the same prejudicially erroneous. The authorities bearing upon it are collected in the opinion in that case. Under the holding of that case, we have no hesitation in holding that the instruction was misleading and prejudicial."

27—*Gorgo v. People*, 100 Ill. App. 130 (131).

"We think it was properly refused because of the use of the word 'inconsistent' instead of 'irreconcilable.' Although some fact might be shown which is inconsistent with guilt, there may notwithstanding be other evidence which may fully establish guilt to the entire satisfaction of the jury."

this subject, the jury entertain a reasonable doubt as to whether or not said O. was in fact a party to any of such conspiracies,—if the jury find any such exist,—during the period of time above stated, then they must find the said A. O. not guilty.<sup>28</sup>

(b) If you believe from the evidence before you beyond all reasonable doubt, that E. M. came to her death by reason of a shot fired from a revolver by the hand of the defendant, substantially as charged in the indictment, it matters not that such evidence is circumstantial, or made up from the facts and circumstances surrounding the death and the relations of the defendant with her, provided only that the jury believe such facts and circumstances to be proven by the evidence beyond all reasonable doubt, and to be inconsistent with any other hypothesis than the guilt of the defendant. It is not enough, however, that all the facts and circumstances shown, are consistent with the guilt of the defendant but they must be of such character that they cannot reasonably be true in the ordinary nature of things and the defendant innocent.<sup>29</sup>

§ 4440. **Reasonable Doubt of the Material Facts.** The court charges the jury that if they have any reasonable doubt of the material facts they must acquit.<sup>30</sup>

§ 4441. **Degree of Proof Required in Criminal Cases.** (a) The court instructs you that in civil cases, if there be conflicting evidence the duty of the jury is to weigh it, and render a verdict according to its preponderance; but in criminal cases, the guilt of the accused must be fully proven, and it is not sufficient that the weight of the evidence points to his guilt.<sup>31</sup>

(b) If there is one single material fact in the case proved to your satisfaction by a preponderance of the evidence, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.<sup>32</sup>

28—Ochs v. People, 124 Ill. 399 (428), 16 N. E. 662.

"This court has repeatedly sanctioned the refusal of like instructions as to reasonable doubt, invoking its application with respect to the belief of particular facts in a case, instead of to the question of guilt upon the whole case or some essential matter of defense or element of the crime. We cannot say that the court erred in refusing this instruction."

To the same effect see Landers v. State, — Tex. Cr. App. —, 63 S. W. 557 (558); McNair v. State, 14 Tex. App. 82; Haynes v. State, 13 Tex. App. 405; Dyson v. State, 13 Tex. App. 405; Smith v. State, 9 Tex. App. 150; Johnson v. State, 29 Tex. App. 150, 15 S. W. 647.

In Cross v. State, 132 Ind. 65, 31 N. E. 473, it is held error "to constantly admonish the jury against entertaining unreasonable doubts, while there is no corresponding admonition against convicting the appellant if a reasonable doubt of his guilt should exist."

29—State v. Lucas, 122 Ia. 141, 97 N. W. 1003 (1007).

The court said that this "in effect instructed the jury that each essential fact or circumstance relied upon by the state must be

proven beyond a reasonable doubt. It is true the word 'essential' is not used therein, but the common knowledge of jurors would apprise them that not every minor detail, or fact or circumstance, unimportant in itself when standing alone, should be proven beyond a reasonable doubt."

30—Burton v. State, 141 Ala. 32, 37 So. 435 (436).

"A reasonable doubt of material facts, without regard to whether they were essential to the establishment of defendant's guilt, would not have required an acquittal."

31—Bones v. State, 117 Ala. 138, 23 So. 138 (139).

"The above charge was properly refused. The law does not require full proof of guilt,—another expression for clear or positive proof, beyond any doubt,—but only such proof as produces satisfaction beyond reasonable doubt. Griffith v. State, 90 Ala. 583, 8 So. 812; Lowe v. State, 88 Ala. 8, 7 So. 97."

32—Butler v. State, 102 Wis. 364, 78 N. W. 590 (593).

"The expression here criticised is not a fortunate one. While, of course, it is strictly accurate, yet, standing alone, it is possible that it might convey to the minds of jurymen the converse implication

§ 4442. **Requiring Too High a Degree of Proof on the Part of the State.** (a) Unless the jury is convinced beyond all reasonable chance of mistake, that the defendant was present when H. was killed they must find him not guilty.<sup>33</sup>

(b) A reasonable doubt is an impression, after a full comparison and consideration of all the evidence, that does not amount to a certainty that the charge against the accused is true.<sup>34</sup>

(c) To warrant a conviction, the circumstances proved ought fully to exclude all possibility that any other person could have committed the crime.<sup>35</sup>

(d) The court charges the jury that the state is bound to prove every material fact necessary to constitute the guilt of the defendant fully, clearly, conclusively, satisfactorily, and to a moral certainty; and if, on the whole evidence adduced, the jury cannot say that they have an abiding conviction to a moral certainty of the guilt of the defendant, the jury are bound to give him the benefit of that doubt, and acquit him.<sup>36</sup>

§ 4443. **Same Kind of Doubt Interposed in the "Graver Transactions of Life."** (a) The court instructs the jury as a matter of law that in considering the case they are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical,—matters of conjecture. The doubt, to justify acquittal, must be reasonable, and must arise, either negatively or positively, from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge you are satisfied beyond a reasonable doubt.<sup>37</sup>

that, unless some substantive fact were proved by the preponderance of the evidence, it would not raise a reasonable doubt."

33—Bonner v. State, 107 Ala. 97, 18 So. 226 (229).

The court said: "Chance implies possibility and would probably have been so understood by the jury; and 'reasonable possibility' is, at least, no more than a possibility. Sims v. State, 101 Ala. 23, 14 So. 560. And it is not necessary to conviction that the evidence should exclude the possibility of the defendant's innocence."

34—In State v. Powers, 59 S. C. 200, 37 S. E. 690 (695), homicide, it was held that the above was bad as requiring too high a degree of proof on the part of the state.

35—People v. Foley, 64 Mich. 148, 31 N. W. 94 (99).

The court said: "If this statement of the law is correct, it would be impossible to convict unless the circumstances were such as to exclude all possibility that any other person could have committed the crime."

36—Dennis v. State, 118 Ala. 72, 23 So. 1002 (1003). "Calculated to impress the jury with the belief that they must be satisfied beyond

all doubt of defendant's guilt before they could convict. In the case of Torrey v. Burney, 113 Ala. 496, 504, 21 So. 348, we had occasion to consider the word 'satisfy' when used alone in a charge to the jury, and held that it exacted too high a degree of proof."

37—McAllister v. State, 112 Wis. 496, 88 N. W. 212 (213).

"This charge in almost exactly the words here used has been approved by the courts of last resort of at least four states: Miller v. People, 39 Ill. 457; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 868, 3 Am. St. 320, 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570; Polin v. State, 14 Neb. 540, 16 N. W. 898; Maxfield v. State, 54 Neb. 44, 74 N. W. 401; Boulden v. State, 102 Ala. 78, 15 So. 341; State v. Pierce, 65 Ia. 89, 21 N. W. 195. A very similar instruction was approved in Minich v. People, 8 Colo. 440, 9 Pac. 4, 5 Am. Cr. Rep. 20. The proposition is stated also in 2 Thomp. Trials, par. 2475, and we have found no authorities which can be said to directly disapprove it. In the face of such an array of very respectable authority, it seems somewhat presumptuous to declare the instruction erroneous, and yet



(b) In cases of this kind the conclusion to which the jury are convinced is that degree of certainty that they would come to in their grave and important concerns; and that is the degree of certainty which the law requires, and which will justify them in returning a verdict of guilty from all the facts and circumstances laid before them.

we feel compelled to do so for reasons to be stated. In the first place, the instruction seems very unfortunately framed and worded, in this: That it apparently assumes that the jury are to start upon their deliberations upon the basis that conviction is to be the result unless a reasonable doubt has been proven. It reverses the customary and approved manner of putting the question before the jury. Ordinarily, a jury is told that, in order to justify conviction, the evidence must prove guilt beyond a reasonable doubt. This form of instruction calls attention to and emphasizes the leading principle of our criminal jurisprudence, namely, that a man is deemed to be innocent until his guilt is proven; that the jury must find evidence to justify the conviction. But the form of instruction used in the present case comes very near intimating to the jury that guilt is the natural presumption, and that they must find a doubt from the evidence in order to justify the acquittal. If it be calculated to leave such an impression on the minds of the jury, it is certainly misleading and prejudicial. There is another ground, however, upon which we think it is very clear that the instruction was erroneous. This court held in *Anderson v. State*, 41 Wis. 430, 2 Am. Cr. Rep. 198, that in passing on the evidence in a criminal case, the jury should be instructed (if instructed at all on that line) that in performing their duty they should 'scrutinize the testimony with the utmost caution and care, bringing to that duty the reason and prudence which they would exercise in the most important affairs of life,—in fact all the judgment, caution and discrimination they possessed;' and that it was reversible error to charge that they 'should be guided by that reason and prudence which govern you in the ordinary conduct of your affairs.' In so deciding, this court followed the great current of authority. See in addition to the cases cited in the *Anderson* case, sections 2470 *et seq.* 2 *Thomp. Trials*. This doctrine was approved in *Emery v. State*, 92 Wis. 146, 65 N. W. 848, where the test given to the jury was that the judgment and conscience must be convinced to an extent such as would lead 'a careful and prudent man to act affirmatively in important matters of his own,' and it was held that it was distinct error to use the words 'important matters of his own' instead

of the words 'most important affairs of life.' The rule was recognized as correct in the case of *Buel v. State*, 104 Wis. 132, 80 N. W. 78, and it was applied to the definition of reasonable doubt in the case of *Butler v. State*, 102 Wis. 364, 78 N. W. 590. In this latter case the trial court had defined reasonable doubt as being such a doubt as 'would govern and control a reasonably prudent man, and deter him from acting in his own most important affairs and concerns of life,' and it was objected that the expression 'his own most important affairs' was not equivalent to 'the most important affairs of life,' but it was held that the words were fairly legal equivalents in the connection in which they were used. It was assumed in that case (and with entire propriety) that a jurymen must use the same degree of care, judgment and prudence in determining whether there was a reasonable doubt as in determining whether any given fact was proved, in other words, that his mental attitude in the consideration of every question presented to him as a jurymen throughout the case must be the same, namely, that of meeting and solving it with all the care, judgment and prudence of which he is capable. These cases have settled this principle fully and completely in this state, and, as we believe, upon sound, logical and just lines. Were we to approve of an instruction which authorizes the jury to use a less degree of care and caution in passing upon one of the questions which arise in every criminal case, we should confuse and make uncertain legal principles which have been supposed to be certain and definite,—a thing which should not be done except for very good cause. The words 'graver transactions of life' may mean many things, but it cannot be argued that they are the legal equivalent of the words 'most important affairs' of life. A man may not be able to decide satisfactorily as to what matters constitute his 'graver transactions,' but there is little or no doubt in any man's mind as to what the 'most important affairs' of his life consist of. We must, therefore, in view of the settled position taken by this court, as above stated, hold that the instruction given by the court in this case, which uses the words 'graver transactions of life' instead of the words 'most important affairs of life,' or their equivalent, is erroneous on that account."

That the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of their guilt.<sup>38</sup>

**§ 4444. A Juryman to Use all the Reason, Prudence and Judgment Which a Man Would Exercise in the Most Important Affairs of Life.**

(a) On the other hand, when, upon the whole evidence, the judgment and conscience are not convinced of guilt in a degree or to an extent such as would lead a careful and prudent man to act affirmatively in important matters of his own, when the jury feel that upon the whole evidence, rationally considered, guilt is not satisfactorily proven, such feeling amounts to a reasonable doubt of guilt, and in such case the defendants will be entitled to a verdict of not guilty.<sup>39</sup>

(b) Whatever would convince you beyond a reasonable doubt, in the judgment which you use in the ordinary affairs of life, it is all that is necessary to convince you as jurors sitting in a criminal case.<sup>40</sup>

(c) A reasonable doubt is a doubt which as the term implies is founded on reason—some reason that to your mind is sufficient to support a doubt. It is not a mere conjecture. It is not that there is a possibility that the case may be different, but must be such a doubt as would cause a reasonably prudent man to pause or deter him from acting or deciding in the most important affairs of life.

(d) You should in your consideration and conclusion reject every alleged fact or inference not so established beyond all reasonable doubt; then if upon all the established facts, or lack of facts, a doubt as to defendant's guilt arises in your mind, which would lead you to pause and hesitate—to conclude in the affirmative,—concerning the most important affairs of life, you have a reasonable doubt of defendant's guilt and you should acquit him.<sup>41</sup>

38—*Jenkins v. State*, 35 Fla. 737, 18 So. 182 (193), 48 Am. St. 267.

Quoting *Jane v. Commonwealth*, 2 Metc. (Ky.) 30, the court said: "Men frequently act in their own grave and important concerns without a firm conviction that the conclusion upon which they proceed to act is correct; but having deliberately weighed all the facts and circumstances known to them, they form a conclusion upon which they proceed to act although they may not be fully convinced of its correctness. But this degree of certainty is wholly insufficient to authorize a verdict of guilty in criminal cases. In such a case the jury should be fully convinced of the correctness of their conclusion that the prisoner was guilty, and that conviction should be so clear and strong as to exclude from their minds all reasonable doubt that their conclusion was correct." Citing to the same effect also, *People v. Ah Sing*, 51 Cal. 372; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *Lovett v. State*, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705, n.; *State v. Nash*, 7 Ia. 347; *Polin v. State*, 14 Neb. 540, 16 N. W. 898.

39—In *Emery v. State*, 92 Wis. 146, 65 N. W. 848 (850), homicide case, the above instruction was held erroneous on the authority of *Anderson v. State*, 41 Wis. 430, 2 Am. Cr. Rep. 193.

*Anderson v. State*, 41 Wis. 430, 2 Am. Cr. Rep. 193.

The court said: "We are aware that courts in some of the states hold to a different rule, but in this state it has been deliberately declared that a jurymen in a criminal case must use all the reason, prudence and judgment which a man would exercise in the most important affairs of life, and that an instruction authorizing the use of any less degree of reason, prudence and judgment is erroneous. In support of this rule, see, also, *State v. Dineen*, 10 Minn. 407 (Gil. 325); *Com. v. Miller*, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. 170.

40—*People v. Albers*, 137 Mich. 678, 100 N. W. 908 (912).

The court said "that in the ordinary affairs of life most men never require evidence which convinces them beyond a reasonable doubt." Citing *Anderson v. State*, 41 Wis. 430, 2 Am. Cr. Rep. 193.

41—*Ryan v. State*, 115 Wis. 488, 92 N. W. 271 (275).

The court said that the last clause "characterized the meaning to be given to the word 'deter' as used in the previous instruction, and cured the error, or at least prevented it from being reversible error. *Butler v. State*, 102 Wis. 364 (369), 78 N. W. 590, and *McAlister v. State*, 112 Wis. 496 (503), 88 N. W. 212."

**§ 4445. A Conscientious Belief of Guilt is Not Sufficient to Convict.** (a) The test is, does the evidence rise so high as to cause you to conscientiously believe he is guilty? and if you do so believe, then you have no reasonable doubt of his guilt.<sup>42</sup>

(b) You are not required to know that defendant is guilty; but if you conscientiously believe, from all the testimony, he is guilty, then you should convict him, for then you have no reasonable doubt, and the case is made out to a moral certainty.<sup>43</sup>

**§ 4446. It Is Usually Error to Tell the Jury that They Are Not at Liberty to Doubt as Jurors if They Believe as Men.** (a) The court instructs you that you are not at liberty to disbelieve as jurors if, from the evidence, you believe and are satisfied, beyond a reasonable doubt, as men. Your oaths impose on you no obligation to doubt where no doubt would exist if no oath had been administered.<sup>44</sup>

(b) You are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt when no doubt would exist if no oath had been administered.<sup>45</sup>

42—Rucker v. State, — Miss. —, 18 So. 121 (122).

The court said: "A conscientious belief is the only sort of belief that is ever entertained. One may affect to believe, and the pretense may not be conscientious, but any belief really entertained must, from its very nature, be a conscientious one. The judge in effect told them that the defendant should be convicted if the jury believed him to be guilty. The law is that to warrant a conviction the jury must be satisfied beyond a reasonable doubt of the guilt of the accused. Brown v. State, 72 Miss. 95, 16 So. 202."

43—Brown v. State, 72 Miss. 95, 16 So. 202.

The court said: "We fear that the above instruction which defined conscientious belief to be such as left no room for reasonable doubt, and rose to the height of moral certainty, was erroneous. In the matter of giving instructions, the beaten way is the safe way." See also to same effect Orr v. State, — Miss. —, 18 So. 118, and Ellerbee v. State, 79 Miss. 10, 30 So. 57 (58), homicide case, where an instruction concluded: "All that is required to enable a jury to return a verdict of guilty is, after a comparison and consideration of all the testimony, to believe conscientiously that it established the guilt of defendant."

Held, that judgment of conviction must be reversed. Citing Powers v. State, 74 Miss. 777, 21 So. 657. See also Johnson v. State, — Miss. —, 16 So. 494, where the same ruling was made.

In Hammond v. State, 74 Miss. 214, 21 So. 150, homicide case, an instruction requiring the jury to "conscientiously believe beyond a reasonable doubt," passed muster. The court treated the word conscientiously as surplusage.

In Hemphill v. State, 71 Miss. 877, 16 So. 491 (492), this instruction was held bad.

While it is the law that jurors must believe a defendant guilty, from the evidence, beyond a reasonable doubt, before they can so find, still if, from all the evidence, they honestly and conscientiously believe him guilty, the requirements of the law are met, and the jury are warranted in returning a verdict of guilty.

Citing Burt v. State, 72 Miss. 408, 16 So. 342, 48 Am. St. 563.

44—Adams v. State, 34 Fla. 185, 15 So. 905 (909).

The court said: "It adds nothing to the charge in explanation or elucidation of what character of doubt must exist in order to justify an acquittal, but on the contrary, is confusing in its tendency, and tends to impress upon the minds of the jury the idea that their oaths as jurors do not impose upon them the duty to give the evidence any more grave, careful or solemn consideration than if they were forming conclusions upon it as citizens, without the obligation of their oaths as jurors." See Thomas v. State, 74 Ark. 431, 86 S. W. 404, for comment holding a somewhat similar instruction erroneous.

45—Siberry v. State, 133 Ind. 677, 33 N. E. 681 (683).

The court said that this instruction "in effect relieves the jury from the obligation of their oaths. While it probably cannot be said that the fact that a juror is under oath should create a doubt which would not otherwise exist, yet an oath is essential to install him as a juror. The oath is administered for a purpose. The juror acts under the solemnity of his oath in his deliberations. It enjoins upon the juror the solemn obligation to carefully consider that he will 'well and truly try and true deliverance make between the state and the prisoner; and any instruction from the court having for its purpose or its effect the exoneration of the juror from



§ 4447. **Mere Belief of the Jury Authorizing Conviction Held Error.—Satisfaction Beyond a Reasonable Doubt Required.** (a) The court instructs the jury that when the *corpus delicti* is proved, independent of the prisoner's confessions, an extrajudicial confession, establishing the criminal agency of the defendant, if believed by the jury will authorize a conviction.<sup>46</sup>

(b) While it is true you are not authorized to convict unless from all the evidence you believe beyond every reasonable doubt that J. is guilty, still this does not mean that you must know he is guilty, for mathematical certainty is not required in any case; but if you, from a full and fair comparison of all the evidence in the case, believe he is guilty, then this is sufficient, and you should convict him.<sup>47</sup>

§ 4448. **"A Rational Possibility of Defendant's Innocence," Held Erroneous.** I charge you that all of the evidence upon which the state relies for a conviction in this case is circumstantial, and that you must acquit the defendant unless the evidence excludes a rational possibility of defendant's innocence.<sup>48</sup>

§ 4449. **A High Degree of Probability of Guilt will not Justify Conviction.** By "reasonable doubt" is not intended to be excluded every merely possible doubt. If, after a careful consideration and comparison of the evidence in the case, you are satisfied to a moral certainty of the truth of the charge, you may convict the defendant. If you are not satisfied, you should acquit the defendant. A "moral certainty" signifies only a very high degree of probability.<sup>49</sup>

§ 4450. **The Term "Fully Satisfied" Does not Express the Meaning of "Believe Beyond a Reasonable Doubt."** If from a full and fair comparison of all the evidence in the case your minds and consciences are fully satisfied of the defendant's guilt, you should convict.<sup>50</sup>

his oath, and permitting him to disregard it, is erroneous; and the paragraph from the instruction last quoted could have no other effect or purpose than to tell the jurors that they occupied no other or different relations than if they were not acting under oath." A similar instruction was held erroneous in *Lillie v. State*, 72 Neb. 228, 100 N. W. 316 (322).

46—*Burton v. State*, 107 Ala. 108, 18 So. 284 (290).

Above instruction "was faulty, in that it authorized a conviction upon the mere belief of the jury, instead of requiring them to be satisfied beyond a reasonable doubt. *Whitaker v. State*, 106 Ala. 30, 17 So. 456."

47—*Jeffries v. State*, 77 Miss. 757, 28 So. 948, homicide case.

The court said: "The last clause in this charge is put as the conclusion from an attempted definition of 'reasonable doubt' and reduces it to a mere matter of belief, and is fatal error; and such error as is not susceptible of cure, from the very fact that it is given as the result of reasoning on what is a reasonable doubt. *Brown v. State*, 72 Miss. 95, 16 So. 202; *Burt v. State*, 72 Miss. 410, 16 So. 342, 48 Am. St. 563, n.; *Webb v. State*, 73 Miss. 456 (460), 19 So. 233; *Lipscomb v. State*, 75 Miss. 560 (577),

23 So. 210 (230); and *Powers v. State*, 74 Miss. 779, 21 So. 657." See *State v. Harris*, 97 Ia. 407, 66 N. W. 728; a similar statement was held cured by what followed.

48—*Morris v. State*, 124 Ala. 44, 27 So. 336 (337).

Held properly "refused. The jury need never find that the defendant cannot be innocent. *Webb v. State*, 106 Ala. 52, 18 So. 491. There might be a possibility of defendant's innocence, and yet from the whole evidence, no reasonable doubt of his guilt. *Sims v. State*, 100 Ala. 23, 14 So. 560; *Nichols v. State*, 100 Ala. 23, 14 So. 539."

49—In *Byedo v. State*, 69 Ark. 537, 64 S. W. 270 (271), the above was held bad as justifying conviction upon a strong probability of guilt.

50—*Riley v. State*, —, Miss. —, 18 So. 117 (118).

The court said: "In what sense is the word 'fully' which the court instructed the jury might characterize the belief which would warrant a conviction, to be understood? Some of the synonyms given by lexicographers are 'amply,' 'sufficiently,' 'clearly,' 'distinctly.' Now, did the court mean to tell the jury that while the law required it to believe the accused to be guilty beyond a reasonable doubt, before he should be convicted, yet all that was meant

(b) One of the correct definitions of beyond a reasonable doubt is to be wholly satisfied or satisfied to a moral certainty.<sup>51</sup>

§ 4451. **It is Insufficient that the Evidence Necessarily Leads to a "Conclusion" of Guilt.** (a) It is not my intention by the words "reasonable doubt" to declare that a bare possibility of innocence will acquit, because that may be true in nearly all cases. What I wish to be understood as saying is this: When a circumstance is of doubtful character in its bearings, you are to give the accused the benefit of the doubt. If, however, all the facts established necessarily lead the minds to the conclusion that the defendant is guilty, though there be bare possibility, merely, not supported by some good reason therefor, that he is innocent, you should find him guilty.<sup>52</sup>

(b) The court charges the jury that the evidence sufficient to convict M. T. should not only be a preponderance of mere probabilities, but the evidence should be so convincing, as to lead your mind to the conclusion that the defendant cannot be guiltless.<sup>53</sup>

§ 4452. **A "Well Founded" Doubt of Defendant's Guilt "Of Any Offense" Will Not Prevent Conviction.** The court charges the jury that if there is generated in their minds by the evidence in this case or any part of it, after consideration of the whole evidence by them, a well founded doubt of defendant's guilt of any offense, then the jury must find the defendant not guilty.<sup>54</sup>

§ 4453. **Jury May Convict "Although the Act May be Surrounded in a Degree by a Doubt."** If, under the foregoing rules, the testimony in this case is sufficient to convince you, as reasonable men, beyond a reasonable doubt, that the defendant did commit the act charged, *although the act may be surrounded in a degree by a doubt*, then I charge you that it is your duty to convict.<sup>55</sup>

was that the jury should 'clearly,' or 'distinctly,' or 'sufficiently' so believe? If this was what was meant the instruction was palpably wrong."

51—Thayer v. State, 138 Ala. 39, 45 So. 406 (408), condemns above instruction because it exacts "too high a degree of proof. Griffith v. State, 90 Ala. 588, 8 So. 812."

52—Cross v. State, 132 Ind. 65, 31 N. E. 473, rape case, the above was disapproved.

The court said: "It is often true that a preponderance of the evidence will necessarily lead the mind to a conclusion; but, where human life or liberty is at stake, reasonable doubt is not always essential to a necessary conclusion. A necessary conclusion may logically appear to result, and yet all reasonable doubt be not removed. It is immaterial whether the doubt is to be removed by direct or circumstantial evidence, since, in every case, all reasonable doubt must be removed by the evidence in the cause before the accused can be convicted. No preponderance of evidence, however great, is sufficient, whether direct or circumstantial, unless it generate full belief of guilt, to the exclusion of all reasonable doubt."

Citing, Rhodes v. State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. 429, 9 L. R. A. 607, and Wall v. State,

51 Ind. 543, in which case a somewhat similar instruction was held good.

53—Thomas v. State, 107 Ala. 13, 18 So. 229 (230).

The court said: "In Coleman v. State, 59 Ala. 52, we ruled that a charge the same, in substance, as the first requested by the defendant in this case, should have been given, and reversed the judgment of the court below on account of its refusal; but in more recent rulings we have departed from that decision, and under their influence, now hold that the charge was properly refused. Bonner v. State, 107 Ala. 97, 18 So. 226."

54—In Stewart v. State, 133 Ala. 105, 31 So. 944 (945), the above was held bad because "the jury might have a well founded doubt of the defendant's guilt of some offense other than that charged in the indictment, and if they should the charge requested directs an acquittal."

The same instruction without the words "of any offense" was approved in Turner v. State, 124 Ala. 59, 27 So. 272.

55—People v. Olsen, 1 Cal. App. 17, 81 Pac. 676 (678).

The court said: "This very instruction was given in People v. Anthony, 56 Cal. 397, and approved. But we think the trial judge might

§ 4454. **Instructing that Certain Specific Facts, if Proven, are Sufficient to Raise a Reasonable Doubt.** (a) Should the jury believe from the evidence that C. F. died from a mortal wound inflicted by a gun shot, and if the jury further find that some other person than the defendant had the same opportunity to fire the shot that inflicted said mortal wound, and that all the circumstances of the affray point as clearly to some other person as having fired the fatal shot at the defendant, then these facts are sufficient to raise a reasonable doubt in the mind of the jury as to the guilt of the defendant, and the jury should acquit him.<sup>56</sup>

(b) If the guilt of the prisoner depends upon the testimony of the witness G. P., proof of contradictory statements or declarations of that witness, made as to a material point, may be sufficient to raise a reasonable doubt of the defendant's guilt in the minds of the jury, and warrant an acquittal.<sup>57</sup>

(c) The court charges the jury that a probability of the defendant's innocence is just foundation for a reasonable doubt of his guilt, and therefore, for his acquittal; and if, from all the evidence in this case they believe the defendant's account of this transaction is the correct one, then they must acquit the defendant.<sup>58</sup>

§ 4455. **Leaving the Mind of Jury in State of Confusion.** The court charges the jury that if, after considering all the evidence in the case, the mind of the jury is left in a state of confusion as to any fact necessary to constitute defendant's guilt then they must find him not guilty.<sup>59</sup>

§ 4456. **Defendant Need Not Prove Facts Inconsistent With His Guilt in Order to Raise a Reasonable Doubt.** And if there is any one material fact, which is proved to the satisfaction of the jury, by a preponderance of the evidence, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt.<sup>60</sup>

§ 4457. **It is Error to Charge that the State Must Furnish Evidence Sufficient to Convict; It is Enough if Such Evidence is Furnished by the Defense.** (a) The court charges the jury that they

very well have omitted the words italicized, as they seem to be meaningless when all the rules and definitions of circumstantial evidence are given, and in view of the fact that the jury was repeatedly admonished that they must be satisfied from the evidence and beyond a reasonable doubt of the defendant's guilt, or they must acquit him."

56—State v. Vance, 29 Wash. 435, 70 Pac. 34 (47), homicide, disapproves the above instruction on the ground that it is a comment on the evidence and argumentative.

57—Jackson v. State, 136 Ala. 22, 34 So. 188 (190). Held to be argumentative.

58—Held erroneous. Hester v. State, 103 Ala. 83, 15 So. 857 (859).

Citations: Prince v. State, 100 Ala. 744, 14 So. 409, 46 Am. St. 28; Bain v. State, 74 Ala. 38; Williams v. State, 98 Ala. 22, 12 So. 808.

59—Bodine v. State, 129 Ala. 106, 29 So. 926 (928).

The court said: "No matter how slight the confusion might be as

to any fact, and although not such a state of confusion as would render it impossible for the jury to be satisfied of the defendant's guilt beyond a reasonable doubt the charge nevertheless required an acquittal."

60—State v. Judiesch, 96 Ia. 249, 65 N. W. 157.

The court said: "It is difficult to understand what the court had in mind in inserting this clause, unless he intended thereby to refer to the evidence touching the previous chaste character of the prosecutrix. That matter, however, was fully referred to in another instruction. We think the jury may well have been led to think, from this statement, that it was incumbent upon the defendant to prove by a preponderance of the evidence some fact inconsistent with his guilt, in order that a reasonable doubt be raised as to his guilt."

The same instruction was held to invade the province of the jury in Walker v. State, 117 Ala. 42, 23 So. 149 (151).



must believe beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment to the exclusion of every probability of his innocence and every reasonable doubt of his guilt, and if the prosecution has failed to furnish such measure of proof, and to impress the jury with such belief of his guilt, they should find him not guilty.<sup>61</sup>

(b) The court charges the jury that the only foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence beyond a reasonable doubt, and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of any probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to so impress the minds of the jury of the defendant's guilt, they must find the defendant not guilty.<sup>62</sup>

§ 4458. "**Slightest**" Reasonable Doubt. The court charges the jury that no man should be convicted of a crime whose guilt is in reasonable doubt, or in the slightest reasonable doubt.<sup>63</sup>

§ 4459. **A Reasonable Doubt Arising Out of a Part of the Evidence Does Not Acquit Defendant.** (a) If the jury have a reasonable doubt growing out of the evidence, or any part of it, whether defendant was at Rock Run station on the 27th of March, 1898, then the defendant is entitled to the benefit of such doubt and the jury must find him not guilty.<sup>64</sup>

(b) If there is any one fact arising out of the evidence which is sufficient to create a reasonable doubt in the mind of the jury, then the jury should find the defendant not guilty.<sup>65</sup>

(c) The court charges the jury that if you have a reasonable doubt, growing out of any part of the evidence, as to the guilt or innocence of defendant, he is entitled to the benefit of such doubt, and should be acquitted.<sup>66</sup>

61—Johnson v. State, 133 Ala. 38, 31 So. 951 (1953).

The court said that "a similar charge was approved in Brown v. State, 118 Ala. 111, 23 So. 81, but the report of that case does not show any evidence proceeded from the defendant's side of the case tending to prove guilt."

62—Wilson v. State, 140 Ala. 43, 47 So. 93 (94).

The court said that this is argumentative "and is also bad for its tendency to require the jury to base conviction alone on the evidence adduced by the state when some incriminating evidence was introduced by the defendant."

63—Held misleading in Goodlett v. State, 136 Ala. 39, 33 So. 892 (894); charge of homicide.

64—Lodge v. State, 122 Ala. 107, 26 So. 200 (201).

Citing Nicholson v. State, 117 Ala. 32, 23 So. 792, where the court said of a like charge that it "might have misled the jury to the conclusion that, if they had a reasonable doubt of the defendant's guilt, growing out of a certain part of the evidence, they should acquit him, even though such doubt were dissipated by other evidence, or did not exist upon the whole evidence."

See also Walker v. State, 117 Ala. 42, 23 So. 149 (151); Herd v. State, 94 Ala. 100, 10 So. 528.

65—Deal v. State, 136 Ala. 52, 34 So. 23 (24).

This instruction "has an undue tendency to withdraw the consideration of the jury from the whole to particular parts of the evidence as going to the creation of a reasonable doubt."

In Mitchell v. State, 129 Ala. 23, 30 So. 348 (354), homicide, it is held that a reasonable doubt "arising out of any part of the evidence," "after considering all the evidence," acquits the prisoner. Citing McLeroy v. State, 120 Ala. 274, 25 So. 247; Turner v. State, 124 Ala. 60, 27 So. 272.

To the same effect see Gordon v. State, 129 Ala. 113, 30 So. 30 (31); Gordon v. State, 140 Ala. 29, 36 So. 1009 (1011); Winter v. State, 133 Ala. 176, 32 So. 125; Turner v. State, 124 Ala. 60, 27 So. 272; Stewart v. State, 137 Ala. 33, 34 So. 818 (820); Hale v. State, 22 Ala. 85, 26 So. 236; Liner v. State, 124 Ala. 1, 27 So. 438 (440).

66—Smith v. State, 137 Ala. 22, 34 So. 396.

The court held the above charge was bad. It would have tended to

(d) The court charges the jury that if they have a reasonable doubt as to the defendant's guilt as charged in the indictment, growing out of the entire evidence, or any part thereof, they must give the defendant the benefit of this doubt and acquit him.<sup>67</sup>

§ 4460. **Reasonable Doubt May Arise by Reason of Lack of Evidence.** What is a reasonable doubt? This does not mean that the proof must be free from all doubt. Proof is to be deemed to be beyond reasonable doubt when the evidence is sufficient to impress the judgment of an ordinarily prudent man with a conviction on which he would act without hesitation in his most important concerns in life. You are not to go beyond the evidence to hunt for doubts. A doubt, to justify an acquittal, must be reasonable, and must arise from a fair and impartial consideration of all the evidence in the case. The defendant comes into court, and for plea says that he is "not guilty," and the court instructs you that it is incumbent on the prosecution to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendant, but every presumption of the law is in favor of his innocence; and in order to convict him of the crime alleged in the indictment, or of any lesser crime included in it, every material fact necessary to constitute such crime must be proven beyond a reasonable doubt, and if the jury entertained any reasonable doubt upon any material fact necessary to constitute the crime, it is your duty, gentlemen, to resolve that doubt in favor of the defendant and acquit him. When there is a reasonable doubt in which of two or more degrees of an offense a defendant is guilty, he must be convicted of the lowest degree only.<sup>68</sup>

§ 4461. **The Abiding Conviction of Guilt Must Arise From the Evidence and Not from the Lack of Evidence.** The court is asked to charge the jury that every man is innocent until proven guilty beyond a reasonable doubt by the evidence given upon the witness stand; that the presumption is with him when he is arraigned, remains with him through the trial, goes with you into the jury room, and remains there until you are satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment. By a reasonable doubt is not meant a mere possibility of a doubt, but such a doubt arising from the evidence as leaves your mind in such a condition that, after reviewing all the evidence, you cannot say that you have an abiding conviction

mislead "the jury to instruct them to acquit on a reasonable doubt arising from part of the evidence as a whole might have dispelled such doubt. *Liner v. State*, 124 Ala. 1, 27 So. 438; *Nicholson v. State*, 117 Ala. 32, 23 So. 792."

67—In *Hale v. State*, 122 Ala. 85, 26 So. 236 (238), citing, *Nicholson v. State*, 117 Ala. 32, 23 So. 792, the above instruction was held erroneous for a similar reason.

68—*Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230.

The Supreme Court said: "This instruction is not erroneous, for it does not embody an incorrect definition. It is no definition at all. It is mere tautology, stated with awkward circumlocution. The terms of the expression 'reasonable doubt' import the most exact idea of its

meaning, and are incapable of simplification, and there is no equivalent in phrase more easily understood. All such endeavor is futile and foredoomed; the usual result being a maze of casuistry, tending to confuse rather than to enlighten, often involving incorrect propositions, as shown in the recent cases of *Powers v. State*, 74 Miss. 779, 21 So. 657; *Hammond v. State*, 74 Miss. 214, 21 So. 149; *Williams v. State*, 73 Miss. 822, 19 So. 826; *Burt v. State*, 72 Miss. 408, 16 So. 342, 48 Am. St. 563 n.; and *Brown v. State*, 72 Miss. 95, 16 So. 202. In all of these cases, besides, the specific errors of the particular instructions considered, the practice of attempting such definition at all is criticised and deprecated, if not condemned."

to a moral certainty of the guilt of the accused. If you have not that abiding conviction to a moral certainty arising from the evidence, or from the lack of evidence, as to the guilt of the accused, you must find him not guilty.<sup>69</sup>

§ 4462. **If a Single Juror Has a Reasonable Doubt the Jury Cannot Convict.** (a) Before the jury can convict the defendant the evidence must be so strong as to convince each juror of his guilt beyond a reasonable doubt; and if, after considering all the evidence, a single juror has a reasonable doubt as to the defendant's guilt, then the jury cannot convict him.<sup>70</sup>

(b) The jury are instructed that in their deliberations, if any one or more of their number, after deliberating with their fellow jurymen, retains a reasonable doubt as to defendant's guilt, the jury should not find him guilty.<sup>71</sup>

(c) I charge you, gentlemen of the jury, that if any member of the jury has a reasonable doubt as to the guilt of the defendant and any other member of the jury does not have a reasonable doubt of the guilt of the defendant, it is the duty of the jury not to return a verdict either way.<sup>72</sup>

(d) Each jurymen must separately and segregately be satisfied beyond a reasonable doubt and to a moral certainty that defendant is guilty or they must acquit him.<sup>73</sup>

(e) The court instructs the jury that if there be one jurymen who believes the state has not proven the defendant guilty beyond a reasonable doubt and to a moral certainty, then this jurymen should not consent to a verdict of guilty.<sup>74</sup>

69—Shiver v. State, 41 Fla. 630, 27 So. 36 (39).

Held properly refused. The court said: "The last clause was calculated to impress the jury with the idea that the abiding conviction to a moral certainty necessary to justify a verdict of guilty might arise from lack of evidence. The reasonable doubt may, and frequently does, arise from a lack of evidence to prove guilt; but the abiding conviction must arise from the evidence, and not from the lack of evidence."

70—Cook v. State, 46 Fla. 20, 35 So. 665 (669).

Held properly refused because it is the duty of jurors to confer with each other and agree. Citing Barker v. State, 40 Fla. 178, 24 So. 69; Davis v. State, 63 Ohio St. 173, 57 N. E. 1099; Myers v. State, 43 Fla. 500, 31 So. 275; Sigsbee v. State, 43 Fla. 524, 30 So. 816. Contra, it was held error to refuse to give this instruction in Mitchell v. State, 129 Ala. 23, 30 So. 348 (354).

71—In People v. Curtis, 97 Mich. 489, 56 N. W. 925, 37 Am. St. 360, homicide case, this was held bad. Citing State v. Hamilton, 57 Iowa 596, 11 N. W. 5, 42 Am. Rep. 59 n.; State v. Young, 105 Mo. 634, 16 S. W. 408.

72—Oakley v. State, 135 Ala. 15, 23 So. 693 (694), says it was not the duty of the trial judge to give this instruction.

Davis v. State, 131 Ala. 10, 31 So.

569 (571), homicide case, condemns the following:

If after a careful and cautious examination of all the testimony in the case, there is a reasonable doubt of defendant's guilt in the mind of either of the jurors, you should acquit the defendant. Citing Littleton v. State, 128 Ala. 31, 29 So. 390, 86 Am. St. 71.

73—Littleton v. State, 128 Ala. 31, 29 So. 390 (392), 86 Am. St. 71, homicide case, holds that this charge was properly refused.

The court said: "While the reasonable doubt postulated in the charge would be good ground for not convicting the defendant, as we have decided (Grimes v. State, 105 Ala. 87, 17 So. 184) yet it would not be ground for his acquittal. The reasonable doubt of guilt by one juror, or by any number of them less than the entire twelve, could not affect the others who did not indulge such doubts, and unless all were reasonably doubtful of guilt there could be no verdict of not guilty. Such a condition might work a mistrial but never an acquittal."

74—Cunningham v. State, 117 Ala. 59, 23 So. 693 (695).

In comment the court said that "it is vicious, in that it is calculated to impress the mind of a juror with the idea that his verdict must be reached and adhered to without the aid of that consideration and deliberation with his fellow jurors



(f) It is the duty of the jurors to carefully examine all of the evidence and consider the same in the light of, and in connection with, the court's instructions, and honestly endeavor to reach and return a verdict either against or in favor of the defendant; but if a juror, or any juror, after he has duly weighed and considered all of the evidence and the court's instructions, is not then satisfied beyond all reasonable doubt that the defendant is not guilty, it will be the duty of such juror or jurors to vote for the defendant's acquittal, and to refuse to agree to a verdict of guilty. This will be so notwithstanding all other jurors may be satisfied and express themselves; for no single juror who has duly weighed and considered all the evidence in the case, and also the court's instructions, and thereafter and thereupon honestly concluded that the defendant is not guilty or that he is not satisfied beyond all reasonable doubt of the guilt of the defendant, is required to or expected to surrender or abdicate his individual honest judgment in order that a majority, or even a large majority, of all the jurors may thereby be enabled with his acquiescence to return a verdict of guilty.<sup>75</sup>

(g) While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal.<sup>76</sup>

(h) And if, from the testimony in this cause, there arises in your minds, or in the mind of either of you, a reasonable doubt as to defendant's guilt, you cannot find such defendants guilty.<sup>77</sup>

(i) Where a criminal is tried by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt, before a conviction can be had. Each juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the body, and should realize that his own mind must be convinced beyond a reasonable doubt of the defendant's guilt before he can consent to a verdict of guilty. If any one of the jury, after having duly consulted with his fellow jurymen,

which the law intends shall take place in the jury room. The general charge was properly refused."

75—*State v. Rue*, 72 Minn. 296, 75 N. W. 235 (237); charge of embezzlement.

The court said that "this request is an invitation to disagree, if possible, and was properly refused."

76—*Stitz v. State*, 104 Ind. 359, 4 N. E. 145 (147), 5 Am. Cr. Rep. 48; charge of arson.

The court said: "This instruction is essentially different from the one passed upon in *Fassinow v. State*, 89 Ind. 235. A reasonable doubt entertained by some of the members of the jury may not compel an acquittal, but it may so strongly prevail, and among so many, as to warrant others in yielding their opinions, and joining in a verdict of acquittal."

77—*Baldwin v. State*, 46 Fla. 115, 35 So. 220 (221).

The court said:

"The charge quoted is objectionable in that it tends to drive the jurors apart, rather than to get them together; it is a breeder of mistrials. Jurors know their verdicts must be unanimous, and it is not in the interest of a due administration of justice to urge upon each individual the duty of 'standing pat.' A more specific objection to the charge is the use of the word 'arises.' It is not that doubt, that 'reasonable doubt' that may come to the juror after carefully weighing and considering all the evidence, and after full, free and fair discussion with his fellows, but such reasonable doubt as may hastily arise in his mind be it only for a moment. Counsel cites us no authority to sustain such a charge, nor do we think it sound in principle. See *Barker v. State*, 40 Fla. 178, 24 So. 69."

entertain such reasonable doubt, the jury cannot in such case find the defendant guilty.<sup>78</sup>

§ 4463. **A Reasonable Doubt Arising from the Argument of Counsel Should Not Acquit Defendant.** I further charge you, gentlemen of the jury, that upon the trial of a criminal case, a reasonable doubt of any facts necessary to convict the accused is raised in the minds of the jury by the evidence itself, or by the argument of counsel, based upon any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner, and he should be acquitted.<sup>79</sup>

§ 4464. **Definition of "Moral Certainty."** (a) Moral certainty is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it.<sup>80</sup>

(b) Is the juror so convinced by the evidence that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interest?<sup>81</sup>

78—Shenkenberger v. State, 154 Ind. 630, 57 N. E. 519 (524).

"The rule to be deduced from the decisions is that in a criminal case the defendant is entitled to the benefit of an instruction to the effect that each juror must be satisfied by the evidence of the guilt of the defendant, beyond a reasonable doubt, before he can consent to a verdict of guilty. A glance at the instruction tendered by the appellant shows that this idea or proposition is three times repeated in slightly varying language. Such needless repetitions are calculated to make erroneous impressions upon the minds of the jurors, and are universally condemned.

The proper charge is that the juror or jurors entertaining such doubt cannot consent to a verdict of guilty. The result, under such circumstances, is a disagreement of the jury, and nothing more. State v. Hamilton, 57 Ia. 596, 11 N. W. 5, 42 Am. Rep. 59 n.; Wachstetter v. State, 99 Ind. 290, 50 Am. Rep. 94 n.; Goodwin v. State, 96 Ind. 550; Campbell v. People, 109 Ill. 566, 50 Am. Rep. 621; Haney v. Caldwell, 43 Ark. 184; Sadler v. Sadler, 16 Ark. 628; Hanger v. Evins, 38 Ark. 334; Merritt v. Merritt, 20 Ill. 65 (80); Roe v. Taylor, 45 Ill. 485; Dunn v. People, 109 Ill. 635; Hamilton v. People, 29 Mich. 173; People v. Cowgill, 93 Cal. 596, 29 Pac. 228; Gardiner v. State, 14 Mo. 97; State v. Roberts, 15 Ore. 187, 13 Pac. 896."

Use of the words to justify an acquittal, held error in State v. Phillips, 118 Ia. 660, 92 N. W. 876 (881); the court said that the expression "though it has the support of precedent, is unfortunate, and should be avoided, as being open to the interpretation that the jury starts with the primary obligation to convict the accused unless some

reasonable doubt arises to justify a verdict of not guilty. State v. Pierce, 65 Ia. 85, 21 N. W. 195; State v. Elsham, 70 Ia. 531; 31 N. W. 66."

79—In Walker v. State, 138 Ala. 53, 35 So. 1011 (1012), the above was held bad for requiring acquittal to be based upon argument of counsel; citing, Green v. State, 97 Ala. 59, 12 So. 416, 15 So. 242.

80—People v. Huntington, 138 Cal. 261, 70 Pac. 284 (285).

The court said: "The use of the word 'impression' as the basis of conviction in a criminal case is an uncertain and dangerous use of language. Moreover, what definite notion can there be of 'coercion' which is only 'a sort' of coercion?"

81—State v. Martin, 29 Mont. 273, 74 Pac. 725 (728), homicide, held this to be insufficient as a definition of moral certainty but refused to reverse on that account.

The court said: "This is in effect weighing the evidence in the case in the same manner and with the same standard that jurors would weigh evidence touching their own financial and other interests. . . . Certainty and stability in the rules governing judicial proceedings, however, should never be sacrificed to undue nicety in phraseology and too great critical exactness in the use of words. Territory v. Bannigan, 1 Dak. 451, 46 N. W. 597. In State v. Gleim, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. 655, the court says: 'If the definition of 'moral certainty' is to be given at all—then follow suggestions as to what it should be; and while it is not error to give the proper definition to 'moral certainty,' we cannot conclude that the rights of the defendant have been invaded, or that he has been prevented from having a fair trial, merely because the court did not specifically define

§ 4465. **Intimation that Burden of Proof Shifts from State to Defendant—Held to Deprive Defendant of the Benefit of a Reasonable Doubt.** You are instructed that the burden is on the state to prove that the defendant is guilty as charged in the indictment, and, if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of such doubt and acquit. If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit. That unless you further believe that the killing by the defendant has been established by the state, and the defendant has failed to show by the evidence that he was justifiable or excusable in committing the act.<sup>82</sup>

§ 4466. **Doubt Whether Defendant or Another Was the Guilty Agent.** The court charges the jury that if, upon a consideration of all the evidence in this case, the jury are in doubt as to whether defendant, or some other person who was not acting in concert with the defendant, and whom defendant was not aiding or abetting or encouraging did the shooting, then the jury cannot convict.<sup>83</sup>

§ 4467. **Exclusion of Every Hypothesis but that of Innocence.** (a) The court charges the jury that it is a well-settled rule of the law that if there be two reasonable constructions which can be given to facts proven,—one favorable and the other unfavorable to a party charged with crime,—it is the duty of the jury to give that which is favorable rather than that which is unfavorable to the accused. The humane provision of the law is that upon circumstantial evidence there should not be a conviction unless to a moral certainty it excludes every other hypothesis than that of the guilt of the accused, no matter how strong may be the circumstances; if they can be reconciled with the theory some other person may have done the act, then the guilt of the accused is not by that full measure of proof the law requires.<sup>84</sup>

(b) The proof of guilt must be inconsistent with any other rational supposition.<sup>85</sup>

(c) Unless the evidence against the prisoner should be such as to

the term 'moral certainty' as a proper definition of the term 'reasonable doubt' was given, as in the *McAndrews* case, 3 Mont. 158."

82—*Tanks v. State*, 71 Ark. 459, 75 S. W. 851 (852).

The final clause of an instruction cited was held to vitiate it by depriving defendant of the benefit of a reasonable doubt and by intimating that the burden of proof shifted from the State to defendant.

83—*Hall v. State*, 130 Ala. 45, 30 So. 422 (424).

"Above charge misconceives the measure of proof or degree of mental conviction necessary in criminal cases. The jury may be 'in doubt' as to whether the defendant, or some other person with whom he had no connection, did the shooting, and yet they may have no reasonable doubt that the defendant was the guilty agent."

84—*Walker v. State*, 134 Ala. 86, 32 So. 703.

"This charge requested by defend-

ant, has been repeatedly condemned by this court. *Compton v. State*, 110 Ala. 24 (35), 20 So. 119. The law does not require the exclusion of every hypothesis of innocence, but only every reasonable hypothesis."

To the same effect see *People v. Smith*, 162 N. Y. 520, 56 N. E. 1001 (1003); *Ruloff v. People*, 18 N. Y. 194, 11 Am. Cr. Rep. 700; *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, 11 Am. Cr. Rep. 700.

85—*State v. Brady*, 121 Ia. 561, 97 N. W. 62 (65).

"This is an inadequate statement of the well-established principle. In submitting a case depending entirely upon circumstantial evidence, the jury should not be given loose rein but should have careful direction as to the quantum of proof necessary to justify a conviction. *State v. Johnson*, 19 Ia. 230; *People v. Cunningham*, 6 Parker Cr. R. 398; *Dreesen v. State*, 38 Neb. 375, 56 N. W. 1024."



exclude to a moral certainty every hypothesis but that of the guilt of the offense imputed to him, they must find the defendant not guilty.<sup>86</sup>

§ 4468. **"Wholly Inconsistent with Every Other Rational Conclusion Than Guilt."** Before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of highest concern and importance to his own interest, then they must find the defendant not guilty.<sup>87</sup>

§ 4469. **Hypothesis of Innocence—Reconciliation of Testimony With.** You must reconcile the testimony, so as to make all the witnesses speak the truth, and if you can so reconcile it upon a reasonable hypothesis of the defendant's innocence, you must acquit him.<sup>88</sup>

§ 4470. **It Is Error to Charge that Circumstances in Mitigation of a Killing Must Be Proven Beyond a Reasonable Doubt.** If the jury are satisfied beyond a reasonable doubt that the defendant slew the deceased with a deadly weapon, to-wit, a pistol, and are left in doubt as to the circumstances of mitigation or excuse offered by the defendant or derived from the state's evidence, they should convict of murder in the second degree.<sup>89</sup>

§ 4471. **Not Necessary that Jury Should Have All the Facts and Circumstances Before Them.** The court instructs you that you should know to a moral certainty that you have all the facts and circumstances before you before you can convict.<sup>90</sup>

86—*Bones v. State*, 117 Ala. 138, 23 So. 138 (139).

Because it "predicates an acquittal merely upon the exclusion of 'every hypothesis' of guilt, whether reasonable or not, it was properly refused. *Horn v. State*, 102 Ala. 145, 15 So. 278."

The same ruling was made in *Crawford v. State*, 112 Ala. 1, 21 So. 214 (222). These decisions overruled in this respect, the earlier cases of, *Riley v. State*, 88 Ala. 188, 7 So. 104, and *Riley v. State*, 88 Ala. 193, 7 So. 149. To the same effect see *Ragsdale v. State*, 134 Ala. 24, 32 So. 674 (675), and *Walker v. State*, 117 Ala. 42, 23 So. 149 (151).

87—This instruction was held erroneous in *Amos v. State*, 123 Ala. 50, 26 So. 524; *Willis v. State*, 134 Ala. 429, 33 So. 226 (235) and *Pitts v. State*, 140 Ala. 70, 37 So. 101 (103).

In the first case the court said: "This is a literal copy of instructions held correct in *Burton v. State*, 107 Ala. 108, 18 So. 284, and in *Brown v. State*, 108 Ala. 18, 18 So. 811, but which was in the later case of *Rogers v. State*, 117 Ala. 9, 22 So. 666, condemned as being argumentative. We adhere to the opinion rendered in the last mentioned case and the contrary opinion expressed in *Burton's Case* and in *Brown's Case*, supra, must be overruled."

*Brown v. State*, 128 Ala. 12, 29 So. 200 (201), holds the following to be argumentative and misleading:

The court charges the jury that a reasonable doubt may exist although the evidence reasonably satisfies the jury that the defendant is guilty.

88—"This charge is bad. Its tendency is to require the jury absolutely to reconcile the testimony which is in hopeless conflict. *Sherill v. State* 138 Ala. 3, 35 So. 129 (130).

89—*State v. Clark*, 134 N. C. 698, 47 S. E. 36 (38).

The court calls attention to its ruling in "*State v. Barrett*, 132 N. C. 1005, 43 S. E. 832, that the defendant is required to satisfy the jury of the existence of the mitigating circumstances in order to reduce the offense from murder to manslaughter, or of the matters in excuse in order to sustain his plea of self-defense, not beyond a reasonable doubt, nor even by a preponderance of evidence." Other cases cited: *State v. Brittain*, 89 N. C. 502; *State v. Ellick*, 60 N. C. 450, 86 Am. Dec. 442; *State v. Willis*, 63 N. C. 26; *State v. Vann*, 82 N. C. 632; *Asbury v. Ry. Co.*, 125 N. C. 574, 34 S. E. 654."

90—*Gray v. State*, 42 Fla. 174, 28 So. 53 (55).

The court said: "It is incumbent upon the state to establish the guilt of the accused beyond a reasonable doubt. But suppose this has been

§ 4472. **Establishing Self-defense Beyond a Reasonable Doubt—Burden of Proof.** Gentlemen of the jury, I charge that where a defense of self-defense is set up, in the legal term, the burden of proof is upon the defendant to establish his defense beyond a reasonable doubt.<sup>91</sup>

§ 4473. **An Instruction on Reasonable Doubt Should Not Be Involved and Confusing.** If the jury are not satisfied beyond a reasonable doubt, to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of the defendant's guilt, they should find him not guilty; and it is not necessary to raise a reasonable doubt that the jury should find from all the evidence a probability of the defendant's innocence, but such a doubt may arise even when there is no probability of his innocence in the testimony; and if the jury have not an abiding conviction to a moral certainty of his guilt, it is the duty of the jury to find the defendant not guilty.<sup>92</sup>

done, and it should appear from evidence introduced for the defense that some important matter within the knowledge and capacity of accused to produce has been omitted by him, could it be insisted that he should be acquitted because of such failure?"

<sup>91</sup>—*People v. Riordan*, 117 N. Y. 71, 22 N. E. 455.

"The above charge was given by the court, and at the same time, on behalf of the defendant, the court refused to charge 'that if, on all the evidence, there is reasonable doubt as to whether, at the time when the defendant fired the shots, he was in danger of great bodily harm, and as to whether there was reasonable ground to apprehend such injury, the defendant is entitled to the bene-

fit of the doubt.' The action of the court in giving the first mentioned instruction, and refusing the second, was held reversible error."

<sup>92</sup>—*McCoggle v. State*, 41 Fla. 525, 26 So. 734 (735).

The court said: "This formula of instruction was approved by the supreme court of Alabama in the case of *Bell v. State*, 15 Ala. 525, 22 So. 526, but was subsequently repudiated by the same court in the case of *Henderson v. State*, 120 Ala. 360, 25 So. 236, as being too involved, and calculated to confuse and mislead. We do not think the court erred in its refusal, and agree with the criticism made of it in the case cited from Alabama. It is artfully worded, but greatly calculated to confuse and mislead the jury."

## CHAPTER CLXXII.

### CRIMINAL—PRINCIPALS AND ACCESSORIES—MISCELLANEOUS.

See Approved Instructions, Chapter XCI, Vol. II.

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| <p>§ 4474. Who are principals—Presence.</p> <p>§ 4475. Present aiding and abetting—Conspiracy.</p> <p>§ 4476. Presence at the time crime is committed—Conspiracy to rob.</p> <p>§ 4477. Aiding and abetting—Accessory in homicide.</p> <p>§ 4478. Instrumental in communicating the poison.</p> <p>§ 4479. Larceny—What constitutes a principal in.</p> <p>§ 4480. Intent—Consent to a criminal act.</p> <p>§ 4481. Accessories may not be guilty of same crime as principal.</p> <p>§ 4482. In trial of accomplice, the name of principal should be given if known.</p> <p>§ 4483. Pouring gasoline and turpentine on person and igniting—Commenting on the evidence.</p> <p>§ 4484. Expressing an opinion on what has been proved.</p> <p>§ 4485. Testimony of accomplice must be corroborated.</p> <p>§ 4486. Testimony of accomplice sufficient where statute does not require corroboration.</p> <p>§ 4487. No greater weight to testimony of accomplice because it is corroborated.</p> <p>§ 4488. Assuming that the corroboration of testimony of accomplice is sufficient to convict.</p> <p>§ 4489. Testimony of accomplice to be received with caution—Omitting to define corroboration.</p> | <p>§ 4490. To charge that is "unsafe" to convict on testimony of accomplice is error.</p> <p>§ 4491. Calling attention to difficulty of convicting without testimony of accomplice.</p> <p>§ 4492. Testimony of wife of accomplice.</p> <p style="text-align: center;">MISCELLANEOUS.</p> <p>§ 4493. Policy of the law to protect the innocent.</p> <p>§ 4494. Degree of proof based on crime.</p> <p>§ 4495. Rules of evidence prescribed by law must be followed—Jurors cannot use same rules of evidence that they would use anywhere else on any question.</p> <p>§ 4496. Particularizing witnesses for the prosecution.</p> <p>§ 4497. Testimony of relatives of accused—Weight of.</p> <p>§ 4498. Testimony of hired detectives in a class separate and apart even from that of ordinarily interested witnesses.</p> <p>§ 4499. Motive of witness to be considered—Usurping powers of the jury.</p> <p>§ 4500. Invading province of the jury—That but little weight should be given the testimony of a witness because of ill will.</p> <p>§ 4501. Duty to convict or acquit—Argumentative.</p> <p>§ 4502. Suggestive interrogatories in charge.</p> <p>§ 4503. Records as <i>prima facie</i> proof of conviction.</p> <p>§ 4504. Correcting of error by a new trial—Defendant cannot be twice put in jeopardy.</p> |
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§ 4474. **Who Are Principals—Presence.** (a) You are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense has actually been committed by one or more persons, the true criterion for determining who are principals is, did the parties act together in the commission of the



offense? Was the act done in pursuance of a common design, and in pursuance of a previously formed design, in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed or not.<sup>1</sup>

(b) You are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons the true criterion for determining who are the principals is: Did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether, in point of fact, all were actually bodily present on the ground when the offense was actually committed or not.<sup>2</sup>

§ 4475. **Present, Aiding and Abetting—Conspiracy.** (a) The court charges the jury that even though they may believe from the evidence that defendant and his associates, J. B., and S., in what they did at H. on the night of the difficulty, acted simultaneously, and acted illegally or maliciously, with the same end in view, yet you should not

1—*McAlister v. State*, 45 Tex. Cr. App. 258, 76 S. W. 760, 108 Am. St. 958.

"This was error. See *Criner v. State*, 41 Tex. Cr. App. 290, 53 S. W. 873, in which the authorities are collated.

This further charge was given: 'Moreover, if you believe and find from the evidence in this case that H. took the mules described in the indictment under such circumstances as to constitute such taking theft that the defendant was not present and did not participate in such taking of the said mules at the time they were taken, if you find they were taken, or if you have a reasonable doubt as to whether or not defendant was actually present and participated in said taking under such circumstances as to make him a principal, you will acquit him.' This charge is in direct conflict with the one above quoted. In the first charge the jury are informed that appellant could be convicted as a principal whether he was present or not. In the other the jury are told if he was not present, or they had a reasonable doubt of his guilt, they should acquit. These charges are irreconcilable, and left the jury in chaotic confusion as to the status of the law. On this question see, also, *Criner v. State*, supra.

This doubtless was given by the court to meet that phase of the evidence which called for a charge upon the law of accomplices; that is if the property was taken, and appellant had advised or had per-

formed acts of an accomplice beforehand and was not present at the time the jury could not convict him under the indictment. But as the charges are presented in the record they are confusing and contradictory. The jury should be told plainly in cases of this character, where the issues of accomplice and principal are suggested by the testimony, that if the facts show him to be a principal he may be convicted; if they show him to be an accomplice he cannot be convicted."

2—*Armstead v. State*, — Tex. Cr. App. —, 87 S. W. 824.

"As before stated, this being a case of circumstantial evidence, this charge was error. If there had been no question of the fact that all the parties were concerned in the original taking, being present and aiding, this charge would not have been of sufficient error to reverse the judgement. Unless the evidence is clear and conclusive of the presence of all the parties at the time of the commission of the offense—that is, the original taking,—under our statutes defining principals, then such a charge as this is reversible error. The mere fact of the possession of the property that may have been stolen does not necessarily make the parties principals where there may be more than one found in possession. One may have taken the animal or property, and the other joined in the disposition of it or in the handling or carrying it away. This would put him in the role of a receiver."

convict the defendant unless it appears from the evidence, beyond a reasonable doubt, that their acts were done pursuant to a mutual agreement, and that one of them inflicted the fatal wound, or that defendant himself did the cutting.

(b) The court charges the jury that the mere fact that defendant, J., B., and S., were each present and engaged in the difficulty resulting in the fatal stabbing of A. is not sufficient to convict defendant, unless the jury find, from the evidence, beyond a reasonable doubt, that defendant and his associates had previously formed a combination or agreement between them to accomplish some criminal act, or to do some lawful act by unlawful means, or that defendant himself inflicted the fatal wound.

(c) Unless the jury find from the evidence beyond a reasonable doubt, and to a moral certainty, that defendant and his associates had conspired together before the cutting to do some unlawful act, or to do some lawful act by unlawful means, and that the fatal wound was inflicted by the defendant or one of his associates in pursuance of such conspiracy, or that defendant himself inflicted the wound after having provoked or encouraged the difficulty, or that there was not either real or apparent danger to his life or limb, and that there was or appeared to be no other reasonable means of escape without increasing his danger, the defendant should not be convicted.<sup>3</sup>

(d) It is not necessary to prove a conspiracy between appellant and C. to kill L. or to do any violence to him; it is not necessary to prove that H. fired a shot at L. or told C. to shoot L.; but the jury ought to convict H. of murder if they believe that L. was killed, and that H. aided, assisted or encouraged such killing by anything said or done by his presence for that purpose or in any other way.<sup>4</sup>

3—*Liner v. State*, 124 Ala. 1, 27 So. 438 (440).

"These charges," said the court, "requested by defendant were severally bad, in that they each predicate an acquittal on the failure of the jury to believe beyond a reasonable doubt that there was a conspiracy, in furtherance of which H. was killed, or that this defendant personally inflicted the fatal wound, and withdraw from the jury the inquiry whether the defendant, though not a conspirator and not the direct physical agent of the blow, was present, aiding and abetting the person who delivered the wound."

4—*Harper v. State*, 83 Miss. 402, 35 So. 572 (574).

"The legal effect of this instruction was to say to the jury that, though H. and C. approached L. upon a lawful mission, with no intention of doing any violence to his person, and that thereafter, if for any reason, upon provocation, C. killed L. and that H. encouraged such killing by his presence or in other way. If appellant aided or abetted or encouraged such murder by word or act or deed or in any other way," that they (the jury) were to find appellant guilty as charged.

This instruction is, in our judgment based upon a total misconception of the true legal principle. It

is well settled that one who is present with an avowed intention to aid is a participant in the homicide, or one who, though not present, counsels a homicide, is an accessory before the fact, and therefore, under our law, deemed and considered a principal.

*Hodsett v. State*, 40 Miss. 522; *Uger v. State*, 42 Miss. 642. But the instruction now under consideration is an unwarranted extension of this rule. It does not state that the appellant was present at the scene of the homicide; therefore he could not be under this instruction, convicted as a participant upon that theory alone. It states that, if he aided or abetted or encouraged such murder by 'word or act or deed or in any other way,' then he was guilty of murder. In this connection, upon what legal principle was the expression 'in any other way,' warranted? If one is not present at the scene of the homicide, and has not aided, abetted, or encouraged the slayer by act or word or deed, in what other way can he be held to be an accessory? It is undoubtedly true that, to convict a person as an accessory before the fact, one of two things must exist: he must either be present with the intention to aid or assist in the killing, or though not pres-

(e) The court instructs the jury that if, from the evidence, you believe, first, that the defendant fired a shot; second, that the shot by defendant was fired after the shot was fired by T.; third, and that the shot fired by defendant did not hit H.,—then you cannot convict the defendant of murder or of manslaughter, unless you further believe, from the evidence, and believe it beyond a reasonable doubt, first, that before the shot was fired by T. there had been formed between T. and the defendant a common purpose to take the life of H.; and, second, that the shot fired by T. was fired in pursuance of this common purpose, or was fired as a natural or probable result of said common purpose.

(f) If from the evidence you believe, first, that defendant fired a shot; second, that the defendant fired it immediately after the shot was fired by T., and fired it with the intent to hit H., or to aid T., or to encourage him or to incite him,—you cannot find the defendant guilty of murder or of manslaughter, unless you further believe, and believe it beyond a reasonable doubt, and believe it from the evidence, first, that before the shot was fired by T. there has been formed between T. and the defendant a common purpose to take the life of H.; second, that the shot fired by T. was fired in pursuance of the common purpose so formed.

(g) The defendant ought not to be found guilty of murder in either degree, or of manslaughter in either degree, unless the evidence in the case satisfies you beyond a reasonable doubt, first, that between defendant and T. there was an understanding or agreement or conspiracy to take the life of H., or to do him some bodily harm; second, that this understanding or agreement or conspiracy was made before the fatal shot was fired; third, that the fatal shot was fired in pursuance of the understanding or agreement of conspiracy.

(h) I charge you, gentlemen of the jury, that if you believe from the evidence that the defendant fired a pistol at H., unless the ball or bullet from said pistol struck the said H. or contributed to his death, you cannot find the defendant guilty of homicide in any degree, unless you further find from the evidence, that there was a prearrangement or agreement between the defendant and T. to take the life of H., or to do him some bodily harm.

(i) The court charges the jury that if they find from the evidence that the defendant and his associates acted illegally and maliciously in what they did, with the same end in view, yet, unless you are satisfied from the evidence beyond a reasonable doubt and to a moral certainty, that their acts were done pursuant to a mutual agreement, you should not convict the defendant, unless you believe, from the evi-

ent, must counsel, procure, or command the killing.

A strikingly clear and accurate statement of the rule is found in that very valuable work, McClain on Criminal Law, c. 15, par. 194, as follows: 'Some degree of participation in the criminal act must be shown in order to establish any criminal liability. Proof that one has stood by at the commission of a crime without taking any steps to prevent it does not alone indicate such par-

ticipation or combination in the wrong done as to show criminal liability, although he approved of the act.

Even the fact of previous knowledge that a felony was intended will not render one who has concealed such knowledge and is present at the commission of the offense a party thereto. See, also, 9 Am. & Eng. Enc. of Law, p. 575; 2 Thompson, Trials, par. 2216."



dence, beyond a reasonable doubt and to a moral certainty, that defendant aided and abetted T. in the infliction of the fatal wound.<sup>5</sup>

(j) The court instructs you that there need not be shown in express words an agreement between A., B. and C. to pursue D. and take the money from him by force, but if the circumstances satisfy the jury beyond a reasonable doubt that all of them, knowing the purpose of said pursuit, joined therein, and continued therein until the life of D. was taken, then they are authorized to infer that there was such understanding between the parties.

(k) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant remained at a convenient distance in order to favor the other defendants' escape if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to the other defendants, he was aiding and abetting.

(l) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant was present for the purpose of such actual assistance as the circumstances might demand, and the principal was encouraged to take the life of the deceased by the presence of the defendant, then the defendant aided and abetted in the killing of the deceased.

(m) The assistance given, however, need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient that it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it. If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life which but for it he would have had, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance.<sup>6</sup>

5—Thomas v. State, 130 Ala. 62, 30 So. 391 (392).

In holding the above instructions erroneous, the court said, in commenting, that "from the evidence it was open to the jury to infer that defendant himself fired a pistol at the deceased, and that he, being present, by his conduct encouraged another to commit the homicide, or abetted that other in its commission. Such participation in a crime makes the participant criminally responsible, though there may have been no previously formed purpose or agreement to do an illegal act. Caddell v. State (Ala.), 30 So. 76; Amos v. State, 83 Ala. 1, 3 So. 749, 3 Am. St. 682. Each of the first four charges would have withdrawn from the jury the question of defendant's capability as an immediate aider or abettor in the offense. If the defendant, acting maliciously with the slayer and other associates, shot at the deceased, the jury might have found that such conduct on his part was for the purpose, and had the effect, of encour-

aging the slayer to fire the fatal shot. The last charge was calculated to mislead the jury to permit that consideration, and was, therefore, properly refused. There is no error in the record."

6—Singleton v. State, 106 Ala. 49, 17 So. 327 (328).

"The instructions are objectionable and could have been properly refused by the trial court. They embody correct legal propositions, or principles drawn from decisions of this court, but they are in form and substance mere arguments addressed to the jury. While without error the court could have refused these instructions, it has long been the settled practice of this court not to reverse judgments in civil or criminal cases because of the giving or refusal of such instructions. If injury from them was apprehended, the party complaining had the opportunity, and it was a duty, to request additional or explanatory instructions curing and removing whatever of injury was apprehended. The instructions are

§ 4476. **Presence at the Time Crime Is Committed—Conspiracy to Rob.** The court instructs the jury that if they believe, from the evidence of this case, beyond a reasonable doubt, that the prisoner, J., and M., R., H. and E., or any two of them, the prisoner being one, entered into a conspiracy for the purpose of robbing B., the party named in the indictment in this case, of his money, and that in pursuance of said conspiracy and agreement H. and E., they, or either of them, being armed with a deadly weapon, to-wit, a loaded gun, assaulted the said B., and put him in bodily fear, shot and wounded him, and by force took from the person of the said B. a certain sum of money mentioned and described in the indictment in this case, and did feloniously and violently steal, take and carry away said money, then you should find the prisoner guilty, although the prisoner may not have been present at the time the money was so taken from the person of the said B.<sup>7</sup>

In accord with the principles announced in *Tanner v. State*, 92 Ala. 1, 9 So. 613; *Jolly v. State*, 94 Ala. 19, 10 So. 606; *Turner v. State*, 97 Ala. 57, 12 So. 54; *Caddell v. State*, (Ala.), 30 So. 606, and upon the authority of these cases the judgment must be affirmed."

7—*State v. Roberts*, 50 W. Va. 422, 40 S. E. 484 (485).

"This is a joint indictment against all the defendants named therein as principals. As stated in 4 Shars. Bl. Comm., p. 33: 'A man may be principal in an offense in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done,—which principal need not always be an actor immediately standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance.

... In case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous qualities, or giving it to him for that purpose, and yet not administering it himself, nor be present when the very deed of poisoning is committed. And the very same reasoning will hold good with regard to other murders committed in the absence of the murderer by means which he had prepared beforehand, and which probably could not fail of their mischievous effect,—as by laying the trap or deadfall for another, whereby he is killed, letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues. In each of these cases the party offending is guilty of murder, as a principal in the first degree. ... An accessory is he who is not the chief actor in the offense, nor present at its performance, but is some way

concerned therein, either before or after the fact committed.' Section 8, c. 152, Code, provides: 'An accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted and punished in the county in which he became accessory, or in which the principal felon might be indicted. Any such accessory before the fact may be indicted either with such principal or separately.' An accessory must be indicted as such, whether indicted with the principal felon or separately. In *State v. Lilly*, 47 W. Va. 496, 35 S. E. 837, (Syl., point 2): 'Under the laws of this state, to convict a person as an accessory to crime he must be indicted and tried as such.' And in *Hatchett's Case*, 75 Va. 925, it is held: 'An accessory to a felony cannot be prosecuted for a substantive offense, but only as an accessory to the crime perpetrated by the principal felon.' *Thornton's case*, 24 Grat. 657 (Va.): 'An accessory before the fact to a felony cannot be convicted on an indictment against him as principal.' The instruction complained of is given upon the theory that the proof against the defendant is to sustain the charge against him as an accessory, and not principal, and he not being indicted as an accessory, but as principal, the instruction is wrong. The instruction charges the jury that if they find that in pursuance of said conspiracy, entered into by all of the defendants, or any two of them, the prisoner being one, H. and E., they or either of them being armed with a deadly weapon, to-wit, a loaded gun, assaulted the said B., and put him in bodily fear, and by force took from his person the money described in the indictment, and did feloniously and violently steal, take and carry away said money, then they should find the prisoner guilty, although the prisoner may not have been present at the time the money was so taken from the person of

§ 4477. **Aiding and Abetting—Accessory in Homicide.** (a) The court charges the jury that the offense with which the defendant is now indicted and on trial in this case is manslaughter in the first degree; that manslaughter in the first degree is an unlawful killing, as the result of passion suddenly engendered by present provocation, and that in law there could be no conspiracy to commit such offense; and that in law there could have been no aiding or abetting F. in the commission of said offense by defendant, unless defendant was present and so aiding or abetting at the time of the killing.

(b) If the jury believe, from the evidence in this case beyond all reasonable doubt, that F. killed A. by shooting him with a gun; that such killing was done by F. with malice aforethought, and not in sudden passion engendered by present provocation—then the jury must acquit the defendant, even though the jury may be satisfied, from all the evidence beyond all reasonable doubt, that prior to such killing this defendant conspired with F. to so kill said A., or that this defendant actually aided and abetted said F. in such killing of said A.

(c) If the jury believe, from the evidence in this case, that the killing of A. by F. was murder, and that this defendant was accessory to such killing, then the defendant in this case has been acquitted of such murder, and cannot again be put on trial for said offense, and the jury should acquit him.<sup>8</sup>

(d) B. being charged for doing the shooting that killed young F., and he (B.) having heretofore been convicted of murder in the second degree, you cannot convict the prisoner of a higher offense than murder in the second degree, if you should convict him at all.<sup>9</sup>

the said B. 'An accessory before the fact is he that, being absent at the time of the actual perpetration of the crime, procures, counsels, commands, incites or abets another to commit it.' 1 Encl. Pl. & Prac. 66. The crime of accessory before the fact is a particular one. The absence of the accessory at the time and place of the principal offense is an essential element of the crime. Sir Mathew Hale defines the accessory before the fact to be 'one who, being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime. Wherein absence is necessary to make him an accessory.'"

8—Ferguson v. State, 141 Ala. 20, 37 So. 448 (449).

The court said, in comment, that "it is not true, as is asserted by these charges, that because defendant had on the first trial been guilty of manslaughter he ought not to have been again convicted of that offense on evidence that he aided or abetted in the homicide by conspiring with his son for its commission. Our statute (Code 1896, § 4308) abolishes the common law distinction between accessories before the fact and the principals in felony, and makes guilty as principals' all persons concerned in the commission of a felony whether they directly commit the act constituting the offense, or aid or abet in its commission, though not pres-

ent.' In Barnett v. People, 54 Ill. 325, the court declared a principle properly applicable here and which as stated in the head-notes of that case is as follows: 'Where a party has been tried on an indictment for murder and convicted of manslaughter, that is an acquittal of the charge of murder; and if, in such case, a new trial is granted, the accused cannot be put upon his trial again for murder, but only for manslaughter. And upon the second trial in such case the court may properly instruct the jury, for the prosecution, that if they believe the accused guilty of murder, that of itself will not justify them in acquitting him of manslaughter, inasmuch as the law only regards him as guilty of manslaughter.' See also Commonwealth v. McPike, 3 Cush. 181, 50 Am. Dec. 727."

9—Green v. State, 40 Fla. 191, 23 So. 851 (853).

The comment follows: "The court properly refused this charge, for several reasons: First, there was no evidence before the jury that J. B. had been convicted of murder in the second degree, or any other offense under this indictment. The defendant was tried alone, and there was no evidence before the jury that any other defendant embraced in the indictment had been tried or convicted. Second. The indictment in this case charged each and all of the defendants with murder in the first degree. B. was charged as



§ 4478. **Instrumental in Communicating the Poison.** The court further charges the jury that, unless they find from the evidence that E. was instrumental in communicating the poison to J., they should acquit her.<sup>10</sup>

§ 4479. **Larceny—What Constitutes a Principal in.** To constitute a person as principal in the commission of larceny, as charged in the information, the person so charged must have been actually present at the commission of the larceny charged, or he cannot be convicted.<sup>11</sup>

§ 4480. **Intent—Consent to a Criminal Act.** If you believe, from the evidence, beyond a reasonable doubt, that in D. county, Texas, on or before ———, ———, that any person or persons bought turpentine or other inflammable liquid, and carried it into the saloon of C. & F., and that said turpentine or other such fluid was poured upon the body of B. by any person or persons, and that said turpentine or other inflammable fluid was set on fire by an ignited match by any person or persons, and that defendant was present in said saloon, and knew said turpentine or other inflammable fluid was poured or being poured or placed upon said B. by any person or persons, and said match ignited and fired said turpentine, or other inflammable fluid by any person or persons, and that such act of setting afire said turpentine or other inflammable fluid by any person or persons might probably result in the death of said B., and that said defendant then and there reasonably knew that such act might so result, and that defendant was then and there the owner or one of the owners of said saloon, and that said burning of said B. occurred in said saloon, and caused the death of said B., then, in that event, defendant would be guilty, as a principal, of murder in the first degree, by torture, whether he participated in the said act or not, and whether it was intended to kill the said B. or not, or whether the said B. had been robbed or not;

principal of the first degree, and the defendant and five others as principals of the second degree, in this crime. 1 Bish. New Cr. Law, par. 648. Although the indictment charged that B. fired the fatal shot, the defendant could be properly convicted upon proof that he fired it, or that it was fired by either of the other defendants while he was present, aiding and abetting the act; provided, of course, the homicide amounted to murder in the first degree. Bryan v. State, 19 Fla. 864; Albritton v. State, 32 Fla. 358, 13 So. 955, 37 Am. St. 101. And the acquittal or conviction of B. or any other defendant, or their conviction of a lesser offense than that of murder in the first degree, if the evidence was sufficient to show that he was guilty of that crime. Montague v. State, 17 Fla. 662."

10—Brunson v. State, 124 Ala. 37, 27 So. 410 (411).

"The charge asserts that, unless the defendant was instrumental in communicating the poison to J., she must be acquitted. The only act shown by the evidence in the giving or delivering the bottle containing the poisoned whisky to the deceased was done by F. It is also shown by the evidence that the defendant

was not present when he gave the whisky to B., the deceased, to be drunk by him. In view of this state of the evidence, the jury could have construed the language of the charge to mean that, unless she was personally present, and expressly directed F. to give the whisky to J., then she would not be guilty. This certainly renders the charge misleading, and its refusal proper. The testimony tended to establish that the defendant was an accessory to the poisoning of the deceased, and, if the jury believe this to be true, they were authorized to convict her, notwithstanding she may not have either expressly or impliedly directed F. to give it to him to be drunk by him. Again, if she put the strychnine in the whisky for the purpose of having it drunk by the deceased with the intent to poison him, and it was given to him by anyone without her knowledge, and death resulted therefrom, she would be guilty."

11—Baldwin et al. v. State, 46 Fla. 115, 35 So. 220 (222).

"This was properly refused. The language is entirely too broad and forbids the idea of that 'constructive' presence recognized by all the authorities."

and without reference to what the unlawful intent of setting the said B. on fire may have been, you should so find and frame your verdict as above directed.<sup>12</sup>

§ 4481. **Accessories May Not Be Guilty of Same Crime as Principal.** If but one of the defendants was guilty of the act of shooting which caused the death of J., still, if you find that the other defendants were present aiding, abetting and encouraging and assisting in the commission of the crime, then both of the defendants would be equally guilty of the crime charged.<sup>13</sup>

§ 4482. **In Trial of Accomplice, the Name of Principal Should Be Given, if Known.** If a person other than the defendant shot and killed M., and if the defendant aided and abetted the person who did

12—Chapman v. State, 43 Tex. Cr. App. 328, 65 S. W. 1098 (1099), 96 Am. St. 874.

"This charge is clearly erroneous. The fact that appellant should have consented to the pouring of turpentine upon the person of deceased would not *per se* make him guilty of murder. In all prosecutions for crime under our law the gist of every offense is the intent of the defendant. If defendant poured fluids upon the person of deceased without any thought or expectation that some one else would ignite the turpentine, and thereby cause the death of deceased, he would not be guilty of any grade of offense higher than a misdemeanor. In order to make the appellant guilty, he must adopt the intent of that party, and the proof must satisfy the jury beyond a reasonable doubt that C., while present and knowing the unlawful intent of the other parties, assisted them not only in pouring turpentine, but in all other criminal acts leading up to the destruction of the life of deceased, and adopted said acts as his own. The conclusion of the above clause: 'Then, and in that event, defendant would be guilty, as a principal, of murder in the first degree by torture, whether he participated in the said act or not, or whether the said B. had been robbed or not, and without reference to what the unlawful intent of setting the said B. on fire may have been.' This is clearly contradictory of the law of principals as given by the court in the first part of the charge. Certainly, if appellant did not participate in the crime he would not be guilty; and if he did not intend to kill deceased he could not be guilty. But if appellant, either alone or acting with others, placed turpentine upon deceased, which turpentine was by appellant or the others with whom he was acting set on fire, and appellant reasonably expected that death would ensue from said act, and, so believing, set fire to the said B., then appellant and those who participated with him in the commission of the offense would be guilty, as charged by the court, of murder in the first degree. But, if he poured

turpentine upon the person of deceased without such intent, he would not be guilty, and the court should have so charged. Furthermore, the court should have told the jury that the fact defendant poured turpentine upon the person of deceased, and was present when someone else set fire to deceased, did not adopt the intent and agree to the unlawful act, either by words or actions, appellant's presence and the fact that he poured turpentine alone would not constitute him guilty of murder. We have repeatedly held that presence and knowledge that an offense is about to be committed or is being committed would not *per se* render such person guilty as a principal to the commission of the offense, but there must be some consent and co-operation of some character on the part of the person present in the commission of the offense, before he would be guilty of any offense. These principles of law should have been applied by the court to this phase of the case."

13—State v. Phillips, 118 Ia. 660, 92 N. W. 876 (883).

The court said: This "is not in harmony with our holding in State v. Smith, 100 Ia. 1, 69 N. W. 269. We there said: 'The guilt of a person who aids or abets the commission of a crime must be determined upon the facts which show that he had a part in it, and does not depend upon the degree of another's guilt. . . . The shot which endangered the sheriff was fired by S. (the defendant's brother). He may have fired it with such premeditation and malice as to have committed the offense of assault with intent to commit murder, yet defendant may have abetted or counselled it in the heat of passion and thus have been guilty of assault with intent to commit manslaughter.' The . . . instruction referred to states the contrary doctrine and is therefore erroneous. The liability of an aider or abettor differs materially from that of a co-conspirator. State v. Smith, supra; State v. Wolf, 112 Ia. 458 (484), 84 N. W. 536."

such shooting in doing said shooting, yet the jury should find the defendant not guilty, unless the jury believe, from the evidence, beyond a reasonable doubt, that the person who did such shooting was not doing it in his own defense, nor in the defense of another, or if said shooting was done by some person other than the defendant, and if the defendant did aid and abet such person in doing such shooting, yet the jury should not find the defendant guilty of murder, unless the jury believe, from the evidence, beyond a reasonable doubt, that said shooting was not done in the defense of any one, and unless the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant knew, at the time he so aided and abetted, that such shooting was not being done in the defense of any person, and unless the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant so aided and abetted with malice aforethought.<sup>14</sup>

§ 4483. **Pouring Gasoline and Turpentine on Person and Igniting—Commenting on the Evidence.** The court instructs the jury that, if you are satisfied, from the evidence, that turpentine and gasoline, either or both, were poured or placed upon the person of B., and that defendant knew of that fact, and that defendant himself procured part of said turpentine to be poured upon said B., and that he, the said B., was set on fire after said turpentine and gasoline, either or both, had been poured upon him, and that at the time or just before the match was ignited that fired said liquid or liquids, if it was so ignited, defendant, with a sedate and deliberate design, poured turpentine on said B., and was present with C. and F. leaning over the body of said B., when said match was so ignited, and that the act of so setting fire to said B. might probably end in his death, and that defendant reasonably knew that it might so result, then defendant would be guilty as a principal as charged, whether death was intended or not, and you should so find.<sup>15</sup>

§ 4484. **Expressing an Opinion on What Has Been Proved.** Now, you are to determine, gentlemen, whether or not he is an accomplice. He denies having anything to do with the commission of this offense himself. He states that he had nothing to do with it, and was not an accomplice.<sup>16</sup>

14—Taylor v. Commonwealth, 28 Ky. L. 819, 90 S. W. 581 (583).

"This instruction was clearly erroneous. By failing to name the person or persons supposed to have been aided and abetted, it failed to inform the defendant with what he stood charged. In order to convict one of aiding and abetting another with a crime, it is necessary either to charge the principal with him in the indictment, or, if this be not done, then the name of the principal should be stated if known, or, if unknown, that fact should appear, and the facts of the aiding and abetting sufficiently set forth."

15—Renner v. State, 43 Tex. Cr. App. 347, 65 S. W. 1102 (1103).

The above charge was held erroneous because it "was directly upon the weight of the evidence, and authorized a conviction upon a state

of case that would not have made him guilty as a principal."

16—Suddeth v. State, 112 Ga. 407, 37 S. E. 747 (748).

The court said that the "Code declares that the judge, in his charge to the jury, must not 'express or intimate his opinion as to what has or has not been proved.' (Civ. Code, § 4334); and a violation of this rule imperatively demands the grant of a new trial, under the very terms of the section. A statement by the court as to what a witness has testified has been construed to be an intimation or expression of opinion as to what has been proven, within the meaning of this section. Davis v. State, 91 Ga. 167, 17 S. E. 292 (Syl., point 2); McVicker v. Conkle, 96 Ga. 584, 596, 24 S. E. 23 (Syl., point 3). Following the rule made in these two cases, the charge now under consideration was erroneous."



§ 4485. **Testimony of Accomplice—Must Be Corroborated.** (a) You are instructed that under the law of this state, a person charged with a crime cannot be convicted upon the evidence of an accomplice or upon the evidence of any number of accomplices, unless the evidence of such accomplices is corroborated by other evidence tending to connect defendant with the commission of the offense charged; and the corroboration is not sufficient if it merely shows the commission of the crime, and one accomplice cannot corroborate another accomplice. Now, if you find from the evidence that the said H., at the time and place alleged in the indictment, was shot and killed, then you are charged that the witnesses, G. and B., are accomplices in the commission of said crime, if any, and you are further charged that you cannot convict the defendant upon the testimony of said witnesses, unless you believe the testimony of said witnesses has been corroborated by other evidence in the case tending to connect the defendant with the crime committed.<sup>17</sup>

(b) The jury should act upon the evidence of an accomplice with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied beyond all reasonable doubt of its truth.<sup>18</sup>

(c) The court instructs the jury that you cannot find the defendant guilty upon the testimony of an accomplice, unless you are satisfied that the same has been corroborated by other evidence tending to establish that the defendant did in fact commit the offense.<sup>19</sup>

(d) The court charges the jury that it is necessary, in order to convict the defendant, that the corroborating evidence of T. should be upon some part of the testimony which is material to the issue. It must also tend to show that defendant committed the crime charged in the indictment; for it is not sufficient corroboration to prove the offense was in fact committed in the manner described by T., the

17—*Barton v. State*, — Tex. Cr. App. —, 90 S. W. 877.

"This instruction was excepted to because the said charge assumed that the evidence of G. and B. is true, and because the court takes from the jury the consideration of any other question than that of corroboration of the testimony of said witnesses, and because same is a charge upon the weight of the evidence, and because it assumes that G. and B. have sworn the truth, and that they were parties to the killing of H., and because it assumes that the killing of H. was a crime, and because it assumes that a crime was committed and instructs the jury that they are only required, in order to convict defendant, to find other testimony in the record tending to connect the defendant with the crime committed. This charge is erroneous for the reasons set out by appellant. *Garlas v. State*, — Tex. Cr. App. —, 88 S. W. 345; *Crenshaw v. State*, — Tex. Cr. App. —, 85 S. W. 1147; *Hart v. State*, — Tex. Cr. App. —, 82 S. W. 652; *Jones v. State*, 44 Tex. Cr. App.

557, 72 S. W. 845; *Bell v. State*, 39 Tex. Cr. App. 677, 47 S. W. 1010."

18—*State v. Bond*, 12 Idaho 424, 86 Pac. 43 (48).

The court said this "instruction is clearly erroneous and should not have been given, as it does not state the law, neither is it in harmony with the other instructions given."

19—*Dixon v. State*, — Tex. Cr. App. —, 90 S. W. 878.

The court said that this "charge assumes the truth of the testimony of the accomplice, and tells the jury that they can convict, if they find there is other testimony tending to corroborate him. Nowhere does the charge submit to the jury to determine whether or not the accomplice told the truth. This charge has been so often condemned that we are at a loss to know why judges continue to give it. *Garlas v. State*, — Tex. Cr. App. —, 88 S. W. 345; *Crenshaw v. State*, — Tex. Cr. App. —, 85 S. W. 1147; *Bell v. State*, 39 Tex. Cr. App. 677, 47 S. W. 1012; *Barton v. State*, — Tex. Cr. App. —, 90 S. W. 877."

See also *Morawitz v. State*, — Tex. Cr. App. —, 91 S. W. 227 (228).

accomplice, unless proof of the *corpus delicti* necessarily involves the defendant's connection with the crime.<sup>20</sup>

§ 4486. **Testimony of Accomplice Sufficient Where Statute Does Not Require Corroboration.** (a) The court instructs the jury that the witness B. is an accomplice in this case, and before you can convict the defendant upon the testimony of B., you must find that he is corroborated by evidence independent from said accomplice tending to connect the defendant with the commission of the crime.<sup>21</sup>

(b) If you believe, from the evidence, that G. is an accomplice to the charge against the defendant, and that the only evidence showing the *corpus delicti*—that is, the sexual intercourse between B. and G. was committed—is her evidence only, you should acquit the defendant B., as an accomplice is an incompetent witness to establish the *corpus delicti* of the offense.<sup>22</sup>

§ 4487. **No Greater Weight to Testimony of Accomplice Because It Is Corroborated.** The principle upon which the evidence of accomplices has been and is received in evidence and considered legal and competent is that in many cases, were it otherwise, it would hardly be possible if not altogether impossible, to prove the guilt of one who violates the law under cover of darkness or secrecy. Where the evidence of an accomplice is corroborated by facts and circumstances proven, tending to connect the defendant with the homicide, or by the evidence of other credible witnesses, it is entitled to more weight than when not so corroborated, and the corroborating testimony should tend to connect the accused with the crime.<sup>23</sup>

§ 4488. **Assuming that the Corroboration of Testimony of Accomplice Is Sufficient to Convict.** (a) You are instructed that the uncontradicted evidence before you shows that if A. was murdered, S. was an accomplice to said murder, as the term "accomplice" is above defined to you; and you cannot convict defendant upon his testimony unless the same has been sufficiently corroborated by other evidence before you tending to connect defendant as a principal with the commission of the crime charged against him in the indictment. The defendant, P., cannot be convicted in this case unless you believe beyond a reasonable doubt that there is evidence before you independent of the testimony of T., and independent also of the testimony of F., if you find that F. was an accomplice, corroborating the said witness

20—Held "both argumentative and misleading, and for this reason, if no other, properly refused. *Crittenden v. State*, 134 Ala. 145, 32 So. 273 (275)."

21—In *State v. Haynes*, 7 N. D. 352, 75 N. W. 267 (268), burglary case, it was held that the above instruction was properly refused as the statute did not require corroboration.

22—*Brown v. State*, 42 Fla. 184, 27 So. 869 (870).

"This instruction was clearly erroneous, and therefore properly refused, for the reason that in this state an accomplice is a competent witness, and a conviction may be had upon his uncorroborated testimony, if it satisfies the jury beyond

a reasonable doubt. *Bacon v. State*, 22 Fla. 51; *Tuberson v. State*, 26 Fla. 472, 7 So. 858. And the rule stated applies to cases of this character as well as others. *People v. Jenness*, 5 Mich. 305; *State v. Dana*, 59 Vt. 614, 10 Atl. 727. The case of *State v. Jarvis*, 20 Or. 437, 26 Pac. 302, 23 Am. St. 141, cited by counsel as holding a different rule, is based upon a statute (*State v. Jarvis*, 18 Or. 360, 23 Pac. 251), but we have no such statute in this state."

23—In *Adams v. State*, 34 Fla. 185, 15 So. 905 (910), it was held error to give the above charge, as a matter of law, no greater weight can be given to the testimony of an accomplice whether corroborated or not.

upon material matters which tend to connect said defendant with the commission of the murder charged.<sup>24</sup>

(b) You are instructed that the witness P. was an accomplice, as that term is defined in the foregoing instructions; and you are further instructed that you cannot find the defendant guilty upon his testimony, unless you are satisfied that the same has been corroborated by other evidence tending to establish that the defendant did in fact commit the offense.<sup>25</sup>

**§ 4489. Testimony of Accomplice to be Received with Caution—Omitting to Define Corroboration.** (a) I charge you further, as to witnesses, that you are authorized to convict upon the uncorroborated statements of an accomplice, if you believe his testimony, just as you would on the uncorroborated statement of any other witness whom you believe; but, in considering the testimony of an accomplice, I charge you that you should receive the same with caution, construing it with all the facts and circumstances surrounding the homicide, and, if you should find from the evidence that the facts and circumstances surrounding the homicide bear out the testimony of the accomplice, you can act upon the same as in your judgment the testimony is true or false. In considering the corroboration of an accomplice you shall take into consideration all the facts and circumstances not only surrounding the narrative of the accomplice, but the facts and circumstances showing the body of the offense.<sup>26</sup>

24—*Jones v. State*, 44 Tex. Cr. App. 357, 72 S. W. 845 (846).

"Here, the court tells the jury that they cannot convict defendant upon the testimony of the accomplice unless the same has been corroborated by other evidence, etc. This charge is reiterated three several times. In our opinion it is tantamount to telling the jury that if they believe the testimony of the accomplice has been corroborated, thus suggesting to them the truth of the accomplice's testimony, the very fact that the accomplice is required to be corroborated is a recognition of the weakness of his testimony; and for the court to assume, as was done here, that the accomplice is to be believed, and the only required step for the jury to take is to find that he has been corroborated, is the most vicious character of a charge on the weight of the testimony. We do not think it cures the vice by telling the jury as was done in this instance, in the conclusion of the charge, that they were the judges of the facts proved and the credibility of the witnesses, and the weight to be given to their testimony." The court also referred to the case of *Bell v. State*, 39 Tex. Cr. App. 677, 47 S. W. 1010.

25—*Crenshaw v. State*, — Tex. Cr. App. —, 85 S. W. 1147.

"The objections urged are that this charge is upon the weight of the evidence, and assumed the truth of P.'s testimony. The effect of

this charge, as contended, was that it instructed the jury to convict defendant, provided the testimony of the accomplice had been corroborated. In other words, this charge simply requires the jury to believe the accomplice's testimony has been corroborated, and, if they so found, they could convict whether they believed his testimony true or false. These exceptions are well taken. *Bell v. State*, 39 Tex. Cr. App. 677, 47 S. W. 1012; *Jones v. State*, 44 Tex. Cr. App. 557, 72 S. W. 845; *Hart v. State*, — Tex. Cr. App. —, 82 S. W. 652; *Washington v. State*, — Tex. Cr. App. —, 82 S. W. 653."

26—*State v. Hopper*, 114 La. 557, 38 So. 452.

"Possibly by the words 'the body of the offense' the judge meant the connection of the defendant with the crime. If so, the idea was too vaguely expressed. As a matter of course, the point on which the testimony of the accomplice needs corroboration is that of the connection of the prisoner with the crime. *State v. Callahan*, 47 La. Ann. 444, 10 Am. Cr. Rep. 97, 17 So. 50, and authorities cited at page 482 of 47 La. Ann., page 56 of 17 So., and the charge ought to make that very clear to the jury; otherwise it does more harm than good, since it is hardly conceivable that the story of an accomplice should not be corroborated on the other main facts, and such charge might lead the jury to attach to this corroboration of undisputed facts an importance it does not deserve."



(b) The court instructs the jury that the testimony of parties who admit that they have aided, assisted, and abetted in the commission of the crime for which a party is on trial is admissible as evidence, yet such evidence should be received and considered by the jury with great caution; and in this case the evidence of C. should be received and considered by you with great caution. But if, after a cautious and careful consideration of the same, you are satisfied of its truth, and if such testimony satisfies you beyond a reasonable doubt of the guilt of defendant, you will be warranted in convicting the defendant on said testimony, even without any corroboration thereof.<sup>27</sup>

§ 4490. **To Charge that It Is "Unsafe" to Convict on Testimony of Accomplice, Is Error.** (a) The jury are instructed that while a conviction might be had on the uncontradicted testimony of an accomplice, yet it is admonished that it would be unsafe to do so.<sup>28</sup>

(b) The court charges the jury that they are to take into consideration the animus actuating the accomplice in the testimony given against defendant.<sup>29</sup>

§ 4491. **Calling Attention to Difficulty of Convicting without Testimony of Accomplice.** When the state seeks to prove the guilt of the defendant by the testimony of persons indicted for participation in, or any connection with, the same crime, the testimony of such persons ought to be received with care and caution; and if the witnesses testifying for the state appear to be so testifying with the expectation or hope of receiving immunity from criminal prosecution under the belief that the testimony given against the accused will tend, either to save them from prosecution, or acquit them on their own trials, you will scan such testimony carefully, and seek for facts to corroborate it; but, whether corroborated or

27—State v. Sprague, 49 Mo. 409, 50 S. W. 901 (904).

The court said: "The trouble with this instruction given by the court is that it is too limited in its scope and operation, since it leaves the jury without any guide as to what is meant by the word 'corroborated.' In illustration of this is the case of State v. Donnelly, 130 Mo. 642, 32 S. W. 1124, where this instruction was before this court: 'The court instructs the jury that they are at liberty to convict the defendant on the uncorroborated testimony of an accomplice alone, if they believe the statements as given by such accomplice in his testimony are true in fact, and sufficient in proof to establish the guilt of defendant. But the jury are instructed that the testimony of an accomplice in crime, when not corroborated by some person or persons not implicated in the crime, as to matters material to the issue,—that is, matters connecting the defendant with the commission of the crime charged against him and identifying him as the perpetrator thereof,—ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defend-

ant on such testimony.' Burgess, J., in passing upon such instruction, and speaking for the court, remarked: 'There are a number of objections urged against this instruction, but they seem to be without merit. It is in the usual form, and has often met with the approval of this court.' State v. Dawson, 124 Mo. 422, 27 S. W. 1104; State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704; State v. Crab, 121 Mo. 554, 26 S. W. 548; State v. Jackson, 106 Mo. 179, 17 S. W. 301; State v. Harkins, 100 Mo. 666, 13 S. W. 830; State v. Woolard, 11 Mo. 248, 20 S. W. 27. See also, 3 Rice Ev., pp. 507, 509, and cases cited; State v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; State v. Sprague, 149 Mo. 409, 50 S. W. 901 (904)."

28—State v. Hauser, 112 La. 313, 36 So. 396 (402); charge of forgery.

"It was no part of the court's duty, and in fact it would have been reprehensible in the judge, to have expressed his opinion that it would be 'unsafe' for the jury to act on such testimony. It was for the jury to determine whether it would be safe or not, under the evidence adduced, to return a verdict of guilty."

29—Condemned in Crittenden v. State, 134 Ala. 145, 32 So. 273 (275), as invading province of the jury.

not, if you are satisfied of its truth, you should not hesitate to declare your convictions by your verdict; and you will remember that the only chance to bring offenders to justice, and to protect the lives and property of honest citizens, is often that which is offered by allowing one offender to turn state's evidence, and to escape, that another may be convicted and punished. And I charge you that you may believe that the witnesses, T. and X. have a guilty knowledge of the killing and murdering of the B.'s, and yet it is your duty to find the defendant, L., guilty, if you are satisfied beyond a reasonable doubt that he aided, abetted or procured X. to commit or participate in the murder, if there was a murder.<sup>30</sup>

§ 4492. **Testimony of Wife of Accomplice.** The court charges the jury that the testimony of the wife of the accomplice must be viewed with caution, and that they must give every consideration to the fact that she is the wife of the accomplice.<sup>31</sup>

### MISCELLANEOUS.

§ 4493. **Policy of the Law to Protect the Innocent.** The court charges the jury that it is not the policy of the law to punish the guilty, but that the policy of the law is to protect the innocent.<sup>32</sup>

§ 4494. **Degree of Proof Based on Crime.** The court instructs the jury that the fouler the crime is the clearer and the plainer ought to be the proof to convict. That the more flagrant the crime is, the more clearly and satisfactorily it should be made to appear to the jury. That the greater the crime, the stronger is the proof required for conviction.<sup>33</sup>

§ 4495. **Rules of Evidence Prescribed by Law Must be Followed—Jurors Cannot Use Same Rules of Evidence That They Would Use Anywhere Else on Any Question.** The court instructs the jury that your purpose is to find out what is the truth of this transaction, and you use the same rules of evidence in this case—that you would anywhere else on any question outside the courthouse or inside the courthouse, only you give the defendant the benefit of any reasonable doubt in the case.<sup>34</sup>

30—Long v. State, 23 Neb. 33.

"The principal objection made to this instruction is the language therein: 'And you will remember that the only chance to bring offenders to justice, and to protect the lives and property of honest citizens, is often that which is offered by allowing one offender to turn state's evidence, and to escape, that another may be convicted and punished.' . . . The language objected to should have been omitted."

In State v. Sprague, 149 Mo. 409, 50 S. W. 901 (905), it was held error to assume that the evidence of an accomplice is uncorroborated when there is corroborative evidence.

31—Condemned as invading the province of the jury in Crittenden v. State, 134 Ala. 145, 32 So. 273 (275), larceny.

32—Smith v. State, 141 Ala. 59, 37 So. 423.

"The above charge is clearly argumentative."

33—State v. Johnson et al., 104 La. 417, 81 Am. St. 139, 29 So. 24.

The judge declined to so charge and a bill of exceptions was taken. We have been referred to no law or precedent, and know of none which requires, authorizes, sanctions or approves the propositions advanced, or the distinctions in criminology sought to be made. There was no error in the ruling of the judge."

34—Seales v. State, 97 Ga. 692, 25 S. E. 388.

In holding this erroneous the court said that "in the trial of a criminal case the jury ought not to use the same rules of evidence, or the same reasoning, they would use 'anywhere else on any question outside the courthouse.' None but the Infinite can know what rules of evidence, or what methods of reasoning, persons serving as jurors

§ 4496. **Particularizing Witnesses for the Prosecution.** The court instructs the jury that in this case the jury is not bound to believe the uncontradicted statement of a witness for the prosecution against the defendant as to a fact. The jury are not bound to take the testimony of any witness as true.<sup>35</sup>

§ 4497. **Testimony of Relatives of Accused—Weight of.** (a) You should not be quick to disregard the testimony of witnesses for the defendant because they are relatives of his, because most of the transactions of men in the daily routine of business are carried on either with, or in the presence of, relatives; and you may remember that there are many incidents in the lives of some of you, which if you were called upon to explain without the aid of your relatives, might greatly embarrass you.<sup>36</sup>

(b) The jury are the judges of the credibility of the witnesses, and, in determining the weight to be given to the testimony of the different witnesses, you should consider the relationship of the witnesses to the parties, their interest in the event of the suit, etc.<sup>37</sup>

§ 4498. **Testimony of Hired Detectives in a Class Separate and Apart Even from That of Ordinarily Interested Witnesses.** The court instructs the jury that you are at liberty and ought to treat such testimony in the light of testimony given by interested witnesses, and give their testimony closer scrutiny, before accepting its truth, than if they were wholly disinterested witnesses. Yet you have no right, as jurors, to disbelieve such witnesses solely and only for the reason that they have been thus employed; but you should give to their testimony the same consideration as to any other testimony in the case, giving it such weight as, considering the nature of the same, their opportunities for knowing the facts of which they testify, and their appearance and demeanor upon the witness stand, and all the other elements which go to their credibility, including their interest and bias, and to give their testimony such weight as, under all the circumstances, the same is, in your judgment entitled to receive.<sup>38</sup>

may invoke in transacting their business, or in dealing with other affairs, at their homes or any other places. Criminal cases must be tried by the rules of evidence prescribed by law, and the reasoning of the jury should be in accord with these rules, under proper instructions from the bench."

35—*People v. Lonnen*, 139 Cal. 634, 73 Pac. 586 (587).

"This instruction was properly refused, because it was directed specially against the testimony of a witness for the prosecution." Instructions should be general, and not confined to the testimony on one side of the case; otherwise the jury may think the court is suspicious of the testimony against which its instructions are particularly directed. *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. Patterson*, 124 Cal. 102, 56 Pac. 882. Besides, the instruction is objectionable in other respects not necessary to be here stated."

36—"This charge was argumentative." *Childress v. State*, 122 Ala. 21, 26 So. 162 (165).

37—*Unruh v. State*, 105 Ind. 117, 4 N. E. 453 (456).

"Here, again, it is enjoined upon the jury as a duty, in determining the credibility of witnesses, to consider their interest in the event of the suit, and their relationship to the parties; and, here, again, by the phraseology of the instructions, discredit is thrown upon the classes of witnesses named. One of the witnesses in this case, and one of the most important witnesses for appellant, was his father, who contradicted the relatrix upon the vital points in the case. By the above instruction, discredit was thrown upon his testimony, by reason of his relationship to appellant. The jury had a right to consider that relationship if they thought it worthy of consideration, and might have been instructed as to that right, but to enjoin it as a duty implied infirmity in the testimony, by reason of the relationship."

38—*Frudie v. State*, 66 Neb. 244, 92 N. W. 320 (321).

"It will be noticed that this instruction simply classifies detectives as interested witnesses, and tells



**§ 4499. Motive of Witness to be Considered—Usurping Powers of the Jury.** Is the evidence given by A. in this case true, or is it untrue? Did he make up or did he fabricate the story which he has told for the purpose of convicting an innocent man? These are questions which each of you should consider in weighing his testimony. It is your plain duty, if you believe that A. made up or fabricated the story which he has disclosed to you, to determine, if you can, the motive for such a course on his part. It is quite improbable that such a thing could be done without a motive. In this connection the court instructs you that if you should agree with the defendant J. that the testimony of A. is a pure fabrication, you should at least be able to find some motive for such a wicked fabrication on his part.<sup>39</sup>

**§ 4500. Invading Province of the Jury—That but Little Weight Should be Given the Testimony of a Witness Because of Ill Will.** (a) I charge you, if you are convinced from the testimony that this prosecution is founded upon a desire upon the part of the prosecuting wit-

the jury that such evidence should receive the same consideration as any other testimony in the case; that is, that they should simply consider the bias or prejudice that the witness might have in the case. If we have not mistaken the rule established by this court in *Preuit v. People*, 5 Neb. 377, and *Sandage v. State*, 61 Neb. 240, 85 N. W. 35, this court has set apart the testimony of hired detectives in a class separate and apart even from that of ordinarily interested witnesses who have a bias or prejudice for one or the other of the contending parties; and to give full force to an instruction on the caution to be used in weighing detective testimony, the reason for such caution should be contained in the instruction."

<sup>39</sup>—*Schutz v. State*, 125 Wis. 452, 104 N. W. 90 (92-93).

"The first criticism of this charge is that it usurps the functions of the jury, in substantially instructing them that A.'s story is either true or a fabrication. By the clearest implication, it excludes the jury from that field which especially belongs to them, of considering whether a conflict of evidence may be accounted for on the ground of innocent mistake. Such an act by a trial court is always improper, though not always prejudicially so, for there may be situations where no reasonable possibility of innocent mistake can be conceived, as in the case of *Douglas v. State*, 43 Wis. 392, where the opposing parties respectively affirmed and denied an act of carnal intercourse. No such palliation exists in the present case, however. An important part of A.'s testimony was to alleged statements of one B. as a co-conspirator with defendant, from which might result an inference that a corrupt agreement was made by B. upon the authority of the defend-

ant. Upon no subject is it more obvious, either in law or in reason, that mistakes are probable, than in quoting a conversation with another. Such narratives involve uncertainty as to whether the narrator fully understood the words spoken to him, whether he truly interpreted the meaning of the speaker, and whether he correctly remembers those words at the time of testifying. The conversation related might well be deemed ambiguous; it was complicated by the joining of two foreign names, *Schutz* and *Schunk*, not wholly dissimilar, as is evinced by the repeated confusion of them by counsel in their arguments; and some probability of a mistake on A.'s part is at least suggested by the testimony of *Schunk* that he alone was involved in the corrupt agreement. All of these considerations were proper for the jury before reaching the conclusion that A. wilfully fabricated his story, and by the preliminary portion of the instruction were erroneously excluded. *Moore v. Kendall*, 2 Pin. 99, 103, 52 Am. Dec. 145; *Ely v. Tesch*, 17 Wis. 202; *Roberts v. State*, 84 Wis. 361, 54 N. W. 580; *Smith v. Ry. Co.*, 170 N. Y. 394, 63 N. E. 338. Another serious criticism of this charge arises from the rule that it is not proper for the court to select one witness from several, and apply to him or his testimony exclusively rules of consideration equally applicable to others. *McKeon v. Ry. Co.*, 94 Wis. 477, 486, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. 910; *Valley Lumber Co. v. Smith*, 71 Wis. 304; *Meyer v. M. E. Ry. Co. & L. Co.*, 116 Wis. 336, 343, 93 N. W. 6; *Loose v. State*, 120 Wis. 115, 133, 97 N. W. 526; *Harriott v. Holmes*, 77 Minn. 245, 79 N. W. 1003. Such discrimination is extremely likely to mislead the jury into a disregard of other testimony in the case, or undue respect or suspicion for the specified witness."

ness to satiate his feelings or grudge against the defendant, you should give his testimony but little weight in making up your verdict.

(b) Although a witness may say he has no ill feeling or malice towards the defendant, yet it is your duty to carefully examine the manner and mode of the witness testifying, and if he demonstrates ill will or feeling against the defendant, you should give such testimony very little credence.

(c) I charge you that if the witness for the state demonstrates ill will or feeling in the mode or manner of his testifying against the defendant, such demonstration may generate a doubt in your mind of the defendant's guilt, and you should acquit the defendant.<sup>40</sup>

§ 4501. **Duty to Convict or Acquit—Argumentative.** There is no duty devolving on this jury to either convict or acquit to elevate the colored race. The question of whether the colored race will be elevated by a conviction in this case is not a question to be considered by the jury.<sup>41</sup>

§ 4502. **Suggestive Interrogatories in Charge.** Was C. murdered in this county, in the manner and at the time alleged in the indictment? If so, who does the evidence point to with reasonable and moral certainty? Does it point to the defendants, A. and B.? If so, you should convict them. If not, you should acquit them.<sup>42</sup>

§ 4503. **Records as Prima Facie Proof of Conviction.** These records (that is, the judgment, sentence and indictment of G.) are admitted alone for the purpose of proving that G. was guilty of the murder of T., as charged in the indictment in this case, and you will not consider this evidence for any other purpose than that for which it was admitted; that is, for the purpose of proving G. to have been guilty of murder in the first degree, as charged in the indictment against him, as determined by the judgment of the H. county district court. You are instructed that said records are conclusive proof of the conviction and guilt of G. of murder in the first degree, and of the murder of T. by said G.<sup>43</sup>

§ 4504. **Correcting of Error by a New Trial—Defendant Cannot be Twice Put in Jeopardy.** On the one hand, you should remember that

40—*Norwood v. State*, 118 Ala. 134, 24 So. 53.

The court held these "charges were faulty in that the principles of law asserted invaded the province of the jury. The bias or ill will of a witness should always be considered by a jury in weighing his evidence, but it is not the province of the court to instruct the jury that but little weight should be given to the veracity of a witness because of his ill will. The jury is made the sole judge of the weight of such testimony. The third charge is also faulty. Although facts testified to and the manner of a witness may be such as to generate a reasonable doubt, it does not follow that it must or ought to produce such an effect. The charge was faulty in that it demanded an acquittal whether or not the jury in fact entertained a reasonable doubt of his guilt."

41—"The charges requested by defendant were mere arguments, and, as the case is presented here, abstract." *Pope v. Ste*, 137 Ala. 56, 34 So. 840 (841).

42—*Campbell v. State*, 100 Ga. 267, 28 S. E. 71 (72).

"While we think it best not to employ such interrogative expressions in charging the jury, yet we cannot say that an opinion is expressed, or an assumption made, by their use."

43—*Dent v. State*, 43 Tex. Cr. App. 126, 65 S. W. 627 (630).

"We think the court erred in this charge. It was the duty of the court to tell the jury that the records introduced (naming them) were prima facie proof of the conviction and guilt of G. of the murder in the first degree of T., and not conclusive proof of said fact. *Floock v. State*, 34 Tex. Cr. R. 314, 30 S. W. 794."

a failure to perform your duty, by which a crime, if one is shown, might go unpunished, and a criminal escape the penalty of his crime, cannot be corrected by a new trial, for the defendant cannot twice be put in jeopardy under our law.<sup>44</sup>

<sup>44</sup>—State v. Crofford, 121 Ia. 395, 96 N. W. 889 (894).

The court said that an instruction in substantially the same language was before them in State v. Hunter, 118 Ia. 686, 92 N. W. 872, and by a majority of the court held to be erroneous.

It is held error for the court to refuse to instruct in the language of counsel where the instructions prepared by counsel are correct. People v. Stewart, 75 Mich. 21, 42

N. W. 662 (665), where the court cited Cook v. Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. 870; Myning v. Railroad Co., 59 Mich. 257, 26 N. W. 514; People v. Macard, 73 Mich. 15, 40 N. W. 784, and said: "If this may not be required of the court, the rule that counsel may prepare and make such request to charge is of but little or no benefit to the respondent, or in fact to either party in any suit tried by jury."



## CHAPTER CLXXXIII.

### CRIMINAL—ABDUCTION—ABORTION—ADULTERY—BAS- TARDY—BIGAMY—DISORDERLY HOUSE—INCEST—RAPE— SEDUCTION.

See Approved Instructions, Chapter XCII, Vol. II.

#### ABDUCTION.

§ 4505. Abduction of a minor for purpose of prostitution of marriage.

#### ABORTION.

§ 4506. Whether abortion or death from some drug or poison.

§ 4507. Aiding, advising or encouraging perpetration of.

#### ADULTERY.

§ 4508. Occasional illicit acts do not constitute a living in adultery—Intention to continue same—Keeping house of ill-fame.

§ 4509. Presumption of habitual sexual intercourse when one act is proved and the parties reside together.

§ 4510. Proof of the day when the offense took place.

§ 4511. Agreement to live in adultery consummated in another county—Intent not sufficient.

#### BASTARDY.

§ 4512. Fact that a bastard child was born as tending to prove that the defendant was the father.

§ 4513. Period of gestation, in order to charge defendant with the parentage, should not be arbitrarily fixed by the court.

#### BIGAMY.

§ 4514. Prior common law marriage—What would constitute such.

#### DISORDERLY HOUSE.

§ 4515. Disorderly house—Admissions of inmates as to the character of the place.

§ 4516. Prosecution under statute against procurers.

#### INCEST.

§ 4517. Whether admission of relationship when not corroborated will warrant conviction—Argumentative.

§ 4518. Testimony of accomplice.

#### RAPE.

§ 4519. Lesser offense excluded.

§ 4520. Burden of proof—Defendant need not prove that the act was consented to.

§ 4521. Must make active resistance unless overcome by drugs, etc.

§ 4522. Character of the force used.

§ 4523. Assault to commit rape—Force of some kind must be used—Producing a feeling or sense of shame is insufficient.

§ 4524. Character of prosecutrix affecting credibility.

§ 4525. Statement of prosecuting witness, whether complaint or confession, for jury.

§ 4526. Failure to make complaint—Presumption.

§ 4527. Testimony of prosecuting witness to be weighed exactly as that of any other witness. Use of the word "implicated" held improper.

§ 4528. Testimony by State's witnesses not specifically denied, cannot be taken as true.

§ 4529. Male under fourteen years conclusively presumed to be incapable of the crime.

#### SEDUCTION.

§ 4530. Definition of seduction.

§ 4531. Birth of child, evidence of.

§ 4532. Several acts under distinct promises of marriage—Presumption of chastity weakened or destroyed.

§ 4533. Previous intercourse with others as a defense.

§ 4534. Intimacy with others.

§ 4535. Assuming that the words and acts of defendant amounted to a temptation.

§ 4536. Corroborative testimony—Seduction.

## ABDUCTION.

**§ 4505. Abduction of a Minor for Purpose of Prostitution of Marriage.** (a) The court charges the jury that, before they can find the defendant guilty they must believe beyond a reasonable doubt, from the evidence in this case, that defendant not only took A. away from her father for the purpose of concubinage, but the jury must also believe beyond a reasonable doubt that the said A. was under the age of 14 years when she was so taken away.

(b) The court charges the jury that if they believe, from the evidence, that the defendant took the girl from her father only for the purpose of having intercourse alone with her himself, then they must acquit him.<sup>1</sup>

## ABORTION.

**§ 4506. Whether Abortion or Death from Some Drug or Poison.** If you believe from the evidence that the deceased died from the effects of some drug or poison, not inserted into her womb by the defendant, you will find the defendant not guilty.<sup>2</sup>

**§ 4507. Abortion—Aiding, Advising or Encouraging Perpetration of.** (a) The court instructs the jury that even though you may believe, from the evidence, that the defendant did not, by his own hand and act, produce the abortion charged, if you believe, from the evidence, beyond a reasonable doubt, that the same was so produced as charged in the indictment, yet if you do believe from the evidence, beyond a reasonable doubt, that the same was committed by some person in manner and form as charged in the indictment, and if you further believe, from the evidence, beyond a reasonable doubt, that the person so committing it, if the evidence so shows, beyond a reasonable doubt, whether it was C. or another, was advised, encouraged and induced by the defendant to so commit it, and if you further believe, from the evidence, beyond a reasonable doubt, that the death of C. was thereby occasioned and caused as charged in the indictment, then, if you find the facts as last above stated, it would be your duty to find the defendant guilty.

(b) If you believe, from the evidence, beyond a reasonable doubt, that the defendant did, in manner and form as charged, either by word, act, gesture, sign or otherwise, intentionally cause or induce, aid, advise or encourage said C. to produce an abortion in manner and form as charged in the indictment, and that such operation, if the

1—*Boyett v. State*, 130 Ala. 77, 30 So. 475, 89 Am. St. 19.

The first of these instructions "requested by the defendant was properly refused by the court, as the same withdrew from the consideration of the jury the charge in the indictment that the defendant took the said E. for the purpose of prostitution of marriage. The second charge was erroneous in withdrawing from the consideration of the jury the charge laid in the indictment that the defendant took the

said E. for the purpose of marriage."

2—*Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740 (746).

The court said that "it is not competent for the commonwealth to prove, nor for the fact to be considered by the jury, that the death of deceased was caused by poison administered by defendant in any way or manner. He is not charged with that. With the clause, 'not inserted into her womb by the defendant,' omitted from the above instruction, it is without objection."

evidence shows it beyond a reasonable doubt, resulted in and caused the death of C. in manner and form as charged, you should find the defendant guilty.<sup>3</sup>

### ADULTERY.

§ 4508. **Occasional Illicit Acts Do Not Constitute a Living in Adultery—Intention to Continue Same—Keeping House of Ill Fame.** (a) The court charges the jury, that even should they be reasonably satisfied from the evidence that defendant, W., was engaged in keeping or helping to keep a house of prostitution, where negro men had sexual intercourse with white women, or with said W., still these facts alone would not be sufficient to warrant the jury in convicting either defendant under this indictment.

(b) A woman who keeps or helps to keep a house of prostitution is not guilty of living in adultery, as charged in this case, with a man who at such house merely has occasional acts of criminal sexual intercourse with such women, and if such facts constitute all that is shown beyond a reasonable doubt in this case, then no matter if the jury are satisfied of such facts beyond a reasonable doubt, the jury, under their oaths, should acquit the defendant.

(c) The keeping of a house of prostitution is an offense against the laws of Alabama, for which a defendant may be indicted and convicted, but these defendants are not charged with that offense in this case, and cannot be convicted upon this trial upon evidence which only reasonably satisfies the jury beyond a reasonable doubt of the keeping of such house of prostitution, notwithstanding the evidence may further so satisfy the jury that at such house defendants were guilty of different acts of criminal sexual intercourse.<sup>4</sup>

(d) If the evidence does not show anything more than an occasional act of illicit intercourse, although it was according to a previous understanding, then the defendants are not guilty.<sup>5</sup>

3—*Dunne v. People*, 172 Ill. 582 (599), 50 N. E. 137.

"The effect of these instructions," the court said, "was to relieve the jury from the difficult task of determining the truth as to the controverted question whether the plaintiff in error supplied the deceased with calomel, and thus brought about the miscarriage and her subsequent death, and to invite them to return a verdict finding the plaintiff in error guilty though they were unable to determine whether he supplied her with calomel, and even if they believed some person other than the plaintiff in error 'committed' the abortion by any means, if, upon a general view of the whole of the case, the jury entertained the belief the plaintiff in error had advised, encouraged or aided and abetted the perpetration of the alleged crime. When it is remembered there was evidence tending to show the plaintiff in error had had sexual intercourse with deceased, and tending to show how she became pregnant and aborted the foetus, the vice of these instructions becomes manifest. They might well be understood by the jury to

suggest that suspicions which naturally arise from proof of the existence of a motive to commit the crime, justified the conclusion the party having such motive had by some 'word, act, gesture, sign,' or in some other manner aided or abetted in the perpetration of the offense."

4—*McAlpine v. State*, 117 Ala. 93, 23 So. 130 (131).

The court said that "admitting all that is hypothesized in charges (a), (b), and (c), the jury might nevertheless have found the defendants guilty of living in adultery. They each ignored any reference to any intention of the parties for a continuance of the hypothesized illicit acts; for, if they lived together in adultery for a single day, intending to continue the illicit connection, a conviction might have been had. *Linton v. State*, 88 Ala. 216, 7 So. 261; *Walker v. State*, 104 Ala. 56, 16 So. 7. The charges, moreover, were misleading, invasive of the province of the jury, and faulty generally."

5—*Walker v. State*, *supra*.

"We are of opinion," said the court, "that, construing that portion



§ 4509. **Presumption of Habitual Sexual Intercourse When One Act is Proved and the Parties Reside Together.** That if the jury find from the evidence, beyond a reasonable doubt, that the defendant and B. had sexual intercourse during any portion of the time alleged in the information, then the rule of law is that it is presumed that the defendant and said B. had sexual intercourse habitually as long thereafter as she was an inmate of defendant's dwelling house.<sup>6</sup>

§ 4510. **Proof of the Day When the Offense Took Place.** I will instruct you also that you must find beyond a reasonable doubt that the act of adultery charged in the information was committed on the day mentioned in the information, to wit, on the — day of —, otherwise your verdict should be for the defendant.<sup>7</sup>

§ 4511. **Agreement to Live in Adultery Consummated in Another County—Intent Not Sufficient.** If the defendant and B. agreed in this county to go to M. county, Ala., and live in the state of adultery, and went off from C. under the circumstances described by the witnesses in this case and then went together to M. county, Ala., and lived in the state of adultery, and such living together was a consummation of the previous agreement, he would be guilty.<sup>8</sup>

of the above charge given *ex mere motu* which was excepted to with reference to the evidence, it was not erroneous. The most that can be said against it is that it was calculated to mislead, and authorized the defendant to ask for an explanatory charge."

6—Sweeney v. State, 59 Neb. 269, 80 N. W. 815.

"It being conceded that the parties lived in the same house, the practical effect of the instruction was to advise the jury to convict if a single act of adultery was proven beyond a reasonable doubt. This was error requiring a reversal of the judgment, notwithstanding the fact that in other paragraphs of the charge given at the defendant's request it was stated that habitual intercourse is an essential element in the crime of illicit cohabitation. The paragraph complained of stated a rule of evidence, while those given at defendant's instance related to matters of substantive law. The latter had no tendency to cure the error in the former. Besides, it is well settled that they could not have had that effect, even if they covered the same ground. Ballard v. State, 19 Neb. 609, 28 N. W. 271; Barr v. State, 45 Neb. 458, 63 N. W. 856; Metz v. State, 46 Neb. 547, 65 N. W. 190."

7—State v. Eggleston, 45 Or. 346, 77 Pac. 738 (742).

The court held that the above requested instruction "does not correctly state the law and that no error was committed in refusing to give it," citing B. & C. Comp., par. 1309.

8—Brown v. State, 108 Ala. 18, 18 So. 811.

"As we gather from the argument of counsel, the instruction was supposed to be authorized by the statute (Cr. Code, § 3719), which de-

clares that 'when an offense is committed partly in one county and partly in another, or the acts, or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county.' It was a rule of the common law that when an offense was constituted by a series of acts, a part of which were done in one county and a part in another, there could be no prosecution in either, unless so much was done in the one as would constitute a complete offense. 1 Bish. Cr. Proc., § 54. Examples of the application of the rule will be found in 1 Chit. Cr. Law 177, 5 Bac. Abr., tit. 'Indictment,' subd. 2. The controlling purpose of the present statute was the abrogation of the rule of the common law. A single, indivisible offense, not consisting of several parts is not within the operation of the statute. If there was no more in B. county than the agreement of the parties to live in adultery in M. county, however immoral the agreement was, an indictable offense was not committed. Miles v. State, 58 Ala. 390; Shannon v. Com., 14 Pa. St. 226; Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686. The offense the statute denounces may have been contemplated, but it rested in contemplation merely. There was not and could not be elsewhere than in M. county, an attempt to commit it. An attempt to commit a crime may be indictable; but the mere intent to commit it, unaccompanied by any act in furtherance of the attempt, cannot be matter of indictment. The living together in adultery, the state or condition against which the statute is directed in its nature and essence, is a single, indivisible offense, which cannot be severed. It

## BASTARDY.

§ 4512. **Fact that a Bastard Child Was Born as Tending to Prove That the Defendant Was the Father.** In determining the fact as to who is the father of the child in question, it is not proper for you to consider, as bearing upon that question, the fact that a child has been born to the relatrix, and that it is a bastard. That is a fact that there is no dispute about and the sole question is as to whether or not the defendant is the father of the child, and the fact that such a child has been born does not tend to prove that the defendant is the father of the child.<sup>9</sup>

§ 4513. **Period of Gestation, in Order to Charge Defendant with the Parentage, Should Not be Arbitrarily Fixed by the Court.** You are instructed that it is incumbent upon the prosecuting witness W. to prove by a greater weight of the evidence that her bastard child was born after a period of gestation of 234 days in order to charge the defendant with the parentage of the child, and unless the said W. has proven this state of facts by a greater weight of the evidence upon that subject, it is your duty to find the defendant not guilty.<sup>10</sup>

## BIGAMY.

§ 4514. **Prior Common Law Marriage—What Would Constitute Such.** If defendant lived and cohabited with another woman in another state as her husband, and held her out to the public as his wife, and received and treated her as such, this would constitute a marriage, and would warrant you in finding that he was a married man, and married to another woman, in the meaning of the law; and if you so believe from the evidence beyond a reasonable doubt, and further believe from the evidence beyond a reasonable doubt that he afterwards while said woman was living, and without having been divorced from

commences when the state or condition is assumed, and not until it is assumed; and it is indictable only when and where the state or condition is actually and intentionally entered upon and assumed. There was error in the giving of this instruction."

<sup>9</sup>—Goodwine v. State, 5 Ind. App. 63, 31 N. E. 554.

"That a bastard child had been born to the relatrix was a fact necessary for the state to prove. The consideration of this fact cannot be excluded from the jury, though it may have been admitted as true without the introduction of evidence. It was the first step necessary to establish before the appellant could be adjudged the father of the child. While, of itself, it does not prove the paternity, it is a necessary link in the evidence required to that end. It is therefore not accurate to say that the jury have not the right to consider this fact, even in the determination of

the question of the child's paternity. It is not the duty of the court to give an instruction requested, unless the same is correct in the form in which it is asked. The court is not bound to modify such instruction and make it accurate, and then give it. The party requesting the instruction must present it in the form in which it is to be given; and, unless it is accurate as framed, there is no error in refusing to give it. Over v. Schiffing, 102 Ind. 191, 26 N. E. 91; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325."

<sup>10</sup>—Peterson v. People, 74 Ill. App. 178 (180).

"We think there was no error in refusing this instruction. The question as to whether the child was born within the ordinary period of gestation was one of fact for the jury, and it was not proper for the court arbitrarily to fix by the instruction a period within which the child must be born, in order to show the guilt of appellant."

her, married one J., and at any time within one year next before the — day of—, she yet living, openly and notoriously lived and cohabited with her, you will find him guilty.<sup>11</sup>

### DISORDERLY HOUSE.

§ 4515. **Disorderly House—Admissions of Inmates as to the Character of the Place.** We have some testimony with reference to the language which was used in the house, as to what the character of the inmates was,—whether they were prostitutes or not. We have the testimony of one witness who says that this respondent made the remark that this man, whatever his name is, was her “pimp.” We all know what that is when we are outdoors, and we should know what it means when we are here, just as well as when we are outdoors. We know as a matter of fact, that it is a man who has intercourse with a loose woman, and usually she is taking care of him,—supporting him. When she says such a man is her “pimp,” that is what she means. Well, there is a case of unwarranted sexual intercourse if you believe that to be true. Now, under the testimony we have the girl there; and there is testimony of one or more witnesses tending to show that the respondent, on a certain occasion just before this woman was caught in bed with a man not her husband, made the remark to her that she was a ——. There is some evidence of that kind. Now, language of that kind, made use of by the respondent herself to this woman, would be pretty strong evidence against her that that other woman was a ——, and that she had such a kind of house there. It is her own statement as to what the character of the woman was; and being her own house, if she had that kind of a woman around there habitually, and they frequented it (they certainly, according to the evidence, frequented it at one time), you have a right to consider that as pretty strong evidence as bearing upon the character of the people who come to that house. There is evidence by F., by which he swears that she said she kept a ——house. Now

11—State v. St. John, 94 Mo. App. 229, 68 S. W. 374 (375).

The court said that the “instruction just quoted was fatally erroneous in one respect at least. It declared certain facts ‘would constitute a marriage.’ But those facts were certainly of no greater force than as testimony tending to prove the charge of defendant’s prior marriage. If the jury accepted defendant’s explanation of these facts, they should have been left at liberty to find that there was no marriage. The distinction between facts constituting a marriage, and those tending to prove one is clearly pointed out in its application to evidence of marriage in civil actions by Judge Brace, speaking for the supreme court in *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551. The principle of that distinction is even more imperatively applicable in a criminal case, if indeed marriage may be proven at all by evidence of mere reputation and association in prosecutions under the statute on which this proceeding is founded.

(Rev. St. 1899, § 2175). Such evidence has been positively held to be insufficient in a prosecution for bigamy. *State v. Cooper*, 103 Mo. 266, 15 S. W. 327. And it has been declared insufficient (standing alone) to establish marriage in cases of the sort at bar. *State v. Coffee*, 39 Mo. App. 56. But without invoking that doctrine it is evident that the instruction takes from the jury the duty of finding the fact of marriage if they find the subordinate, evidential facts therein enumerated. It was erroneous and could not be justly regarded as harmless. The disputable inference of innocence attaching to defendant’s act in making the marriage contract in Missouri with all the prescribed formalities, could only be overcome by proof and a finding that he had been previously married by a valid contract of marriage with another woman. *Klein v. Laudman*, 29 Mo. 259; *Waddingham v. Waddingham*, 21 Mo. App. 609. That issue was not correctly submitted to the jury and so a reversal must ensue.”



it is for you to say whether she told him that or not. If you believe that she did tell F. that she kept a —house, that is very strong evidence in favor of the guilt of this woman. People do not usually admit themselves guilty of crime when they are not guilty. It is more usual to deny it, and they most always do deny it. If a man, charged with crime, admits that he is guilty of it, it is pretty conclusive evidence, and evidence sufficient for you to act upon in finding him guilty. It is evidence at least that I should not fail to act upon if I was on the jury.<sup>12</sup>

§ 4516. **Prosecution Under Statute Against Procurers.** The court instructs the jury that the question as to whether the defendant did or did not detain or confine said L. and I. or either of them, in the room or house mentioned by the witnesses, is one of fact for your determination from the evidence; and in the determination of such question it is your duty to take into consideration all the evidence in the case, and if, after you have thus considered the evidence, you shall find therefrom that the defendant B. in manner and form as charged in the indictment, detained or confined said L. or I. in the room or house mentioned by the witnesses L. and I. and while so detained or confined, by threats compelled such witnesses to submit to having sexual intercourse with said defendant B. against their will, then if you find the facts last above stated, you should find the defendant guilty.<sup>13</sup>

12—*People v. Gastro*, 75 Mich. 127, 42 N. W. 937 (938).

Several errors were committed in giving these instructions, said the court. "The testimony of H. was that the respondent called the man M. 'a pimp' or 'her pimp,' and also called H. and others 'pimps.' The court was not warranted in determining the language used by her, and applying it to M. as 'her pimp.' It is for the jury to say whether she called M. 'a pimp,' or called him 'her pimp.' The circuit judge assumed that she called him 'her pimp,' and then proceeded to define the word 'pimp,' which definition differs essentially from the common acceptance of the term as defined by lexicographers. Worcester defines it as 'one who provides gratifications for the lust of others; a procurer; a panderer.' Webster's definition is the same. The circuit judge says a pimp 'is a man who has intercourse with a loose woman; and usually she is taking care of him, and supporting him.' Words sometimes acquire a peculiar signification, in a particular locality, different from their ordinary meaning; but, when such is the case, it is a fact requiring proof, and not a fact which the court can take judicial notice of,—the rule being that courts will take judicial notice of the ordinary meaning of English words, but not of uncommon or extraordinary meanings applied in isolated cases or in particular localities. The word 'pimp' is not, so far as we are informed, a technical word, nor has it acquired any peculiar or ap-

propriate meaning in the law. It is therefore to be construed and understood according to the common and approved usage of the language. How. St., para. 2. The court, after affixing a definition, proceeded to draw an inference from the testimony, both as to what the respondent meant and as to the fact established by it, namely, that it was a case of unwarranted sexual intercourse. In this he usurped the province of the jury. The circuit judge also erred in pointing out particular testimony, and instructing the jury, if they believed it, that it was 'pretty strong evidence,' and 'very strong evidence,' in favor of the guilt of the accused; and, with reference to some of the evidence, that 'it is evidence, at least, that I should not fail to act upon if I was on the jury.' Nowhere in his charge does he caution the jury not to be influenced by his individual expression of opinion, or tell them that they are the exclusive judges of the weight of the testimony, and of what facts it tends to establish. We cannot say that they were not influenced by his opinions upon the weight of the evidence, or that they distinguished between the judge's instructions as to the law which they were in duty bound to follow, and his opinion upon the weight and tendency of the evidence which they were to determine."

13—*Bunfill v. People*, 154 Ill. 640, 39 N. E. 565. This was a prosecution under a statute designed to break up the business of procurers which provided that whoever should

## INCEST.

§ 4517. **Whether Admission of Relationship When Not Corroborated Will Warrant Conviction—Argumentative.** (a) The alleged admission of defendant of relationship to E., and the evidence that J. claimed the woman, R., to be his illegitimate daughter, and the fact that she was generally regarded as his daughter in the neighborhood, should be acted on with great caution.

(b) The law regards the admissions on the part of the defendant of relationship with a woman with whom he is charged to have committed the crime of incest as being weak evidence, if not corroborated by other evidence going to show the relationship, and that it should be acted on with great caution, and a mere confession of relationship by defendant, unless so corroborated, will not warrant a conviction.<sup>14</sup>

§ 4518. **Incest—Testimony of Accomplice.** If the jury shall find from the evidence that the witness, G., with whom the incestuous intercourse is alleged to have been had, did voluntarily, and with the same intent that actuated defendant, unite with him in the alleged commission of the offense set out in the indictment, then, and in that event, she would be an accomplice, and her testimony would not be sufficient to warrant a conviction, unless you believe the same to be true, and unless you find that she is corroborated by other credible testimony tending to connect the defendant with the commission of the alleged offense.<sup>15</sup>

## RAPE.

§ 4519. **Lesser Offense Excluded.** I charge you, gentlemen of the jury, that unless you believe beyond a reasonable doubt, and to a moral certainty from the evidence, that the sexual organ of the defendant entered the sexual organ of O., you will find the defendant not guilty.<sup>16</sup>

§ 4520. **Burden of Proof—Defendant Need Not Prove that the Act was Consented to.** The court instructs you, the jury, that if you believe, from the evidence, beyond a reasonable doubt, that the defendant S. had sexual intercourse with N., yet, if you further believe, from the evidence, that she consented thereto, though reluc-

detain or confine any female by force, false pretenses or intimidation in any room, etc., against her will, for purposes of prostitution or with intent to cause such female to become a prostitute, and be guilty of fornication or concubinage therein, should on conviction, etc., be imprisoned, etc. Held that such statute had no application to a case where the stepfather of female children confined them in a room and forced them to have sexual intercourse with himself alone and did nothing to procure or facilitate such intercourse with other men. Held therefore that the instruction was erroneous.

14—Elder v. State, 123 Ala. 35, 26 So. 213 (214).

The charges were considered as

argumentative and properly refused on that ground.

15—Gillespie v. State, — Tex. Cr. App. —, 93 S. W. 556.

The court held this instruction erroneous in not fully defining the meaning of an accomplice, citing Tate v. State, 8 Tex. Ct. Rep. 741, 77 S. W. 793; Clifton v. State, 10 Tex. Ct. Rep. 20, 79 S. W. 824; Pate v. State, — Tex. —, 93 S. W. 556.

16—Oakley v. State, 135 Ala. 15, 33 So. 693.

Held erroneous because it precludes "the jury from convicting the defendant of either of the lesser offenses, although they entertained no reasonable doubt of his guilt of the one or the other of them. Richardson v. State, 54 Ala. 158."

tantly, or if she refused to have sexual intercourse with S. and that such refusal was not in earnest but feigned, and that she consented to such sexual intercourse; or if at first she refused, and for a time in earnest and good faith, to have sexual intercourse with S., but that notwithstanding that she was coaxed and persuaded to have such sexual intercourse without being forced to do the act of sexual intercourse, that then, and in either case, the defendant S. is not guilty of committing the crime of rape as charged in the indictment, and in such case it is your duty as jurors, under the law and under your oaths, to acquit all of the defendants.<sup>17</sup>

§ 4521. **Must Make Active Resistance Unless Overcome by Drugs, etc.** The jury are instructed that if they believe that the defendant forcibly and against the will of the prosecutrix carnally knew her, then he was guilty as charged, and the jury should so find; and this is true whether you believe from the evidence that she made any active resistance to his assault upon her or not.<sup>18</sup>

§ 4522. **Character of the Force Used.** If you have a reasonable doubt as to whether defendant did the act without her consent, you must acquit the defendant though you may believe that there was force used and that prosecutrix was a woman of weak mind.<sup>19</sup>

§ 4523. **Assault to Commit Rape—Force of Some Kind Must be Used—Producing a Feeling or Sense of Shame Is Insufficient.** The court instructs you that the injury intended may be either bodily pain, restraint or sense of shame or other disagreeable emotion of the mind.<sup>20</sup>

17—*Sutton v. People*, 145 Ill. 279 (287), 34 N. E. 420.

The court said that this was "susceptible of the construction that the prosecution was required to prove only one element of the crime beyond a reasonable doubt, viz., sexual intercourse, making it incumbent on the defendants to show that the act was with the consent of the prosecutrix, and so understood it would be clearly erroneous and misleading. But manifestly, the purpose of the instruction was to impress upon the minds of the jury that consent to the sexual act would entitle the defendants to an acquittal, but that reluctance in giving consent, or a mere pretended refusal, etc., would not in a legal sense amount to a refusal, and so the jury would be most likely to understand it."

Another instruction told the jury that "if the prosecution has failed to prove beyond a reasonable doubt not only that S. had sexual intercourse with N., but that said sexual intercourse was forcible on the part of S. and against the will of N., then it is the duty of the jury under the law and under their oaths to acquit." And in view of that, judgment of conviction of rape was affirmed.

18—*Anderson v. State*, 82 Miss. 784, 35 So. 202 (202).

"This is tantamount to telling the jury that mere passive resistance, silent objection, on the part of the assaulted female, is suffi-

cient to justify a jury in convicting of rape. Under the facts developed, this was fatal error. It is true that, where the resistance of the female is overcome by drug or similar means, this instruction might be correct; but no such case is developed here."

19—*Shepherd v. State*, 135 Ala. 9, 33 So. 266 (267).

Held erroneous because it is "abstract, confused and misleading and ignores the character of the force hypothesized."

See also *McQuirk v. State*, 84 Ala. 435, 4 So. 775, 5 Am. St. 381; *Norris v. State*, 87 Ala. 85, 6 So. 371.

20—*Carter v. State*, 44 Tex. Cr. App. 312, 70 S. W. 971 (972).

The court said: "As a prerequisite to assault with intent to rape upon a girl under the age of 15 years, there must be an assault, and that assault must be such as to indicate beyond a reasonable doubt the purpose and intent on the part of the accused at the time to have carnal knowledge of the girl."

The majority of the judges held "that there must be a taking hold of the person of the girl in such manner as to indicate the specific intent to have carnal knowledge of her; that the mere fact that defendant may have produced in her a sense of shame or other disagreeable emotion of the mind, or constraint, does not meet the idea of assault coupled with intent to commit rape. The assault under the



**§ 4524. Character of Prosecutrix Affecting Credibility.** The jury are instructed that in prosecutions of this kind the character of the woman may be called in question, for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, or whether there was any intercourse whatever; and if the jury believe from the evidence that the prosecuting witness is a woman of bad fame or evil repute, or that her reputation for truth and morality is bad, then they may take this fact into consideration for that purpose, together with all the other evidence in the case, in determining the amount of credit, if any, to which her testimony may be entitled.<sup>21</sup>

**§ 4525. Statement of Prosecuting Witness, Whether Complaint or Confession, for Jury.** An admission or a confession, if made by the prosecutrix herein, that she had been guilty of an act of sexual intercourse, is not in law such a complaint as should be considered by the jury as in any wise corroborating her testimony, in any particular.<sup>22</sup>

**§ 4526. Failure to Make Complaint—Presumption.** The testimony furnishes no evidence of complaints by the prosecutrix, of the outrage claimed to have been committed upon her; and the law does not absolutely require her to do so, and furnishes us no fixed rule to be governed by, but relying on the peculiar facts and circumstances surrounding each case, to determine whether failure to complain by the woman claimed to have been outraged should be considered for or against her statements. The fact that she made no complaint of the alleged injury is a circumstance which tends strongly to rebut the hypothesis of guilt; yet it is by no means conclusive. While it is naturally to be expected that an honorable and virtuous woman will at once make known an assault on her virtue, yet what a woman should do in the situation in which the prosecutrix was placed, cannot be determined by any fixed rule of law. Perhaps no two women

statute means force of some kind, and, as construed by the majority of the court, means sufficient force upon the person of the girl to put her under defendant's subjection, either with or without her consent; but still he must have her in the position where he can enforce his desires. The party by simply producing in the mind or feeling of a girl a sense of shame, without touching her or in some way bringing her under his subjection, so that he can enforce his desires, would not be guilty of such an assault as is contemplated by the statute defining this crime."

<sup>21</sup>—*Maxey v. State*, 66 Ark. 523, 52 S. W. 2 (6).

"The instruction says 'the character of the witness may be called in question.' So it may, but character for what? The instruction is faulty in not designating. If it is to affect the probability of her assenting to the act of sexual intercourse, then it must be a general reputation for chastity that is put in evidence. If it is to affect her credibility as a witness on all points, then it must be her general

reputation for untruthfulness and immorality that is adduced. Under the generic term 'immorality' of course lack of chastity may be included; and where it is shown to be included in the inquiry, then under our statute, it might affect both the question of the credibility of the witness and the question of her consent or dissent to the act of sexual intercourse. There was no effort to prove that the prosecutrix had a bad reputation for chastity, specifically."

<sup>22</sup>—*People v. Totman*, 135 Cal. 133, 67 Pac. 51 (52).

"The testimony shows that the girl was asked by a lady of her condition, and at once told her the same. It could not be assumed by the court that this answer on the part of the prosecutrix was either an admission or a confession. To do so would be to pass upon a matter of fact. Whether telling the lady her condition upon being asked was a complaint or an admission or a confession was a matter solely for the jury to determine, under all the circumstances and surrounding conditions."

would do the same thing. The age of the prosecutrix is always to be considered. The dread of being found, or known to have been, in a loathsome place and shameful and disgraceful surroundings, with honor and virtue assailed, might induce a modest and virtuous woman to rely on other means to escape from the humiliation and shame than to publicly, or indeed privately, make known her troubles. Such acts must necessarily be followed by a feeling of excitement, coupled with humiliation and shame; and time might elapse before an honorable and virtuous woman would be able to comprehend its gravity, or enable her to determine what course of right ought to be adopted by her. Hence it is that the law submits the facts in each case to the sound judgment of a jury; to be considered by them in the light of all the facts and circumstances surrounding the parties at the time; and you should give the facts and circumstances such force and effect as they may be fairly entitled to in determining the truth of the issues involved—that is, the guilt or innocence of the defendant.<sup>23</sup>

**§ 4527. Testimony of Prosecuting Witness to be Weighed Exactly as That of Any Other Witness—Use of the Word "Implicated" Held Improper.** The court instructs the jury that — is the prosecuting witness, and is called the prosecutrix; that she has no interest in the

<sup>23</sup>—State v. Wolf, 118 Ia. 564, 92 N. W. 673 (674).

"Failure to make complaint does not tend to rebut the hypothesis of guilt, but may be considered only as affecting the credibility of the testimony of prosecutrix. In the second place, the instruction nowhere states the rule, which the court should have given, that failure to make complaint is to be considered as a circumstance tending to discredit the testimony of prosecutrix as to the wrong committed upon her, but states merely in a vague and indirect way that the failure to make complaint is to be considered by the jury 'for or against her statements,' and it is impossible to extract from the whole instruction any information which would be intelligible to a jury as to what effect should be given to such failure with reference to the credibility of the testimony of prosecutrix. In the third place the instruction is objectionable in that, by emphasizing the excuses which might exist for failure to make complaint, it practically encourages the jury to disregard that fact as seriously affecting the weight of the testimony. It is not necessary to quote at length from the cases in which the sufficiency of the excuses offered for delay in making complaint have been considered. An examination of them will show that fear of threatened violence and want of suitable opportunity are the excuses which have been recognized; and while the sufficiency of the excuse, or the effect of want of complaint without excuse, as affecting the credibility of the testimony of prosecutrix, is for the jury, yet the courts have uniformly recognized

delay without a reasonable excuse as a circumstance to which the jury should give great weight and serious consideration. State v. Witten, 100 Mo. 525, 13 S. W. 871, 10 L. R. A. 371; State v. Peter, 53 N. C. 19; Higgins v. People, 58 N. Y. 377; Mallett v. People, 42 Mich. 262, 3 N. W. 854; Topolanck v. State, 40 Tex. 160; Dun v. State, 45 Ohio St. 249, 12 N. E. 826."

In *People v. Totman*, 135 Cal. 133, 67 Pac. 51 (53), rape, the court said: "It was not error on the part of the court to refuse the instruction asked by defendant that the jury could consider the testimony as to whether the prosecutrix made an outcry, or whether she was changed in appearance or in conduct, or appeared to be nervous, etc. In reference to a similar instruction asked, this court, in *People v. Lee*, 119 Cal. 85, 51 Pac. 22, says: 'But in no case should such an instruction be given. It would have been a clear invasion of the province of the jury, and such interference is forbidden in this state. The court may be called upon under some circumstances to say whether there is or is not any evidence tending to prove an essential fact, but the court should never do this to aid the jury in determining a controverted issue of fact, or whether it is open to reasonable dispute as to whether such evidence does tend to prove the alleged fact. These are questions as to the effect and value of evidence, and when they are or may be matters of reasonable controversy they are exclusively for the jury.'"

Compare *State v. Watson*, 81 Ia. 380, 46 N. W. 868 (869), where a summing up of the evidence by the court is approved.

case whatever, other than that of a witness, and that her testimony is to be weighed exactly like that of any other witness in the case; and the jury are to believe or disbelieve her, and allow such weight to her testimony, as their judgment, under the evidence, shall dictate. And the jury are further instructed that they may convict the defendant on the uncorroborated evidence of the prosecutrix.—, provided that they believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of rape as charged. And the jury are instructed that the defendant is a competent witness in his own behalf and the interest he has at stake in this cause may be considered by the jury in determining the weight and credibility of his testimony.<sup>24</sup>

**§ 4528. Testimony by State's Witnesses Not Specifically Denied, Cannot Be Taken as True.** You are therefore to inquire, first, whether at the time alleged the defendant did or did not carnally know or have sexual intercourse with the female X. Some of the facts bearing upon this proposition are not disputed in the evidence, and may therefore be accepted by you as true. It is not disputed that the defendant was at the house in question at the time in question, and that he was there for a time alone with the said X. It is not disputed that he was found lying on the floor of the bedroom upon the person of the said X. and that the lower limbs and the lower part of the body of the said X. were bare, the limbs extended, and that the defendant had his pants unbuttoned or unfastened down in front so that his shirt at least was exposed.<sup>25</sup>

**§ 4529. Male Under Fourteen Years Conclusively Presumed to Be Incapable of the Crime.** The court instructs the jury that if you

<sup>24</sup>—State v. Sykes, 191 Mo. 62, 89 S. W. 851.

The court said this instruction was erroneous "in that it tells the jury that the prosecuting witness has no interest in the case whatever, other than that of a witness, and that her testimony is to be weighed exactly like that of any other witness in the case, when it must be conceded that she feels a greater interest in the prosecution and punishment of the person whom she believes has wronged her than could other witnesses who have no grievance against him. The prosecution, however, being by the state, she has no control over it, and, strictly and technically speaking, she has no greater interest therein than have others, whether witnesses in the case or not; for every good citizen has an interest in seeing the law enforced and crime punished. Nevertheless instruction went too far, unless qualified and balanced by some other instruction given in the case. This was done by the first instruction given on behalf of the defendant on the same feature of the evidence. It tells the jury that 'the prosecuting witness, is a competent witness, but the fact that she was implicated in the alleged affair may be taken into consideration in determining the weight and credibility to be given to her testimony.' So that, when the instructions are considered together and with reference to each other, as

they should be, it seems clear that the jury could not have been misled, and there exists, therefore, no grounds for complaint on that score. In this connection it is proper to remark that the word 'implicated' used in the said first instruction for defendant, was improper and misleading, and casts a reflection upon the prosecutrix, in that it implies a connection in a bad sense with a discreditable transaction; but it was doubtless used by mistake, and not by design."

<sup>25</sup>—State v. Austin, 109 Ia. 118, 80 N. W. 303.

"It is true witnesses testified to the matters set out in the charge, and that no one in direct terms denied them; but they were not admitted by the defendant, and he offered testimony to show that they were improbable. When found after the alleged offense was committed, he denied having been in the house where the girl was lying helpless. He was 65 years of age, and offered testimony which tended strongly to show that he was impotent and without sexual desires. There was some conflict in the testimony for the state, and facts were shown which tended to discredit some of the witnesses. In view of these facts, the court erred in giving the portion of the charge we have set out. State v. Lightfoot, 107 Ia. 344, 78 N. W. 41; State v. Desmond, 109 Ia. 72, 80 N. W. 214, 11 Am. Cr. Rep. 588."



believe from the evidence that the defendant is under the age of fourteen years, a presumption arises that he is incapable of committing the crime of rape. This presumption of incapacity continues until the state by competent testimony, overcomes this presumption of incapacity, and shows his capacity by showing that he had reached the age of puberty to the exclusion of and beyond a reasonable doubt.<sup>26</sup>

### SEDUCTION.

§ 4530. **Definition of Seduction.** You are instructed that seduction is the inducing of a woman to consent to unlawful sexual intercourse by means of false promises, artifice or enticement that overcome her scruples.<sup>27</sup>

§ 4531. **Seduction—Birth of Child, Evidence of.** Mere proof of opportunity, that she for a time was a member of his father's family and associated with him as such, or even of the birth of a child,, are not alone sufficient corroboration, though they may be considered by you, in connection with other facts and circumstances established in the case for that purpose.<sup>28</sup>

26—*Chism v. State*, 42 Fla. 232, 28 So. 399.

The Florida statute, Revision of 1892, (section 2369) provided that "the common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in the state where there is no existing provision by statute on the subject." There was no statute as to the age under which a male cannot commit the crime of rape."

Held that, under this statute, the courts are not authorized to set aside the common law for the reason that the climatic or racial conditions of our people differ from those of England where the common law was developed. "If such conditions demand a change of the common law it is for the legislature to make it and not the courts. The latter are not invested with legislative power under our system of government. A similar question was raised before the supreme court of appeals of Virginia in 1898, and the conclusion reached is that a boy under 14 years of age is conclusively presumed to be incapable of committing the crime of rape. *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. 846. See also *State v. same*, 60 N. C. 293."

The court noted the following cases in which it is held that inasmuch "as the common law rule originated in England, under climatic and other conditions surrounding the English people, showing that puberty did not develop in males before the age of 14, it should not be rigidly applied here, where experience frequently shows a development of puberal capacity before that time," and holding instead, that "before the age of 14 a presumption

exists of incapacity, but that it may be overcome by proof; *Gordon v. State*, 93 Ga. 531, 21 S. E. 54, 44 Am. St. 189; *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *Heilman v. Com.* 84 Ky. 457, 1 S. W. 731, 4 Am. St. 207; *People v. Randolph*, 2 Park Cr. R. 174."

If the indictment contains an averment, that defendant was over the age of fourteen years that averment, at common law, is surplusage and need not be proved.

*Sutton v. People*, 145 Ill. 279 (286), 34 N. E. 420, citing 2 Whart. Crim. Law (sec. 1453); *Commonwealth v. Lugland*, 4 Gray (Mass.), 7; *Commonwealth v. Scamall*, 11 Cush. 547; *Ward v. State*, 12 Tex. App. 174; *People v. Ah Yek*, 29 Cal. 575.

27—*State v. Whalen*, 98 Ia. 662, 68 N. W. 554 (556).

The court said that this "is not a correct definition of the crime of seduction. It omits to state that the woman must have been unmarried, and of previously chaste character, and, considered alone, would have been erroneous, and presumptively prejudicial."

28—*State v. Dolan*, 132 Ia. 196, 109 N. W. 609 (610).

"The rule in this state is that, while the birth of a child is evidence of seduction, it does not tend in any way to connect defendant with the act. *State v. McGinn*, 109 Ia. 641, 80 N. W. 1068; *State v. Kisson*, 111 Ia. 690, 83 N. W. 724; *State v. Coffman*, 112 Ia. 8, 83 N. W. 721. Even if the testimony as to birth of a child may be considered with other facts and circumstances as corroboration, these other facts and circumstances are nowhere explained in the court's charge. Under the instruction as given, the jury was authorized to take the fact of the birth of a child into consideration,

§ 4532. **Several Acts Under Distinct Promises of Marriage—Presumption of Chastity Weakened or Destroyed.** The girl, —, has gone on the stand and testified that the respondent had, on every occasion when they had intercourse, promised to marry her. I charge you, as a matter of law, that if this respondent did have sexual intercourse with this girl at the time alleged in the information, and, in order to persuade her to allow him to have such sexual intercourse, did make this promise, no matter whether he intended to carry this promise out or not, if this girl relied on his promises and inducements at that time and allowed him to have sexual intercourse with her, and if she was a chaste character, then I charge you that the defendant is guilty of this crime as charged in the information.<sup>29</sup>

§ 4533. **Previous Intercourse with Others as a Defense.** If you should believe from the evidence before you that defendant had intercourse with prosecutrix at the time and place alleged in the indictment, and that defendant made the promise to marry her, if such promise was made, and if you should further believe from the evidence before you that prior to the time at which the alleged promise to marry was made to the prosecutrix, if any ever was made, the said prosecutrix had had intercourse with any other person or persons, then the defendant cannot be convicted, and if you so believe you will acquit the defendant.<sup>30</sup>

§ 4534. **Intimacy with Others.** Evidence has been introduced in this case tending to show various degrees of intimacy of the prosecuting witness with other men than the defendant, prior to and about the time she claims to have been seduced by defendant, also tending

with such other facts and circumstances as they might deem corroborative, and thus conclude there was the necessary corroboration. This was manifestly erroneous."

29—*People v. Smith*, 132 Mich. 58, 92 N. W. 776.

In commenting upon this as erroneous, the court said: "To this part of the charge defendant assigns error. In the case of *People v. Clark*, 33 Mich. 112, the lower court permitted the jury to find the defendant guilty of seduction because of illicit intercourse in August 1873, though the complaining witness testified that she had such intercourse with the defendant not only in August, but on the preceding 28th of July. In deciding this case the court said: We do not wish to be understood as saying that, even as between the same parties, there could not be a second or even a third act of seduction; but where the subsequent alleged acts follow the first so closely, they destroy the presumption of chastity which would otherwise prevail, and there should be clear and satisfactory proof that the complainant had in truth and fact reformed; otherwise there could be no seduction.\* \* \* 'And, although the female may have previously left the path of virtue on account of the seductive arts and persuasions of the accused, or some other person, yet if she has repent-

ed of that act and reformed, she may again be seduced. We do not say there may not have been a reformation in this case. Indeed there may have been many, but they were unfortunately fleeting. Had a reasonable time elapsed between the different acts, a presumption in favor of a reformation might arise; but we think no such presumption could arise in this case, and that the burden of proving such a reformation would be upon the prosecution.' This decision is decisive of the case at bar."

30—*Barnard v. State*, — Tex. Cr. App. —, 76 S. W. 475 (476).

"This charge does not set forth correctly the law. The criterion here fixed by the court is that if, prior to the promise to marry, prosecutrix had had intercourse with any person or persons, appellant would not be guilty. If she had intercourse with another, or other persons after the promise to marry and before appellant had intercourse with her, appellant would not be guilty. Appellant could not seduce a woman that had already been seduced, even by promise to marry; and if appellant had promised to marry the girl, and prior to his having intercourse with her under the promise of marriage another party had had intercourse with her, it would not be seduction. This charge requires a reversal of the judgment."

to prove that she admitted being too free with one P., all of which she now denies. The purpose of such testimony is: (1) To show that another man than the defendant is or may be the father of her child, if she was with child, and so discredit her claim that the defendant seduced her. (2) To show the improbability of her claim that she and the defendant were in fact engaged to be married. You should give such evidence the consideration you deem it to merit for that purpose, bearing in mind, however, that the ultimate question for your determination is, not who was in reality the father of such child, but rather did the defendant debauch and seduce her as hereinbefore explained, and if so, was she, previous to the time of such seduction of chaste character? Even should you be satisfied that another than defendant was the father of such child, you might convict defendant of seducing her, if you believed from the evidence beyond a reasonable doubt, that he first had intercourse with her by means of seductive arts of false promises as hereinafter explained; she being previous thereto of chaste character.<sup>31</sup>

§ 4535. **Assuming that the Words and Acts of Defendant Amounted to a Temptation.** If words are spoken or an act is done by the man for the purpose of enticing the woman to the deed, and by means of such temptation thus presented, and in consequence thereof, she yields to sexual intercourse with him, it is seduction.<sup>32</sup>

§ 4536. **Corroborative Testimony—Seduction.** (a) You are further instructed that you cannot find a verdict of guilty in this case upon the testimony of H. unless the same is corroborated by other testimony tending to connect defendant with the offense committed, and it is necessary that said witness be corroborated both as to the promise of marriage and as to the fact (if such is a fact) that defendant had carnal intercourse with said witness.<sup>33</sup>

(b) Evidence has been given you tending to show statements made by the prosecuting witness at other times and places conflicting with her testimony in this case; also tending to contradict other material testimony given by her. Such evidence is called impeaching evidence, and is for the purpose of casting doubts on the truth of her testimony. You, in this, as in all other matters of evidence, are the sole judges. If you believe the impeaching evidence, and that it is irreconcilable with her own testimony in this case, then you are at liberty to disregard all of her testimony if you see fit. You are not however, obliged to do so, for you may consider it, and allow it such weight as you deem it justly entitled to. If any of her testimony is corroborated or supported by other evidence, either direct or circumstantial, then you cannot disregard it entirely, but must consider it

31—State v. Dolan, 132 Ia. 196, 109 N. W. 609.

"This instruction was erroneous for the reason that such intimacy as is referred to should also be considered as bearing upon the previous chastity of the prosecuting witness."

32—Hall v. State, 134 Ala. 90, 32 So. 750 (754).

The court said that this instruction was erroneous in "assuming that any word or act done by defendant for the purpose of enticing the girl to the doing of the sexual act

amounted to temptation. Whether they did or did not is a question for the jury."

33—Garlas v. State, — Tex. Cr. App. —, 88 S. W. 345 (346).

"This charge is on the weight of the testimony in assuming that prosecutrix had told the truth, and that all that was required was that she should be corroborated. This charge has often been condemned. See Hart v. State, 11 Tex. Ct. Rep. 190, 82 S. W. 652; Crenshaw v. State, 12 Tex. Ct. Rep. 758, 85 S. W. 1147, and authorities there cited."



with the other evidence in the case, allowing it such force and effect as you deem proper and just.<sup>34</sup>

34—State v. Dolan, 132 Ia. 196, 109 N. W. 610.

"The part of this instruction which reads 'also tending to contradict other material testimony given by her,' is erroneous. 'Testimony in contradiction of the prosecutrix was not only impeaching but substantive in character, and should have been considered with reference to

the entire case, and not simply for impeaching purposes. All defendant's testimony was in contradiction of the material testimony given by the prosecutrix, and, if it were to be considered simply as impeaching her, the defendant was placed in a very awkward position. His testimony was not substantive, but simply for impeachment, under this instruction."

## CHAPTER CLXXIV.

### CRIMINAL—ASSAULT AND BATTERY.

See Approved Instructions, Chapter XCIII, Vol. II.

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| <p>§ 4537. Definition must show intent.</p> <p>§ 4538. Discharging pistol—Justification—Accident defined.</p> <p>§ 4539. School teacher is not necessarily guilty of assault and battery if in punishing his pupil he uses unreasonable force.</p> <p>§ 4540. Assault does not justify a counter assault.</p> <p>§ 4541. Inhabitants of town driving persons out of town—Not always bound to retreat.</p> <p>§ 4542. Provoking the difficulty—Third party interfering in fight.</p> <p>§ 4543. Assaulting trespasser—Self-defense—Instructions ignoring part of the evidence.</p> <p>§ 4544. Assault with deadly weapon.</p> <p>§ 4545. When the defendant is guilty of some offense it is error to instruct to acquit.</p> <p style="text-align: center;">ASSAULT WITH INTENT TO KILL.</p> <p>§ 4546. Elements State must prove—Misplacing burden of proof.</p> <p>§ 4547. Aggravated assault—Homicidal intent.</p> <p>§ 4548. An intent to kill is an essential element, but is a question for the jury.</p> | <p>§ 4549. Specific intent is not necessary.</p> <p>§ 4550. Failure to prove intent to kill does not necessarily mean that defendant must be acquitted.</p> <p>§ 4551. Premeditated design need not be proven to make out a case of assault with intent to murder.</p> <p>§ 4552. Deliberation not a necessary element.</p> <p>§ 4553. Voluntary drunkenness, though no excuse for a crime, may be considered in reference to intent.</p> <p>§ 4554. If the crime would be manslaughter if death had ensued.</p> <p>§ 4555. Using the word "shoot" instead of "kill."</p> <p>§ 4556. In a prosecution for assault with intent to kill, an instruction should not include what constitutes murder.</p> <p>§ 4557. Reasonable doubt must be as to the whole evidence and not only in regard to the intent.</p> <p>§ 4558. Assault with intent to kill—Self-defense.</p> <p>§ 4559. Reckless shooting—Assault with intent to kill.</p> |
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§ 4537. **Definition Must Show Intent.** No matter how slight the motion may be, if it amounts to a wanton motion, an angry motion, coupled with the ability at the time and under the circumstances to do harm, it is an assault, and, if carried into effect, it is a battery,—assault and battery; but it is indifferent which one it is, because they are both punishable, and are practically the same thing.<sup>1</sup>

<sup>1</sup>—State v. Carver, 89 Me. 74, 35 Atl. 1030 (1031).

"The motion may be wanton, made in an angry manner coupled with an ability to do harm, and yet no harm be intended, and, if harm should result, it may be from pure accident."

In State v. Manderville, 37 Wash. 365, 79 Pac. 977 (979), the following instruction defining "a beating" was criticised:

The court instructs the jury that

"a beating," or a "mere beating" as used in these instructions, is a functional derangement, such as an injury to an eye so as to blacken it, or even to the extent of closing it for a time.

The comment of the court follows: "We doubt the advisability of a trial court, in a case like this attempting to define such expressions as 'a beating,' 'a mere beating,' 'great bodily injury,' or 'great bodily harm' as they practically define

**§ 4538. Discharging Pistol—Justification—Accident Defined.** It is claimed by the defendant that the pistol in question, at the time and place in question, was accidentally discharged. An accident may be defined to be an event happening without the concurrence of the will of the person by whose agency it was caused. If you find from all the facts and circumstances before you that the pistol in question was discharged by the defendant, and that the said B. was shot thereby, and that the discharge of said pistol was without the concurrence of the will of the defendant, then it was an accident, and defendant would not be guilty of any crime. If you fail to so find, then you should disregard the theory of an accident, and inquire as to the guilt or innocence of the defendant, as hereinbefore instructed.<sup>2</sup>

**§ 4539. School Teacher Is Not Necessarily Guilty of Assault and Battery if in Punishing His Pupil He Uses Unreasonable Force.** (a) The court instructs the jury that if a teacher in inflicting punishment upon his pupil goes beyond reasonable castigation, and either in mode or degree of correction is guilty of any unreasonable and disproportionate violence or force, he is clearly liable for such excess in a criminal prosecution for assault and battery.

(b) The court instructs the jury that unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion in all cases when the act was designedly committed, and it then becomes an assault because purposely inflicted without justification or excuse. And if you believe, from the evidence, beyond a reasonable doubt, that the defendant made use of excessive and unreasonable force in inflicting punishment on X., then the jury should find the defendant guilty.<sup>3</sup>

**§ 4540. One Assault Does Not Justify a Counter Assault.** (a) If the jury believe from the evidence that defendant struck D. after D. struck her then she was justified. If the jury believe from the evidence that the defendant was rightfully on the place where the

themselves and must usually be interpreted with reference to the particular case under consideration; and it is doubtful if the average juror is much enlightened by a definition given of them."

In *Hardin v. Commonwealth*, 114 Ky. 722, 71 S. W. 862, the Kentucky code (sec. 1242) defines the offense of shooting another thus: "If any person shall, in sudden affray or in sudden heat and passion, without previous malice, and not in self-defense, shoot at," etc. The trial court in defining it added the words, "and under circumstances reasonably calculated to excite his passion beyond his power of self-control." Held error for the reason that no elements should be added to the statutory definition of a crime when it is complete in itself.

2—*State v. Matheson*, 130 Ia. 440, 103 N. W. 137 (140).

"It seems to us this instruction was fundamentally wrong. Any evidence bearing on the question whether the defendant intentionally fired the pistol was evidence going to the very essence of the crime. Unless the jury found beyond a reasonable doubt that the pistol

was intentionally, and not accidentally, fired, then it would be their duty to acquit, yet they are told, in effect, that, unless they find affirmatively—that is, by a preponderance of evidence—that the pistol was accidentally discharged, they are not to take into account the evidence as to an accident, but are to apply the rule as to presumption of intent from a wrongful act which had been given in preceding instructions."

3—*Fox v. People*, 84 Ill. App. 270 (271).

The court said: "The authority of a teacher over his pupil being regarded as a delegation of at least a portion of the parental authority, the presumption is in favor of the correctness of the teacher's action in inflicting corporal punishment upon the pupil. The teacher must not have been actuated by malice, nor have inflicted the punishment wantonly. For an error in judgment, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injury, and he acts in good faith, the teacher is not liable. Am. & Eng. Ency. of Law, vol. 20, p. 769."



difficulty occurred, and was attacked by D. while there, then defendant was authorized by law to repel force by force, and to protect herself against any assault which she did not herself bring about.<sup>4</sup>

(b) The jury may look to the relation between defendant, D., and defendant's son, the pupil who was chastised, in mitigation or justification, if they find from all the evidence that defendant honestly and candidly believed that his child had been cruelly or immoderately punished by said D.<sup>5</sup>

**§ 4541. Inhabitants of Town Driving Persons out of the Town—Not Always Bound to Retreat.** The inhabitants of J. had no right to drive the defendant and his party out of town by the use of force merely because they were fighting or using bad language in the streets. If the defendant and his party had committed or were committing any public offense, the remedy which the law gave the inhabitants of J. was to arrest them and take them before a magistrate, or complain to a magistrate or peace officer. On the other hand, if the defendant and his party had a reasonable opportunity to leave the town in safety and avoid a conflict with the town people when they approached with whips and threatened the use of force, then the defendant and his party should have taken that course and avoided a conflict. But if the town people assailed the defendant and his party so that they had no reasonable opportunity, after their intentions were known, to retire or retreat in safety, then they had the right to meet force with force and defend themselves as in the case of any other assault.<sup>6</sup>

**§ 4542. Provoking the Difficulty—Third Party Interfering in Fight.** That if the jury believed B. assaulted D. and defendant K. interfered in the difficulty on behalf of D. to prevent his being killed or seriously injured, and that he cut or stabbed said B. in the back with a knife, then to acquit defendant, unless they should believe that D. provoked or brought about the difficulty with B. for the purpose of obtaining a pretext to take his life or of doing him serious bodily injury; in such case D. could not justify his conduct in cutting B. with his knife, although at the time he may have been acting in self-defense. Neither would the defendant be justified under the law of self-defense in stabbing B. in the back, if he did so.<sup>7</sup>

**§ 4543. Assaulting Trespasser—Self-defense—Instructions Ignoring Part of the Evidence.** (a) The court instructs the jury that if they believe from the evidence that the prisoner was on the land of D. with-

4—Harris v. State, 123 Ala. 69, 26 So. 515 (516).

"The charges do not negative the willingness of the defendant to enter into the fight. She may not have done anything to have brought about the difficulty, and yet she would be guilty of an assault and battery, if she struck the prosecuting witness in a mutual combat, or if she struck a blow after the necessity to strike had passed. Howell v. State, 79 Ala. 284."

5—Walkeley v. State, 133 Ala. 183, 31 So. 854 (856).

"The charge requested was argumentative, and bad, also, in assuming that defendant might be legally justified in committing the assault and battery on no other provocation

than the punishment received by his son on the day previous."

6—State v. Evenson, 122 Ia. 88, 97 N. W. 979 (980).

The court said that "under the law the defendant when threatened with an assault and battery, was not bound to retreat, but might stand his ground and repel force with force so long as he used only such force as was necessary."

7—Kees v. State, 44 Tex. Cr. App. 543, 72 S. W. 855 (856).

"As we understand the charge, it is subject to the criticism of appellant; that is, his right of self-defense was cut off in case the jury believed that D. provoked the difficulty regardless of whether appellant knew the fact that he did provoke the difficulty."

out authority, and that D. approached the prisoner and ordered him off the land, and the prisoner refused to go, and if they further believe from the evidence that the prisoner cocked his gun and pointed the same at the said D. and that the said D. had reason to believe that the prisoner was about to shoot him, then the said D. had the right to use all reasonable and necessary means to protect himself from the apprehended injury to him.<sup>8</sup>

(b) The court charges the jury that the burden of proving that the defendant was the aggressor, or that he provoked or encouraged the difficulty, rests upon the state, and if in reference to the fact there be no testimony, or if the testimony be not sufficient to satisfy the jury beyond a reasonable doubt that the defendant was in fact the aggressor, then they must acquit him.<sup>9</sup>

(c) If the defendant did cut and wound X. with a knife, but at the time he did so the defendant believed, and had reasonable grounds to believe, that he was then and there in danger of death or of suffering some serious bodily harm at the hands of said X., and it was necessary, or to the defendant reasonably appeared to be necessary, to cut said X., to avert the danger, or what reasonably appeared to the defendant to be such danger, this was a cutting and wounding in self-defense. And if the defendant did cut and wound X., yet the jury should find him not guilty unless they believe from the evidence, beyond a reasonable doubt, that said cutting and wounding was not done in self-defense.<sup>10</sup>

§ 4544. **Assault with Deadly Weapon.** (a) If you find from the evidence in this case beyond a reasonable doubt that at the time and place charged, the defendant made an assault upon S. with a revolver, that he then and there had a revolver in his hand which he aimed and pointed at S., and that S. then and there believed it to be loaded—I think the testimony does not show whether or not it was—and further find that this revolver which S. believed to be loaded was the means of putting him in fear and overcoming him and compelling him to deliver up his money, then you may consider the question as to whether the revolver as used was or was not a dangerous weapon. \* \* \* In order to find the defendant guilty under this section (4378) you have not got to find that S. committed any falsehood in this case at all. S. has not testified, as I understand it, in this case that the revolver was

8—*Montgomery v. Commonwealth*, 98 Va. 852, 37 S. E. 1 (2, 3), 13 Am. Cr. Rep. 160.

This charge as to self-defense is held bad because it leaves "out of view the evidence going to show that the prisoner retreated until sprung upon by D. with a deadly weapon, and then did the cutting or wounding in the fight that immediately ensued. *N. Y. P. & N. R. Co. v. Thomas*, 92 Va. 608, 24 S. E. 265." In the case cited, it was held error to call special attention of the jury to a part only of the evidence and the particular fact or facts it may prove.

9—*Hendricks v. State*, 122 Ala. 42, 26 So. 242 (243).

This was held bad because "it ignores reference to present impending peril to life or great bodily harm real or apparent and opportunity to retreat. *Naugher v. State*,

105 Ala. 29, 17 So. 24; *Howard v. State*, 110 Ala. 92, 20 So. 365."

10—*Bailey v. Commonwealth*, 24 Ky. L. 1114, 70 S. W. 838 (839).

The court said: "We think the court should have added to the self-defense instruction given, under the circumstances of this case, the statement that X. was not authorized to arrest appellant, a mere misdemeanant, in F. county, X. being a peace officer of B. county only,—and that, if he attempted to do so, it was the privilege of appellant to resist such attempted arrest by the use of such force as was necessary, or reasonably appeared to appellant to be necessary, to preserve his liberty, and no more, and, to that end, appellant had the right to use force to repel force so far as the same was necessary, or to the appellant, in the exercise of reasonable discretion, appeared to be necessary, for his protection."

loaded; the simple question is for you to determine under the first question whether the revolver as used, if it was used, was the means and force by which he was compelled to submit to the robbery, and therefore a dangerous weapon.<sup>11</sup>

(b) Even if you believe the prosecuting witness made a rush or attack upon the defendant when he came out of his house, if you believe the prosecuting witness had no weapon in his hands, or appearance thereof, then I instruct you that the defendant was not warranted in using a deadly weapon.

(c) An assault or an assault and battery by a person upon another with his hands, arms or head, or the force or momentum of his body, does not justify the use of a deadly weapon.<sup>12</sup>

**§ 4545. When the Defendant Is Guilty of Some Offense, It Is Error to Instruct to Acquit.** If you believe defendant did not shoot at G. for the purpose and with the intention of killing him, but that he shot for the purpose of frightening or scaring the said G., you will acquit the defendant.<sup>13</sup>

## ASSAULT WITH INTENT TO KILL.

### § 4546. Elements State Must Prove—Misplacing Burden of Proof.

(a) In order to convict the defendant in this case, and to deprive him of the protection of the doctrine of self-defense, the state must prove beyond a reasonable doubt each and all of the following propositions: (1) That the alleged crime was committed in this county. (2) That it was committed by the defendant with the intent maliciously and unlawfully to kill S. (3) That to constitute the intent to unlawfully and maliciously kill said S. in this particular case (a) the

11—*Lipscomb v. State*, 130 Wis. 238, 109 N. W. 986 (1908).

"Careful reading of these instructions shows that, not only was no proper instruction given on the question, but that a positively erroneous instruction was given, namely, that if the revolver as used, was the means by which S. was compelled to submit to the robbery, it was thereby shown to be a dangerous weapon."

12—*Davis v. State*, 152 Ind. 34, 51 N. E. 928 (1909), 71 Am. St. 322.

The court said: "These instructions inform the jury that a person assaulted by another, who has no weapon in his hands, or the appearance thereof, is not justified in using a deadly weapon in defense of his person. If that is the law, then, in every conceivable case of a violent attack upon one by another,—no matter what the circumstances may be, no matter what the disparity between the ages and physical strength of the two may be,—the assaulted party must stand and take his chance of being knocked down and stamped into a jelly, or of being choked to death, before he can lawfully use a weapon in his defense. Though the appearance and circumstances of the assault were such as to induce the reason-

able belief to be honestly entertained by the defendant that his life was in danger, or that he was in danger of great bodily harm, from the assault, he could not lawfully use a deadly weapon to repel such assault, unless the assailant has a weapon in his hands, or the appearance thereof, no matter how many he had about his person. That is not the law. *Presser v. State*, 77 Ind. 274-278; *Batten v. State*, 80 Ind. 394; *McDermott v. State*, 88 Ind. 187, and *Shields v. State*, 149 Ind. 395, 49 N. E. 351 in which case an assailant was convicted of manslaughter where he used nothing but his hands, thereby choking his victim to death, and that judgment was affirmed in this court."

Such error in an instruction is not cured by other correct instructions. *Abbitt v. L. E. & W. R. Co.* 150 Ind. 490, 50 N. E. 729 (1904).

13—*Pastrana v. State*, — Tex. Cr. App. —, 87 S. W. 347 (1905).

"Appellant insists that the state of facts suggested by the charge would amount to an assault and battery, and that the court, by instructing the jury to acquit, was in error and the jury would not likely do so, as appellant was guilty of some offense. This contention is supported."



defendant must have been at fault in bringing on the difficulty. (b) There must not have existed at the time of the difficulty, either really or so apparently as to lead a reasonable mind to the belief that it actually existed, a present, imperious, impending necessity to shoot in order to save his life, or to save himself from grievous bodily harm.

(c) There must have been no other reasonable mode of escape by retreat, or by avoiding the combat with safety.<sup>14</sup>

(b) In order to convict it will be necessary to find from the evidence, beyond a reasonable doubt, three things: First, An assault on W. by the defendant. Second, That the defendant was armed with a dangerous weapon. Third, That such assault was made with the intent on the part of the defendant to kill and murder W. Now with reference to the first and second of these elements, or ingredients of this crime, there is no dispute. The defendant admits he fired the shot from the revolver which struck W., and that is not denied in any way. The fact of the assault was present or is present, so as to the first two of these points, I say there is no question.<sup>15</sup>

§ 4547. **Aggravated Assault—Homicidal Intent.** (a) The defendant's attorneys have submitted a charge upon aggravated assault, which I have refused to give as asked, but I give you as the law of this case that if you believe from the evidence that the defendant assaulted the said X. with a deadly weapon, not having a premeditated design to effect the death of the person assaulted, you may find the defendant guilty of an aggravated assault. But, before you would be justified in reducing the crime to an aggravated assault, you should be satisfied from the evidence that the assault was made without any homicidal intent.<sup>16</sup>

(b) By "cutting and wounding with a knife" is meant the intentional infliction of a wound by one person upon another by cutting the person of such other with a knife. The defendant has not been proved guilty, even if a wound was inflicted upon the person of X. by

14—Hendricks v. State, 122 Ala. 42, 26 So. 242 (243).

"Misplaces the burden of proof, in that it requires the state to disprove beyond reasonable doubt some of the elements of self-defense, the burden of proving which was on the defendant. Scroggins v. State, 120 Ala. 369, 25 So. 180; Linehan v. State, 113 Ala. 70 (84), 21 So. 497; Compton v. State, 110 Ala. 24 (37), 20 So. 119; Howard v. State, 110 Ala. 92, 20 So. 365; Miller v. State, 107 Ala. 41, 19 So. 37; Naugher v. State, 105 Ala. 29, 17 So. 24; Holmes v. State, 100 Ala. 80, 14 So. 864."

15—Holmes v. State, 124 Wis. 133, 102 N. W. 321 (324).

"The manner adopted by the court in his instruction of presenting the case to the jury does not meet with our unqualified approval. The better way would have been to state that the two first essentials mentioned were established beyond reasonable controversy, to the extent that defendant was present on the occasion in question armed with a dangerous weapon, and that he, in fact, with such weapon, shot W."

16—Galloway v. State, 47 Fla. 32, 36 So. 168.

Held erroneous, because "it requires that the jury be satisfied from the evidence that the defendant had no intent to take the life of the person assaulted, before they would be justified in finding him guilty of the lower, rather than of the higher, degree of crime. The true rule is that a reasonable doubt in the minds of the jury as to the existence of any element of the higher degree or offense calls for a verdict of the lower degree, where there exists no reasonable doubt of the existence of every element necessary to constitute the latter offense. The state must prove beyond a reasonable doubt the degree of the crime, as well as the other fact of the crime itself, in order to obtain a verdict for that degree, and the accused is not put to the necessity of 'satisfying' the jury that the lower degree only has been committed. 21 Am. & Eng. Ency. Law (2d Ed.) 171; 23 Am. & Eng. Ency. Law (2d Ed.) 952, and cases cited. See, also, Murphy v. State, 31 Fla. 166, 12 So. 453, and Hubbard v. State, 37 Fla. 156, 20 So. 235."

defendant with a knife, unless such wound was so inflicted in the execution of a purpose on the part of the defendant to wound said X. by cutting his person with a knife.<sup>17</sup>

§ 4548. **An Intent to Kill is an Essential Element, But is a Question for the Jury.** (a) If the defendant cut his wife with a weapon likely to produce death, with malice, under such circumstances which would have made him guilty of murder, had death ensued, then I charge you that he would be guilty of the offense with intent to murder.<sup>18</sup>

(b) In order to determine whether or not the defendant is guilty of assault with intent to murder, you just simply ask yourselves the simple question, would it have been a case of murder if the prosecutor had died from the shot? If this assault had resulted in the death of the prosecutor and under the facts and circumstances disclosed by the testimony in this case and the statement of the defendant, that killing would have been without justification or excuse, in whole or in part—it would have been a malicious killing—and he (the defendant) would have been guilty of murder, and if that is true from the facts and circumstances as disclosed by the testimony of the witnesses and the defendant's statement in this case, and you believe it to be the truth of it, then he would be guilty of assault with intent to murder.<sup>19</sup>

(c) If you find, beyond a reasonable doubt, that the defendant fired the shot described in the information,—(if you find a shot was fired),—either in the perpetration or attempt to perpetrate a robbery, and death had resulted, the killing would have been murder in the first degree, and no plea of accident or self-defense can avail this defendant.<sup>20</sup>

17—*Balley v. Commonwealth*, 24 Ky. L. 1114, 70 S. W. 838 (839).

"The statute (section 1166, Ky. St.) provided: 'If any person shall willfully and maliciously cut, strike or stab another with a knife \* \* \* With intention to kill, if the person so cut, stabbed or bruised die not thereby' etc."

The court said that from the omission of the "words with intent to kill" "the jury might have inferred, and doubtless did, that the intentional infliction of a wound by one person upon another by cutting the person of such other with a knife is all that was required to justify a conviction in this case. In *Head v. Commonwealth*, 4 Ky. L. 824, it was held that it was not a felony to willfully and maliciously cut and wound another, unless with intent to kill, and that omitting the words 'with intent to kill' was reversible error."

18—*Lanier v. State*, 106 Ga. 368, 32 S. E. 355 (336).

The court said: "An intent to kill is a necessary element to constitute the offense of an assault with intent to murder. An assault may be made with a deadly weapon, and with malice, yet at the time not made with an intent to kill. Whether there existed such an intent, or not, is a question of fact for the jury. In order for the law to infer an intent, there must have been a killing. This principle has

been so thoroughly established in the following cases decided by this court, that any further discussion on the subject is entirely unnecessary; *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652; *Gallery v. State*, 92 Ga. 463, 17 S. E. 863; and authorities cited in both cases."

19—*Harris v. State*, 120 Ga. 167, 47 S. E. 520 (521).

"We have no hesitancy in holding that this charge was erroneous. The correct rule on this subject was laid down in *Gallery v. State*, 92 Ga. 463, 17 S. E. 863, where the exact question now under consideration was decided, and where it was held: 'Where death results from the unlawful use of a deadly weapon, the law, by presumption, imputes to the slayer an intention to kill; but, where death does not result, intention to kill is not matter of legal presumption, but matter for inference by the jury. Consequently it narrowed the functions of the jury too much to instruct that, 'if, under this indictment, a killing had ensued, and if the crime would have been murder, then the defendant would be guilty of assault with intent to murder.'"

20—*State v. Williams*, 36 Wash. 143, 78 Pac. 780 (781).

"Such an instruction is inapplicable in a case of assault where death did not result, for the reason that in such a case the intent to murder cannot be presumed as a matter

(d) If the jury believe from the evidence beyond a reasonable doubt that the defendant did shoot his wife and cut her throat as charged in the information, and that the natural, probable and ordinary consequences of such acts would be the death of such wife, and that defendant was of sound mind at the time he committed these acts, then the presumption of law is that the defendant did so assault his said wife with intention to kill her; and if such assault and shooting, under these circumstances, was done with the premeditated design to effect the death of said wife, the defendant being sane at the time, the jury should find the defendant guilty, as charged.<sup>21</sup>

(e) The mere fact that death did not ensue, or the mere statement of the defendant that he did not intend to kill the prosecuting witness, would not justify the jury, in themselves alone, in finding that the defendant did not intend to kill the prosecuting witness. A man is presumed in law to intend the probable and natural consequences of his own unlawful act. If one purposely shoots another with a deadly weapon, at or near a vital part, and in such a manner that death would probably ensue, all the other elements of the crime concurring, the jury would be justified in believing that the defendant intended to kill the prosecuting witness, even if death did not ensue, and if the defendant himself claimed that he did not intend to kill him.<sup>22</sup>

(f) Before you can convict the respondent of an assault with intent to kill and murder or of an assault with intent to kill, you must

of law, but must be established as any other fact. An instruction of similar import was held to be erroneous in *State v. Dolan*, 17 Wash. 499, 50 Pac. 472. At page 506, 17 Wash. page 474, 50 Pac., the court said: 'While the court correctly stated to the jury that the natural and probable consequences of every act deliberately done by a person of sound mind is presumed to have been intended, yet the rule of evidence so announced has no application to the case at bar. The rule applies only to offenses actually committed; i. e., to consequences which really ensue, and not to those which do not ensue. *Roberts v. People*, 19 Mich. 409. The crime here charged consists of two essential elements—first, an assault; and second a specific felonious intent to kill. Both these elements were alleged as facts in the information, and it was therefore incumbent upon the state to establish them as facts by competent evidence. And it was for the jury, and not the court, to determine the existence of both these facts. But the court by this charge invaded the province of the jury, and assumed to draw the proper inferences from hypothetical facts stated, as a mere presumption of law. If, it was said by the Supreme Court of Michigan in *Maier v. People*, 10 Mich. 218, 81 Am. Dec. 781, a 'court could do this, juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist.' In the light of the above decision, and of authorities there cited, we think the

instruction under examination here was erroneous.'

21—*Lowe v. State*, 118 Wis. 641, 96 N. W. 417 (422).

The court said there was force in the argument that "the facts recited in the instruction merely raise a presumption or inference of fact that the accused 'did so assault his wife with intent to kill her,' instead of a presumption of law to that effect, as stated in the instruction. And yet it is manifest that the jury were only authorized to find such guilty intent in case they found the facts and circumstances mentioned in the instruction to be true; in other words, the presumption or inference of guilty intent was to be derived wholly and directly from the facts and circumstances of the case, as disclosed by the evidence and recited in the instruction."

22—*Newport v. State*, 140 Ind. 299, 39 N. E. 926 (927).

The court said: "What evidence proves, or tends to prove, after it has gone to the jury, is a question solely for the jury to decide; and it is error for the court to interfere with their decision upon the weight of evidence, by instruction. *Gueltig v. State*, 63 Ind. 278, 3 Am. Cr. Rep. 233; *Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44; *Greer v. State*, 53 Ind. 420; *Kintner v. State*, 45 Ind. 175; *Barker v. State*, 48 Ind. 168; *Reynolds v. Cox*, 11 Ind. 262; *Scott v. State*, 64 Ind. 400; *Steele v. Davis*, 75 Ind. 191, and *Huffman v. Caudle*, 86 Ind. 591." The judgment was affirmed, the error was held to be cured by the rest of the charge.



believe from the evidence, beyond a reasonable doubt, that the respondent had such intent when he made the assault. The natural and probable consequences of every act deliberately done, by a person of sound mind, are presumed to have been intended by the author of the act. Direct and positive testimony is not necessary to prove the intent; it may be inferred from the evidence, if there are any facts proved which satisfy you beyond a reasonable doubt of its existence. And on this question you should take into consideration the previous relations between these parties; also whether it is true that the respondent made any declaration or statement, at the time or before the assault, as to what his intentions were; the fact that he had a revolver, if he did have one; his acts with the revolver, and his threats.<sup>23</sup>

(g) The court instructs the jury, for the state, that if they believe from the evidence in this case that P. was the originator of the difficulty, and provoked and caused C. to advance on him with a knife, he had no right to shoot him, although he may have been in danger of suffering great bodily harm from C. at the time of the shooting. And if the jury believe from the evidence that P. provoked C. to draw his knife and advance on him, and that, while so advancing, P. shot him, intending to kill him, then he is guilty, and the jury should so find.<sup>24</sup>

23—*State v. Kelley*, 74 Vt. 278, 52 Atl. 434 (435).

The court said: "The respondent excepted to the charge that a man intends the natural consequences of his acts, so far as the court applied it to an intent as a part of the crime, but not so far as the court applied it to the simple assault. No change was made in the charge upon the taking of this exception. It seems to us to have been well taken. As contended by the respondent's counsel, there was in this case no act of killing from which to infer or presume the intent to kill. The only act proved was the assault. We think the charge should have been modified to meet the point taken by the exception, and that the omission to do so left it misleading. See *State v. Taylor*, 70 Vt. 1 (9), 39 Atl. 447, 67 Am. St. 648, 42 L. R. A. 673."

In *State v. Taylor*, supra, defendants were charged with assault with intent to kill, upon an officer who was attempting to arrest them for a felony alleged, to have been committed in another state, and without a warrant. The jury were "nowhere distinctly told that unless the respondents were found to have made the assault with an intent to take life, they could be convicted of nothing but a common assault." On the contrary their guilt was treated as depending upon the legality of the attempted arrest. Held, therefore, that their conviction must be reversed.

The court said: "The intent is the body of the aggravated offense. If death results from an unlawful act, the offender may be guilty of murder, even though he did not in-

tend to take life; but if the assault, however dangerous, is not fatal, the offender cannot be convicted of an assault with intent to kill, unless the intent existed. An intent to take life may sometimes be presumed from the fact of killing, but when the fact does not exist the intent must be otherwise established. Any inference that may be drawn from the nature of the weapon and the manner of its use is an inference of fact to be drawn by the jury upon a consideration of these with other circumstances of the case. 2 Bish. Cr. Law § 741, *Roberts v. People*, 19 Mich. 401, and *Patterson v. State*, 85 Ga. 131, 11 S. E. 620, 21 Am. St. 152."

24—*Prine v. State*, 73 Miss. 838, 19 So. 711.

The court said that the instruction omits "any reference to what was the state of P.'s mind,— Whether he had the murderous purpose formed at the time he provoked the difficulty,— if, indeed, the jury should believe from the evidence that P. first approached C., and brought on the difficulty. The jury might believe P. was the aggressor, and brought on the difficulty, and that he entered it armed with a pistol, yet P. was not cut off from the right of self-defense, unless the jury should further believe from the evidence that P. so brought on the difficulty, armed with a deadly weapon, and intending to use it when he provoked or brought on the encounter. He must have been the originator of the difficulty; he must have entered it armed, and he must have so brought it on and entered into it intending to use his pistol and overcome his adversary, if necessary in the course of the encounter."

§ 4549. **Specific Intent is Not Necessary.** Even if the jury may believe that the defendant fired the shot that struck G., yet unless the jury believe beyond a reasonable doubt that the defendant had the specific intent to shoot G., they must find the defendant not guilty.<sup>25</sup>

§ 4550. **Failure to Prove Intent to Kill Does Not Necessarily Mean That Defendant Must be Acquitted.** (a) The defendant can only be convicted upon proof that he did without excuse commit the assault upon the said X. with the felonious intent to take his life.<sup>26</sup>

(b) Unless the jury believe from the evidence beyond every reasonable doubt, that the defendant assaulted H. with the intent to murder him, then the jury cannot convict the defendant.

(c) If, after hearing all the evidence, the jury have a reasonable doubt as to whether the defendant assaulted H. with the intent to get money from him, or with the intent to murder him, then the jury cannot convict the defendant.<sup>27</sup>

§ 4551. **Premeditated Design Need Not be Proven to Make Out a Case of Assault With Intent to Murder.** (a) Before the jury can reach a conviction in this case for assault with intent to murder, they must believe from the evidence, beyond all reasonable doubt, and to a moral certainty, that the defendants, with malice aforethought and with premeditated design, tried to kill C.; that they failed to justify in any particular for their acts as proven.<sup>28</sup>

(b) Before the jury can convict the defendant, as charged in the indictment, they must believe beyond all reasonable doubt that the defendant premeditatedly and with malice aforethought assaulted C., with the intent to unlawfully and maliciously kill the said C.<sup>29</sup>

§ 4552. **Deliberation Not a Necessary Element.** Before you can convict defendant of an assault to murder, you must find, beyond a reasonable doubt, that, at the time the gun fired, defendant had in his mind the deliberately formed intent to kill H.; and, if you do not so find, you will acquit defendant of an assault with intent to murder.<sup>30</sup>

25—*Bush v. State*, 136 Ala. 85, 33 So. 878 (879).

Held faulty, "in that it required the court to instruct the jury that a specific intent on the part of the defendant to shoot G., the party alleged to have been assaulted, was necessary to a conviction of the defendant. A like charge was condemned in the case of *Walls v. State*, 90 Ala. 618, 8 So. 680."

26—*Ehymer v. State*, 95 Ind. 140 (143).

"The instruction is erroneous because it amounts to a direction to the jury that, unless the proof showed the appellant to have committed the assault and battery with intent to kill, he should be acquitted. . . . The law is settled in this State under the charge preferred against appellant he might have been acquitted of the felonious intent and convicted of an assault and battery."

27—*Fleming v. State*, 107 Ala. 11, 18 So. 263. Above charges condemned for similar reason.

28—*Welch v. State*, 124 Ala. 41, 27 So. 307 (308).

The court said that it "asserts the wholly untenable proposition that, to constitute an assault with intent to murder, there must not only be malice, but also premeditated design, *Meredith v. State*, 60 Ala. 441."

29—*Smith v. State*, 141 Ala. 59, 37 So. 423.

Properly refused because "premeditation is not a necessary element in the offense of an assault with intent to murder. *Wood v. State*, 128 Ala. 27, 29 So. 557, 86 Am. St. 71."

30—*Hamilton v. State*, 41 Tex. Cr. App. 644, 56 S. W. 926 (928).

"One can be guilty of an assault with intent to murder upon either express or implied malice, and hence it is not necessary that 'the deliberately formed intent to kill' should exist, but if the intent to kill arose from the sudden impulse, without adequate cause, as indicated in the usual charge of murder in the second degree, the assault may still be an assault with intent to murder."

§ 4553. **Voluntary Drunkenness, Though No Excuse for a Crime, May Be Considered in Reference to Intent.** While it is a general rule of law that voluntary drunkenness is no excuse or justification for a crime perpetrated under its influence, still in cases of this kind drunkenness if proved, may be considered by the jury for the purpose of determining whether the defendant at the time of the alleged offense was capable of forming a willful, deliberate design to take life. And in this case, although the jury may believe from the evidence beyond a reasonable doubt that the defendant made an assault with a dangerous weapon upon said E., in the manner and form as charged in the indictment, still, if you further believe from the evidence that just before and at the time defendant made such assault he was so deeply intoxicated by spirituous liquors as to be incapable of forming in his mind a design willfully and deliberately to do the act, then such an assault, under such a state of intoxication, would not amount to an assault with intent to commit murder.<sup>31</sup>

§ 4554. **If the Crime Would Be Manslaughter if Death Had Ensued.** If the jury find from the evidence that the defendant was intoxicated, as hereinbefore set forth, and they should also find that the defendant shot X. in such manner that if death had ensued it would have been manslaughter, they should find the defendant guilty.<sup>32</sup>

§ 4555. **Using the Word "Shoot" Instead of "Kill."** If you find that the defendant, knowing the revolver to be loaded, pointed it at X., and pulled the trigger thereof with intent to shoot X., the intent to kill is proven, even though you should also find that the revolver missed fire or failed to go off.<sup>33</sup>

§ 4556. **In a Prosecution for Assault With Intent to Kill, an Instruction Should Not Include What Constitutes Murder.** The court charges the jury that malice is an essential ingredient of murder, and if the jury are not satisfied beyond a reasonable doubt, not only that the defendant fired the shot, but also that it was fired at G. with the intent to strike him, and for the purpose of inflicting death, and with malice, they cannot find the defendant guilty as charged in the indictment.<sup>34</sup>

31—State v. Cather, 121 Ia. 106, 96 N. W. 722 (723).

"This was erroneous, in that it omitted a reference to the other included offenses, involving a specific intent. State v. Bell, 29 Ia. 318; State v. Pasnau, 118 Ia. 501, 92 N. W. 683."

32—Cline v. State, 43 Ohio, St. 332, 1 N. E. 22 (24), 5 Am. Cr. Rep. 57.

"The jury would understand from such a charge, and no doubt the judge desired to be understood as saying, that if death had resulted, and the crime would have been manslaughter, the defendant might, death not resulting, be found guilty of the felony charged in one of these counts. But to convict of manslaughter, it is not necessary to show either malice or an intent to kill or wound. It is sufficient to show an unlawful killing. To convict of the felony charged in this indictment, it is necessary to

show malice, and an intent to kill or wound. The charge was manifestly erroneous, and plainly prejudicial."

33—Winn v. State, 82 Wis. 571, 52 N. W. 775 (778).

The court said: "We think it quite impossible that the jury could have been misled by the possible want of accuracy in the use of the term 'shoot' in the instruction." It seems that if the word "kill" or "murder" is substituted for "shoot," this instruction would be correct.

34—Bush v. State, 136 Ala. 85, 33 So. 878 (879).

The court said, this charge "requested by the defendant was confused and misleading. Moreover the court was not required under the law to charge anything as to an actual killing and the court properly refused the same. Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Ogletree v. State, 28 Ala. 693 (703); Moore v. State, 13 Ala. 532."



§ 4557. **Reasonable Doubt Must Be As to the Whole Evidence and Not Only In Regard to the Intent.** To constitute the crime charged, there must be a union of act and intent, and if from all the evidence you have a reasonable doubt as to the defendant having the intent to commit the crime charged, or a reasonable doubt as to his having a sufficiently sane mind to form the criminal intent, your verdict should be for the defendant.<sup>35</sup>

§ 4558. **Assault With Intent to Kill—Self-defense.** (a) The court charges the jury that if S. presented his gun at defendant and snapped the same at him once or twice, then the defendant would have the right to act upon such apparent danger and return the fire, if the jury do not further believe beyond a reasonable doubt that the said defendant was at fault in bringing on the difficulty, and could not have escaped without increasing his danger, or have avoided the impending peril by a retreat with reasonable prospects of safety.<sup>36</sup>

(b) If you believe that defendant committed the assault as a means of defense, believing at the time he did so (if he did so) that he was in danger of losing his life or of serious bodily injury at the hands of the said W., then you will acquit defendant, unless you further believe from the evidence, beyond a reasonable doubt, that the defendant sought the meeting with the said W. for the purpose of provoking a difficulty with said W. with intent to take the life of said W. or do him such serious bodily injury as might probably end in the death of said W., and if you so believe from the evidence beyond a reasonable doubt, then you are instructed that if the defendant sought such meeting for the said purpose and with such intent, defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own self-defense; but, if he had no such purpose and intention in seeking to meet the said W., then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts and circumstances indicated to be necessary to protect himself from danger or what reasonably appeared to him at the time to be danger.<sup>37</sup>

35—Hornish v. People, 142 Ill. 620 (624), 32 N. E. 677.

"The refusal of this instruction is in harmony with the rule laid down in repeated decisions of this court. Thus in Mullins v. People, 110 Ill. 42, where a defendant on trial for robbery attempted to prove an alibi, we said: 'Nor is it proper for the court to designate any particular branch of the case, and tell the jury that unless it is proved beyond a reasonable doubt, they should acquit. The reasonable doubt the jury is permitted to entertain must be as to the whole of the evidence, and not as to a particular fact in the case.' See also Crews v. People, 120 Ill. 317, 11 N. E. 404; Leigh v. People, 113 Ill. 372; Davis v. People, 114 Ill. 86, 29 N. E. 192."

36—Hendricks v. State, 122 Ala. 42, 26 So. 242 (243).

This instruction "in its last hypothesis, after having stated the first as a basis therefor, when properly constructed means, as if it

read: 'If the jury do not further believe beyond a reasonable doubt (both) that the said defendant was at fault in bringing on the difficulty, and (also that he) could not have escaped without increasing his danger,' etc. If the defendant was at fault in bringing on the difficulty, and the jury should have so believed, there remained no necessity for proof, or the belief of facts proved, as further hypothesized in the charge touching the duty of retreat. He could not be heard to urge in his own justification, a necessity for the killing, which was produced by his own wrongful act. The charge exacted too high a degree of proof. Boulden v. State, 102 Ala. 79, 15 So. 341; Storey v. State, 71 Ala. 329."

37—Leito v. State, — Tex. Cr. App. —, 92 S. W. 418.

"This charge is erroneous. The mere fact that one seeks a party for the purpose of provoking a difficulty, would not forfeit his right

(c) The right to defend one's self against the violent assaults of another is a right which the law concedes to all men. In repelling danger not of his own seeking, whether such danger be real or only apparently real and impending, the law permits one to use force even to the extent of killing his assailant, if that be necessary or apparently necessary to avert the apprehended danger, and in such cases the killing would be justifiable, although it may afterwards turn out that such appearances were false and misleading. But one so placed must act at his peril from the force of circumstances in which he stands, for his conduct will be subject to judicial review, and a jury, with all the facts and surrounding circumstances before them, and not he, must finally determine whether or not he had reasonable grounds to apprehend danger; and such jury must determine with all the facts and circumstances before them whether or not he in good faith believed himself in danger. The defendant, therefore, may have done the shooting complained of and still be innocent of any offense against the law. If at the time he shot deceased he had reasonable cause to apprehend from deceased, and in good faith did apprehend, the immediate danger of being killed, or receiving some serious injury to his person, and if to avert such danger or apparent danger he shot, and if at the time he did so he had reasonable cause to believe, and in good faith, did believe, it necessary or apparently necessary in order to protect himself from such injury for him to shoot deceased, then in that case you should acquit him on the ground of necessary self-defense. But if he sought, brought on, or voluntarily entered into a difficulty with deceased with a formed felonious intent to take the life of deceased, then you must not acquit him on the ground of self-defense, for under such facts, if you find they exist, there is no self-defense in this case.<sup>38</sup>

(d) If you believe from the evidence beyond a reasonable doubt that the prosecuting witness at the mouth of the alley or near thereto threw a brick at or against the defendant, or otherwise assaulted him, and immediately thereupon turned and fled from the defendant, and that while so fleeing the defendant, not reasonably apprehending death or great bodily harm, shot the prosecuting witness X., such

of self-defense. He must do some act or utter some word at the time calculated to provoke a difficulty before his right of self-defense would be forfeited. The mere seeking of it for that purpose, without provoking it, would not forfeit that right. We have discussed this phase of the law of provoking the difficulty so often that we do not see fit to further elaborate on the proposition, but refer to the decisions. *McCandless v. State*, 42 Tex. Cr. R. 58, 57 S. W. 672; *Bearden v. State* (Tex. Cr. App.), 79 S. W. 37; *Dent v. State* (Tex. Cr. App.), 79 S. W. 525."

38—*State v. Walker*, 196 Mo. 73, 93 S. W. 385 (389).

"We can conceive of no more hurtful instruction than this one was, and one with less basis. There was nothing in the remarks of de-

fendant to deceased, accepting his son's version of what occurred, that justified the deadly assault made by deceased upon the defendant. On this point the testimony of defendant was corroborated in all material points by that of the son of the deceased, and by the physical facts which appeared to the other disinterested witnesses when they appeared on the scene of the homicide. The proximity of the combatants, the loaded pistol, the wounds upon the mouth and face of defendant, the range of the bullet, and the crippled condition of defendant from rheumatism all indicate that the deceased was the aggressor, and, but for the condition of the revolver, the result probably would have been that the defendant would have been the victim instead of deceased."

shooting would not be justifiable, and you would be warranted in finding the defendant guilty as charged in the indictment.<sup>39</sup>

§ 4559. **Reckless Shooting—Assault With Intent to Kill.** If the jury believe that the shot was fired by the defendant, but that as he went out of the door, he merely fired the shot recklessly, and did not intend to shoot the deceased, they must find the defendant not guilty.<sup>40</sup>

39—Clark v. State, 159 Ind. 60, 64 N. E. 589 (590).

"In criminal prosecutions where the defense was an alibi, the rule has been frequently affirmed by this court that, if the evidence relating thereto, created a reasonable doubt of the guilt of the accused, he should be acquitted. Adams v. State, 42 Ind. 373; Binns v. State, 46 Ind. 311; Kaufman v. State, 49 Ind. 248; French v. State, 12 Ind.

670, 74 Am. Dec. 229; Trogdon v. State, 133 Ind. 1, 32 N. E. 725; Plummer v. State, 135 Ind. 308, 34 N. E. 968. . . . Considered in any light, the charge may be said to be misleading. The state was the only party upon whom it was incumbent to prove any material fact beyond a reasonable doubt."

40—Bush v. State, 136 Ala. 85, 33 So. 878 (879), holds this instruction "palpably false and misleading."



## CHAPTER CLXXV.

### CRIMINAL—BURGLARY—ROBBERY.

See Approved Instructions, Chapter XCIV, Vol. II.

#### BURGLARY.

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| <p>§ 4560. Failure to include all the elements in an instruction is erroneous.</p> <p>§ 4561. Elements of burglary—Error to omit the value of property, ownership of building, or that the property was in the building.</p> <p>§ 4562. Burglary committed upon suggestion of a detective for the purpose of entrapping defendant.</p> <p>§ 4563. Recent possession, of no effect as evidence except when the larceny and the breaking are committed by the same person and at the same time.</p> <p>§ 4564. Whether possession of stolen property is evidence of guilt is for the jury to determine in connection with all the other facts and circumstances in proof—Nebraska.</p> <p>§ 4565. Exclusive possession of property recently stolen does not warrant a presumption of the guilt of breaking and entering, but only of larceny.</p> <p>§ 4566. Possession must be exclusive as well as recent.</p> <p>§ 4567. Possession of stolen property alone not sufficient to convict—A defendant indicted as principal cannot be convicted as accessory or vice versa.</p> | <p>§ 4568. Defendant entitled to acquittal unless breaking and entering is proved beyond a reasonable doubt.</p> <p>§ 4569. Possession is evidence of guilt, unless other facts be such that the jury still has a reasonable doubt—"Presumption" and "prima facie evidence" defined, when used in this connection.</p> <p>§ 4570. Reasonable and credible account of defendants' possession required—Comment on the weight of evidence.</p> <p>§ 4571. Entry of burglary must be made by force, threats or fraud.</p> <p>§ 4572. The stealing and the breaking and entering put in the alternative.</p> <p>§ 4573. Former conviction—Added punishment.</p> |
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#### ROBBERY.

- § 4574. Elements of robbery—Omission of intent.
- § 4575. Taking so suddenly as not to allow of resistance—Taking into consideration condition of prosecuting witness.
- § 4576. Description of money as "good and lawful" not required.
- § 4577. Instruction should be confined to the property described in the indictment.

#### BURGLARY.

**§ 4560. Failure to Include All the Elements in an Instruction Erroneous.** The court instructs you that it is not necessary for the state to prove beyond a reasonable doubt that the defendant stole and carried away all the property enumerated in the information; but if you believe from the evidence, beyond a reasonable doubt, that the defendant, D., feloniously, burglariously, willfully, maliciously and forcibly did break into and enter the building described in the information, and you further believe that said building was occupied

by X. & Y., and you further believe beyond a reasonable doubt that said D., being in said building, in the second story thereof, by means of a pole or any other instrument reached through the skylight opening in the floor of the second story into the storeroom of X. & Y. below, in the night season, and by means of said pole or other instrument, took any property of value, however small, of X. & Y., named in the information, and you further believe, beyond a reasonable doubt, that the said D. so took said property for the purpose and with the intent to steal the same, you are instructed that you shall find the defendant guilty, notwithstanding the fact that you may also believe from the evidence that the said D. did not steal and carry away all of the goods of X. & Y. mentioned in the information.<sup>1</sup>

§ 4561. **Elements of Burglary—Error to Omit the Value of Property, Ownership of Building or that the Property Was In the Building.** The court instructs the jury that if you find, beyond a reasonable doubt, that defendant did, at the time charged in the information, willfully, maliciously, burglariously, and forcibly break and enter said store building, with the intent then and there to steal, take and carry away the property of the firm of X. & Y., and although he did not steal, take, and carry away any of said property, yet you should find the defendant guilty.<sup>2</sup>

§ 4562. **Burglary Committed Upon Suggestion of a Detective for the Purpose of Entrapping Defendant.** The court instructs the jury, although you may believe from the evidence that the defendant in company with C., broke and entered said car, and stole, took and carried away therefrom the shoes mentioned in the indictment, yet if you further find and believe from the evidence that the scheme and purpose to so break and enter and to take said goods, or any goods, from said car, originated with and was conceived by witness F. and communicated to the defendant, and that the defendant acted only upon the suggestion and solicitation of said F., and adopted said scheme and purpose and carried the same into execution, and you further find that said F. was a decoy or detective, and acting under the direction of one H., a police officer of Springfield, and for the

1—Bergeron v. State, 53 Neb. 752, 74 N. W. 253.

"It is a familiar rule that an instruction is faulty which purports to cover the entire case, but which in fact fails to include all the elements necessarily involved in the case and within the evidence. Barnes v. State, 40 Neb. 545, 59 N. W. 125; McAleer v. State, 46 Neb. 116, 64 N. W. 358. The instruction quoted omitted important elements of the crime charged, namely that the breaking and entering of the building occurred in the nighttime and with the intent to steal. Under the instruction, the defendant could have been convicted of burglary, even though he broke and entered the building in the daytime for a lawful purpose, in case he subsequently in the nighttime took property in the building belonging to the complaining witnesses, with the intent to steal the same. On account of the omissions indicated, the instruction was erroneous. Ash-

ford v. State, 36 Neb. 38, 53 N. W. 1036."

2—Bergeron v. State, 53 Neb. 752, 74 N. W. 253 (254).

"The court, by this instruction, attempted to state what was necessary to be proven to entitle the state to a conviction; yet the paragraph of the charge omitted therefrom the question of the value of the property. The section of the Criminal Code already mentioned (48) requires that the property must possess some value to constitute the offense of burglary, when the information charges that the breaking and entering were effected with the intent to steal. The instruction likewise leaves out the element of ownership of the building, and fails to state that the property intended to be stolen must have been within the building. These were essential ingredients of the crime. Winslow v. State, 26 Neb. 308, 41 N. W. 1116."

purpose of entrapping defendant into the commission of the offense charged in the indictment, in order that he might be prosecuted therefor—you will acquit the defendant.<sup>3</sup>

§ 4563. **Recent Possession of No Effect As Evidence Except When the Larceny and the Breaking Are Committed By the Same Person and at the Same Time and Is Unexplained.** Possession of stolen property shortly after theft is sufficient to raise the presumption of guilt, unless the attending circumstances or other evidence so far overcome the presumption which is raised as to create a reasonable doubt of the prisoner's guilt. So, too, the possession of property that has been recently stolen from a building by means of breaking and entering said building creates a presumption of guilt of the person or persons in whose possession said property is found. That is, it creates a presumption that he or they are the party or parties that broke or entered said building and took therefrom the said property, unless the attending circumstances or other evidence adduced explains such possession, and shows that the same might have been otherwise acquired. If, therefore, in this case, you find that the building in controversy was in fact broken into and entered substantially as alleged in the indictment, and that there was therein at the time goods and property that have been introduced in evidence as property stolen from said building, together with other property which was kept for use, sale, or deposit, and that said property or some of it was at the time alleged stolen and carried away from the building, and shortly thereafter the said property, or some of it, was found in actual possession of the defendant, then said possession would raise a presumption of guilt of the defendant, unless the attending circumstances or other evidence adduced so far overcomes the presumption thereby created as to raise a reasonable doubt of the guilt of the defendant.<sup>4</sup>

§ 4564. **Whether Possession of Stolen Property Is Evidence of Guilt Is for the Jury to Determine In Connection With All the Other Facts and Circumstances In Proof—Nebraska.** If you believe from the evidence, beyond a reasonable doubt, that, soon after the burglary of the storehouse or warehouse of the said B., and the larceny

3—State v. Chappell, 179 Mo. 324, 78 S. W. 585 (587).

"The court was clearly right in refusing the instruction."

"To support the contention of appellant that this instruction was erroneously refused, we are cited to the following cases: State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. 360; Saunders v. People, 38 Mich. 218; Spelden v. State, 3 Tex. App. 156, 30 Am. Rep. 126; Allen v. State, 40 Ala. 334, 91 Am. Dec. 476; Connors v. People, — Colo. Sup. —, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. 295. A careful examination of those cases will clearly demonstrate that they are not applicable to this contention, and fall far short of supporting it. . . . None of these cases sanction the principle announced in the instruction sought to be given by the trial court. The court was clearly right in refusing the instruction."

4—State v. Williams, 120 Ia. 36, 94 N. W. 255 (256).

"It is only when the breaking and entering and the larceny are committed at the same time and by the same person, in other words, where the goods are stolen by means of the breaking and entering, that any effect is to be given the recent possession of such goods. In such a case the jury may be instructed that such possession, if unexplained, will justify them in concluding that the person who stole the goods also did the breaking and entering. But they are not bound to make such inference. At most, there is a mere presumption of guilt from the possession of the goods, which, in the absence of explanation, will justify the jury in concluding that the one in possession of property recently stolen, by means of breaking and entering, broke and entered the building. State v. Jennings, 79 Ia. 513, 44 N. W. 799. For the reasons stated, the instruction was erroneous. Reg. v. Hughes, 14 Cox Cr. Cas. 223."



of the corn therefrom, a portion of the said corn so stolen was in the exclusive possession of the defendant, M., you are instructed that this circumstance, if so proven, is presumptive, but not conclusive, evidence of the defendant's guilt; and you should consider this circumstance, if so proven to your satisfaction, along with the other evidence in the case, in arriving at your verdict, giving it such weight and effect as you think it entitled to, and giving the defendant the benefit of any reasonable doubt of guilt.<sup>5</sup>

**§ 4565. Exclusive Possession of Property Recently Stolen does not Warrant a Presumption of the Guilt of Breaking and Entering, but only of Larceny.** The court instructs the jury that if you believe from the evidence that the house of K. was broken and entered, and

5—Metz v. State, 46 Neb. 547, 65 N. W. 190 (192).

"The foregoing was erroneous for more than one reason. By it the court assumed that a burglary and larceny had been committed. The accused, during the entire trial, strenuously insisted that such was not the fact; and it was prejudicial error for the court to assume as established the corpus delicti. True, that question was submitted to the jury for their determination by another instruction, but that did not cure the error indicated in the instruction quoted, since the jury would be left in doubt as to which instruction should guide them in their deliberations. *Ballard v. State*, 19 Neb. 609, 28 N. W. 271. The instruction under consideration is bad for the reason it misdirected the jury as to the presumption arising from the possession of stolen property. In a prosecution for larceny, some of the courts say that the exclusive possession by the defendant of the property stolen, recently after the theft, unexplained, is *prima facie* evidence of guilt. Other courts, including ours, lay down the doctrine that, in larceny cases, no such presumption exists, but that the effect given to the fact of possession of stolen property is solely for the jury to determine, when considered in connection with all the other facts and circumstances disclosed on the trial. *Robb v. State*, 35 Neb. 285, 53 N. W. 134; *Dobson v. State*, 46 Neb. 250, 64 N. W. 956. In *Robb v. State*, supra, the writer used this unfortunate expression, which is now withdrawn: 'It is only where the possession of goods recently stolen is unexplained that the presumption, *prima facie*, of guilt arises.' From the general scope of opinion in that case, it is obvious that the court intended to and did, decide that no presumption of guilt arises from the mere fact of possession of stolen property, but that the inference to be drawn from such fact is alone for the jury, when weighed in connection with all the evidence adduced on the trial. The presumption of guilt never arises from the mere posses-

sion of stolen property, unless the defendant has come into such possession recently after the theft, and such possession is unexplained, even in states where the rule of presumption prevails. Both of these elements are omitted from this instruction. The bare possession of stolen property is not, alone, presumptive evidence of the burglary. In burglary, it is necessary that the breaking and entering be committed in the nighttime; and the presumption will not be indulged that the breaking and entering were in the night season from the fact alone the defendant was found in possession of the fruits of the crime. But, in prosecutions for burglary, like those for larceny, the effect to be given to the fact of possession is solely for the jury. 1 Whart. Cr. Law, par. 813; *People v. Gordon*, 40 Mich. 716; *People v. Beaver*, 49 Cal. 57; *People v. Hannon*, 85 Cal. 374, 24 Pac. 706; *Methard v. State*, 19 Ohio St. 363. It is true, as suggested by the attorney general, that the above instruction is almost identically the instruction given in *Whitmann v. State*, 42 Neb. 841, 60 N. W. 1025, which was approved by this court. In that case, the point was not that the trial court assumed that a burglary and larceny had been committed, nor was that feature of the charge reviewed. Again, the instruction in that case, as was said by Ryan, C. J., 'confined the presumption which might be entertained to larceny of the goods themselves'; while, in the case at bar, the jury were told that the presumption might be indulged, from the fact of possession of the stolen property, that the defendant was guilty of the burglary. It is obvious that the instruction we have been considering is the more objectionable of the two. Nevertheless, the instruction in the *Whitmann* case is contrary to the rule announced in *Robb v. State*, supra, and *Dobson v. State*, supra, and in so far as the decision in *Whitmann v. State* conflicts with the two cases mentioned it is overruled. It was error to give the above instruction, for which the case must be reversed."

goods taken therefrom; that the goods were found in a house of which the defendants were in possession as tenants or occupants,—that, in the absence of a reasonable and credible explanation of how the goods came to be in their house, the fact that the goods were found in the house would be a circumstance proper for you to consider in considering the question of the guilt or innocence of having broken and entered the house; but this fact that the goods were found in the house, unsupported by other evidence of their connection with the breaking and entering it, would not be sufficient to convict the defendants of the crime charged.<sup>6</sup>

§ 4566. **Possession must be Exclusive as well as Recent.** The unexplained possession of property shown to have been taken by burglary or robbery is sufficient to warrant a conviction of these crimes, and any explanation of such possession must be both reasonable and credible, or enough so as to raise a reasonable doubt in the minds of the jury, who are the sole judges of the reasonableness and probability as well as credibility.<sup>7</sup>

§ 4567. **Possession of Stolen Property alone not Sufficient to Convict—A Defendant Indicted as Principal cannot be Convicted as Accessory or Vice Versa.** You are instructed that if you shall find from the evidence that the defendant obtained possession of the chickens, or some of them, that were stolen from X., if in fact you find that any were stolen, and shall further find from the evidence that the accused had knowledge at the time of receiving said chickens that they had been stolen from X., still you should find the defendant not guilty of the crime of burglary unless you find that he participated in the burglary, or that he counseled or advised the commission of the crime.<sup>8</sup>

6—*Roberson v. State*, 40 Fla. 509, 24 So. 474 (479), 52 L. R. A. 751.

"Unless the goods were obtained by a breaking and entry,—in other words, unless the breaking and entry and the larceny were parts of the same transaction, or, not parts of the same transaction, unless the breaking and entry and the larceny were committed by the same person,—the exclusive possession of property recently stolen does not warrant a presumption that the possessor is guilty of the breaking and entry, although it does warrant a presumption that he is guilty of larceny. *Knickerbocker v. People*, 43 N. Y. 177; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; *State v. Rivers*, 68 Ia. 611, 27 N. W. 781; *Smith v. People*, 115 Ill. 17, 3 N. E. 733; *People v. Wood*, 99 Mich. 620, 58 N. W. 638."

7—*Roberson v. State*, 40 Fla. 509, 24 So. 474 (479), 52 L. R. A. 751.

"The instruction given on behalf of the state was erroneous, in that it did not embrace the requirement that the possession must be exclusive, and recently after the larceny by breaking. *Tilly v. State*, 21 Fla. 242."

8—*Sandage v. State*, 61 Neb. 240, 85 N. W. 35 (36), 87 Am. St. 457.

"By this instruction the jury were authorized to find the defendant guilty as a principal although the jury may have found by the evidence that he was only an accessory to the crime. This, we understand, cannot be done under the laws of this state, which makes the offense of an accessory independent of that of the principal, and a substantive offense in itself. The defendant was charged with the crime of burglary, and by the jury was found guilty as charged. Under the instruction this verdict was warranted, even though, as is more probable under the evidence as we understand the record, they believed he was guilty only of aiding, abetting or advising the commission of the crime, and was the recipient of the fruits thereof. In *Casey v. State*, 49 Neb. 403, 68 N. W. 643, says Post, C. J., writing the opinion of the court (page 406, 49 Neb., and page 644, 68 N. W.): 'In these states, where, by statute, the distinction between principals and accessories has been abolished, the accused may be charged either as principal or an accessory before the fact, or both, at the option of the pleader; but in other jurisdictions, where, as in this state, the rule of the common law has not been relaxed, one not present or actually participat-

§ 4568. **Defendant Entitled to Acquittal unless Breaking and Entering is Proved Beyond a Reasonable Doubt.** (a) If you believe from the evidence that the defendants at the bar, or either of them, did not break or enter this building, it will be your duty to acquit them, or either of them, that you believe did not commit the offense.<sup>9</sup>

(b) The court instructs the jury for the state that in a trial for burglary and larceny, possession of property shown to have been recently stolen from the burglarized house is a circumstance from which the jury may infer the guilt of the person or persons found in possession of the recently stolen property; and if in this case the jury believe from all the evidence and circumstances in evidence that the barn house of the F. Co. was broken into and property of the F. Co. of any value whatever, stolen therefrom, and that recently thereafter the defendants were then in possession of said stolen property, then the jury are authorized to convict these defendants, and should do so, unless the defendants have given in the evidence a reasonable account or explanation of how they came in possession of the same.<sup>10</sup>

§ 4569. **Possession is Evidence of Guilt, Unless Other Facts be Such that the Jury still has a Reasonable Doubt—"Presumption" and "Prima Facie Evidence" Defined, when used in this Connection.** The court instructs the jury that the possession of property that has been recently stolen from a building by means of breaking said building is sufficient to raise a presumption of guilt of the person in whose possession said property is found; that is it creates the presumption that he is the party that broke and entered said building and took therefrom the said property, unless the attending circumstances or evidence explains said possession, and shows that the same may have been otherwise honestly acquired. If, therefore, in this case, you find that the building in controversy was in fact broken into substantially as alleged in the indictment, and that there was therein at the time harness and other property, which was kept there for use, deposit, or safe keeping, and that said property, or some of it, was at the same time alleged stolen and carried away from said building, and shortly thereafter the same, or some of it, was found in the possession of defendant, the said possession would raise a presumption of guilt of the defendant as to matters and things charged in the

ing in the commission of the crime alleged, but whose offense consists in the aiding, inciting, or procuring of its commission by the principal offender, should be charged as an accessory before the fact, and since, as has been said 'the law never condemns without accusation \* \* \* one indicted as a principal in a felony cannot be convicted of being an accessory before the fact, or, indicted as such accessory, cannot be found guilty, as a principal felon.' 1 Bish. Cr. Law § 893. And in *Wagner v. State*, 43 Neb. 1, 61 N. W. 85, *Irvine, C. J.*, citing *Whart. Cr. Law*, 208, asserts, as a familiar rule, that no conviction as an accessory will lie under an indictment charging one as principal, and vice versa."

9—*McNish v. State*, 45 Fla. 83, 34 So. 219 (220).

"While it is unquestionably the

law that, where the evidence proves a defendant innocent of the crime, it is the duty of the jury to acquit, the charge is subject to the criticism that it may lead the jury to believe that the defendant must prove his innocence, and not that the state must prove his guilt beyond a reasonable doubt. As an isolated proposition, the charge is misleading, and should not be given."

10—*Cook v. State*, — Miss. —, 28 So. 833 (834).

This "instruction for the state was defective in omitting the words 'beyond reasonable doubt' but this is cured by all four of the instructions given for the defendant. The other parts of this instruction are warranted as applied to the evidence in this case by *Harris v. State*, 6 Miss. 304."



indictment, unless the attending circumstances or other evidence overcome the presumption that is hereby raised as to create a reasonable doubt of the defendant's guilt. In deciding the weight to be given to such presumption you will take into consideration the time which had elapsed between the taking of the goods and the finding of them in the possession of the defendant, if you find they were so found in his possession; the place from where the goods were taken, and the distance therefrom to the place where said goods were found in his possession, if you find they were so found; the kind of property; whether easily transferable or not; what, if anything, was said at the time by the defendant, and what, if any, explanation he made in regard to his possession of said property, and all other evidence tending to explain said possession; and all other facts and circumstances proved fairly tending to show whether the defendant came into possession of said property fairly and honestly.<sup>11</sup>

**§ 4570. Reasonable and Credible Account of Defendant's Possession Required—Comment on the Weight of Evidence.** (a) When stolen property is found in the possession of a person, and such person gives a reasonable account of how he came by such property, or how it came into his possession, by stating that such person gave it to him, it then becomes the duty of the state to prove that this explanation is not true; and if the state fails to do this, the jury should find the defendant not guilty, unless there is evidence in the case otherwise showing the defendant's guilt beyond all reasonable doubt.<sup>12</sup>

11—State v. Brady, 121 Ia. 561, 97 N. W. 62 (64).

"The law does not attach a 'presumption of guilt' to any given circumstance, nor does it require the accused to 'overcome the presumption thereby raised,' in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense that the words 'presumption' and 'prima facie evidence' must be understood when employed in this connection. Smith v. State, 58 Ind. 340; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Commonwealth v. Randall, 119 Mass. 107; Smith v. People, 103 Ill. 82; Bransom v. Commonwealth, 92 Ky. 330, 17 S. W. 1019; People v. Titherington, 59 Cal. 598. In 1 McClain's Cr. Law, par. 617 it is said the rule here stated is 'sounder in principle than that which requires the defendant in some form to overcome the presumption and establish his innocence.' That the word 'presumption,' as used in this class of cases, indicates no more than that the fact of possession is sufficient evidence to sustain a finding of guilt, as shown by the language employed in the opinion of this court in State v. Kelly, 57 Ia. 646, 11 N. W. 635,

where it is said: 'The recent unexplained possession of stolen property tends to establish the guilt of the person in whose possession it is found, and will authorize conviction unless the inference of guilt is overcome by other facts tending to establish the innocence of the accused. The law holds that the presumption in question, unless overcome, will authorize a conviction. If, as here indicated, the term 'presumption of guilt' be understood as something which authorized conviction, and not something requiring it, its use is not open to just criticism; but, unless guarded by proper explanation, we think there is danger that jurors may give it the latter construction.'

Exception is further taken to the instruction, which requires defendant to show the possession of the stolen goods by him as obtained 'honestly and fairly' before he can be relieved from the inference of guilt attaching to such possession. In view of the theory of the defense that the defendant was not and could not have been present at the time and place of the commission of the burglary, and that the harness was purchased by him from another person on the following day, we are of the opinion that the instruction referred to was misleading."

12—Leslie v. State, 35 Fla. 171, 17 So. 555 (557). Citing, Jones v. State, 30 Miss. 653, 64 Am. Dec. 175; Price v. Com., 21 Grat. 846; Garcia v.

(b) If you should find that the house mentioned in the indictment was broken into, and certain chickens were taken therefrom, and the same had been recently stolen, and that they were found in the possession of the defendant, and that when he was first challenged concerning his possession he gave an explanation thereof which was reasonable and probably true and accounted for defendant's possession in a manner consistent with his innocence, then it devolves upon the state to show the falsity of said explanation, and, unless you so find from the evidence, then find the defendant not guilty.<sup>13</sup>

§ 4571. **Entry of Burglary must be made by Force, Threats or Fraud.** Before you can convict defendant under the first count in the bill of indictment, the state must show by the evidence beyond a reasonable doubt that defendant entered the house during the day, and remained concealed therein until night, with the intent to commit the crime of theft, and, unless the state has so shown, you will not find the defendant guilty under said first count. If the defendant did not conceive the intent to commit the crime of theft until after he entered said house, if you find that he entered it, he will not be guilty, and it will be your duty to acquit him on both counts of the indictment.<sup>14</sup>

State, 26 Tex. 209, 82 Am. Dec. 605; Reg. v. Crowhurst, 47 E. C. L. 370; Belote v. State, 36 Miss. 96, 72 Am. Dec. 163; Blaker v. State, 130 Ind. 203, 29 N. E. 1077.

The court said in comment that this instruction "states the rule inaccurately and too broadly, and from its phraseology incorrectly gives the jury, as an unqualified command of the law, the instruction to acquit the defendant if his account of how he came by the possession of the stolen goods is a reasonable account, whether that account is credible, or is believed by the jury or not, or whether it raises a reasonable doubt in the minds of the jury or not, unless it is proven by the state to be untrue. The true rule is that, where a party who is found in possession of goods recently stolen, directly gives a reasonable and credible account of how he came into such possession, or such an account as will raise a reasonable doubt in the minds of the jury, then it becomes the duty of the state to prove that such account is untrue, otherwise he should be acquitted. The account given must be not only reasonable, but it must be credible, or enough so to raise a reasonable doubt in the minds of the jury, who are the judges of its reasonableness and probability as well as of its credibility. The account given may be reasonable and highly plausible, and yet the jury may not believe a word of it to be true. In the latter case they would have the right to convict upon the evidence furnished by the possession of the stolen goods alone, even though the state had not put in any proof directly to prove the falsity of the account given. The account

given by the possessor of goods recently stolen as to how he acquired such possession, must not only be reasonable, but it must be credible, or enough so to raise a reasonable doubt in the minds of the jury before it casts upon the state the burden of proving its falsity; and the jury are the sole judges of its reasonableness and credibility."

13—Dyer v. State, — Tex. Cr. App. —, 77 S. W. 456.

"This charge is upon the weight of evidence, as insisted by appellant, and is almost a literal copy of the one condemned by this court in Wheeler v. State, 34 Tex. Cr. App. 350, 30 S. W. 913."

14—St. Louis v. State, — Tex. Cr. App. —, 59 S. W. 889 (890).

"Article 838, Pen. Code, as amended in 1897, reads: 'The offense of burglary is constituted by entering a house by force, threats or fraud at night; or in like manner, by entering a house at any time, either day or night, and remaining concealed therein, with the intent in either case of committing a felony or the crime of theft.' The contention is that the entry under this statute, where the party remains concealed subsequent to the entry, must be made either by force, threats or fraud. Under the instructions of the court, appellant would be guilty of burglary whether he entered the house by fraud or not, if his intent was to steal at the time of the entry, though he entered through the open door during business hours. Such is not the statute. Where fraud is relied upon, the entry must be made by fraud,—some device or stratagem. This phase of the law was thoroughly discussed in Hamilton v. State, 11

§ 4572. **The Stealing and the Breaking and Entering put in the Alternative.** The court charges the jury that, even if defendant was found in possession of the stolen goods, yet, if the jury have a reasonable doubt from the evidence as to whether defendant stole them, or as to whether he broke and entered into the store-house with the intent to steal, the jury must acquit the defendant.<sup>15</sup>

§ 4573. **Former Conviction—Added Punishment.** (a) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged in the first count of the indictment in manner and form as therein charged; and if you further believe, from the evidence, beyond a reasonable doubt, that the defendant was indicted by the grand jury of this county in September, 1885, for the crime of burglary and larceny, and that in November, 1885, the defendant pleaded guilty to said crime of burglary and larceny, and was by this court sentenced to the penitentiary for a term of two years, and if you further believe, from the evidence, beyond a reasonable doubt, that the defendant went to the penitentiary on said sentence, then in such case you should find the defendant guilty and fix the term that he shall serve in the penitentiary at twenty years.<sup>16</sup>

(b) If you find the defendant guilty under the first count for burglary charging former conviction, say "We, the jury, find the defendant guilty in manner and form as charged in the first count of the indictment, and fix the time he shall serve in the penitentiary at twenty years."<sup>17</sup>

Tex. App. 116. That case has been followed uninterruptedly in this state. It was said in *Edwards v. State*, 36 Tex. Cr. App. 387, 37 S. W. 438, 'in this case, while the purpose with which defendant entered was possibly to steal, yet there was no fraudulent device or stratagem used in procuring an entry into said store. He entered, as other persons, through the open doorway during business hours.' See, also *State v. Moore*, 12 N. H. 42. In all cases of burglary by fraud, there must be an entry, and this entry must be consummated or brought about by some device or stratagem which would constitute a fraud in obtaining such entry. The mere walking into a storehouse and subsequent concealment, with the intent to commit theft, does not, of itself, constitute a fraudulent entry. The fraud included in theft does not constitute fraud in the entry. They are distinct frauds, within the purview of the statute. The fraud would be the same in the theft, or intended theft, whether the entry was accomplished by force or threats, and, unless the entry was by fraud, the subsequent theft, or intended theft, would not relate back to the entry, and be of sufficient cogency to constitute it a fraudulent entry. The exception to the court's charge was well taken."

15—*Hale v. State*, 122 Ala. 85, 26 So. 236 (238).

"The reasonable doubt hypothesized in this charge is alternative:

i. e. whether defendant stole the goods, or whether he broke into the house. The charge would have required an acquittal of burglary upon a reasonable doubt of the actual stealing, when the jury might have had no doubt of the breaking and entry with intent to steal and is therefore abstractly unsound."

16—*Watson v. People*, 134 Ill. 374 (375), 25 N. E. 567.

"By this instruction, the jury are directed to fix the prisoner's time in the penitentiary at twenty years, if they find he committed the crime charged in that count. It is true it required the jury to also believe, from the evidence, that the defendant had been previously convicted of the crime of burglary and larceny and sentenced to the penitentiary, but it does not require that belief to be based on any charge made in the first count, or, in fact, any count of the indictment. The first count does not charge a former conviction. It is an ordinary count for burglary, and upon a conviction under it the jury could fix the punishment at confinement in the penitentiary for any number of years not less than one or more than twenty. It was, therefore, error to instruct it to fix the term absolutely at twenty years, if the conviction was based on that count."

17—*Watson v. People*, supra.

"This instruction is objectionable. Under it, if the jury found the defendant guilty of burglary, they were bound to fix his punishment at



## ROBBERY.

§ 4574. **Elements of Robbery—Omission of Intent.** You are instructed that if you believe and find from the evidence that the defendant, G., on the — day of —, —, or at any time within three years next before the filing of the information in this case, to-wit, the — day of —, at the county of G. and state of Missouri, did then and there feloniously make an assault in and upon the body of R., and seventy-five dollars in money, or any other amount of money, of the personal property of the said R., from the person and in the presence of the said R., and against the will of the said R., then and there by force and violence to the person of the said R. feloniously did rob, steal, take, and carry away, you will find the defendant guilty as charged in the information, and assess his punishment at imprisonment in the penitentiary for any term of years that you may deem proper, but not less than five years.<sup>18</sup>

twenty years, whether there was any proof of his former conviction or not. What is known as 'The Habitual Criminal Act' in force July 1st, 1883 (1 Starr & Curtis' Statutes, p. 832 sec. 351), expressly provides that the former conviction and judgment shall be set forth in apt words in the indictment, and of course, like any other material allegation, it must be proved as alleged. By this instruction, the jury were not required to find that the defendant had been previously convicted of the crime of burglary as a condition to their fixing his punishment at twenty years, and they did not so find. He was found 'guilty in manner and form as charged in the first count of the indictment.' The jury might have thought a less number of years in the penitentiary adequate punishment for the crime of which they convicted him, but, under the instructions, they were bound to either acquit or fix his term at twenty years."

18—State v. Graves, 185 Mo. 713, 84 S. W. 904 (905).

The most serious proposition presented for consideration upon the record in this cause is the one in which the correctness of the above instruction given by the court upon the trial is challenged. It will be observed that this instruction fails to require the jury to find that the defendant did rob, steal, take, and carry away the money of the prosecuting witness with the intent to deprive him of it. The intent in robbery, as in larceny, is an essential element of the offense, and must be properly submitted to the jury. In State v. O'Connor, 105 Mo. 126, 16 S. W. 511, in criticising an instruction substantially the same as the one now under consideration, this court said: 'It has all the elements of robbery except the felonious intent, which is omitted. To constitute robbery, the

property must be taken from the person by force or putting in fear, against the will of the owner, with the intent to deprive the owner of it, and without any honest claim to it on the part of the taker. In other words, the taking must be with intent to steal. This is elementary law. Kelley's Crim. Law and Prac. Par. 582; Bish. C. L. par. 1162a. This element is wholly omitted from the instruction. This was error prejudicial to defendant in this case.' In State v. McLain, 159 Mo. 352, 60 S. W. 740, Burgess, J., in commenting upon the O'Connor Case, said: 'In that case the instruction which was condemned simply told the jury that if the defendant assaulted William Franke, and by force and violence to the person of him, the said Franke, took from the person of him, the said Franke, against his will, the watch named in the indictment, etc., they would find him guilty, regardless of the intent with which the offense was committed, and it was held to be erroneous. The only difference between the instruction passed upon in that case and the instructions complained of in the case at bar is in the use of the words 'willfully, feloniously, and violently' in this case, which is claimed by the state to be sufficient. But, in order to constitute robbery, the property taken must be with intent to steal, or to deprive the owner thereof, and the words used in the instruction do not necessarily import such a taking.' If the announcement of the rule in these cases is longer to be followed, this instruction must be condemned for failure to submit an essential element of the offense to the jury. This is simply the recognition of an old and well-settled principle in criminal law, and there is no good reason suggested why it should be departed from, and we are unwilling to do so."

§ 4575. **Taking so Suddenly as not to Allow of Resistance—Taking into Consideration Condition of Prosecuting Witness.** If you believe from the evidence beyond a reasonable doubt that the defendant, S., and K., in H. County, Texas, on or about the — day of —, —, did fraudulently and privately take from the person and possession of M. the money described in the indictment, without the consent of said M., and without his knowledge, with intent to deprive said M. of the value of the said money, and to appropriate it to the use and benefit of them, the said S. and K.; or if you so believe that the said S. and K. did then and there so fraudulently take the money described in the indictment from the person and possession of M., without his consent, and so suddenly as not to allow the said M. to make resistance to such taking before the money was carried away, taking into consideration his condition at the time; and you further find and believe that such sudden taking, if any, was with intent to deprive the said M. of the value of said money, and to appropriate it to the use and benefit of said S. and K.,—then, in either of the cases stated in this paragraph of the charge, you will find the defendant guilty as charged in the indictment. But, if you do not so believe, you must acquit the defendant.<sup>19</sup>

§ 4576. **Description of Money as “Good and Lawful” not Required.** If you find from the evidence that no money was taken from the person or custody of the prosecuting witness, at the time of the alleged robbery, then the defendant is not guilty of the crime charged in the information, and it is your duty to return a verdict accordingly. In considering whether or not any money was so taken, it is the duty of the state to prove beyond a reasonable doubt that some money other than the torn bills was so taken, or to prove that the defendant took, or assisted in taking, such torn bills, and that the parts of such torn bills thus taken were redeemable at their former full value.<sup>20</sup>

19—Still v. State, — Tex. Cr. App. —, 50 S. W. 355 (356).

“However, there is one clause of the charge that we think is objectionable, and ought not to have been given, to wit: ‘If you believe that the said S. and K. did then and there so fraudulently take the money described in the indictment from the person and possession of M. and without his consent, and so suddenly as not to allow the said M. to make resistance to such taking before the money was carried away, taking into consideration his condition at the time,’ etc. We do not think the court should have alluded to or pointed out any particular evidence, as stating that the jury could take into consideration the condition of the prosecuting witness, M. This was error, because it was upon the weight of the evidence. But this was not excepted to on this ground. *McLin v. State*, 29 Tex. App. 171, 15 S. W. 600; *Steagald v. State*, 22 Tex. App. 465, 3 S. W. 771; Acts 25th Leg. (Code Cr. Proc. art. 723) p. 17.”

20—*Tracy v. State*, 46 Neb. 361, 64 N. W. 1069 (1071).

“The refusal of the district court to give this instruction is the next error assigned here. The instruction was requested upon the theory that, as the plaintiff in error was charged in the information with having robbed X. of \$14.50 of good and lawful money of the United States, that it was incumbent upon the state to prove beyond a reasonable doubt that whatever money was taken from X. by the plaintiff in error or his accomplices was in fact good and lawful money of the United States. Section 420 of the Criminal Code provides that: ‘In every indictment in which it shall be necessary to make any averment as to any money, or bank bill, or notes, United States treasury notes, postal and fractional currency, or other bills, bonds or notes, issued by lawful authority, and intended to pass and circulate as money, it shall be sufficient to describe such money or bills, notes, currency, or bonds, simply as money without specifying any particular coin, note, bill or bond; and such allegation shall be sustained by proof of any amount of coin or of any such note, bill,

**§ 4577. Instruction Should be Confined to the Property Described in the Indictment.** If you are satisfied from the evidence to a moral certainty and beyond a reasonable doubt, that the defendant by means of force and violence, took from the person and possession of G. and against the will of said G. any personal property belonging to said G., then your verdict should be guilty.<sup>21</sup>

currency or bond, although the particular species of coin of which such amount was composed, or the particular nature of such note, bill, currency, or bond, shall not be proved.' In view of this provision of the Criminal Code, we think that the expression in the information, 'good and lawful money of the United States,' was surplusage, and that the state, in order to convict, was not bound to prove that the money of which X. was robbed was good and lawful money of the United States. We are aware that a contrary conclusion was reached in *Taylor v. State*, 130 Ind. 60, 29 N. E. 415, in which state there is a statute almost identical with ours quoted above. We do not know how the supreme court of Indiana reached the conclusion it did, in view of the statute. With all due deference to that court, we feel bound to follow the express provision of our stat-

ute, rather than the decision. In *Coffelt v. State*, 27 Tex. App. 608, 11 S. W. 639, 11 Am. St. 205, 86 Am. Dec. 657n, it was held, where an indictment for robbery alleged that the money taken was 'good and lawful money of the United States,' that in order to convict, the state was compelled to prove the money was of the character alleged in the information. In the absence of a statutory provision such as ours, we have no doubt that is correct. The court did not err in refusing to give this instruction."

21—*People v. Richards*, 136 Cal. 127, 68 Pac. 477 (478).

The indictment charged defendant with taking certain particular personal property, to wit, "about ninety cents or more." By this instruction the jury were told to convict if the crime of robbery was committed by him in the taking of any personal property from G."



## CHAPTER CLXXVI.

### CRIMINAL—CONSPIRACY.

See Approved Instructions, Chapter XCV, Vol. II.

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| <p>§ 4578. Act of one, act of all conspirators.</p> <p>§ 4579. Each conspirator guilty of crime committed.</p> <p>§ 4580. Conspirator not liable for crimes by co-conspirator not within the probable execution of the conspiracy—Accidents.</p> <p>§ 4581. Some act committed by defendant contributing to death of deceased.</p> <p>§ 4582. Conspiracy not carried into effect—Whether acts attributable to the conspiracy solely or to the exercise of self-defense.</p> <p>§ 4583. Conspiracy with parties whose names and identity are not disclosed, held error.</p> | <p>§ 4584. Killing, probable and natural consequence of an unlawful purpose.</p> <p>§ 4585. To instruct that evidence of conspiracy is usually circumstantial, is error.</p> <p>§ 4586. Conspiracy to bribe and corrupt delegates.</p> <p>§ 4587. Conspiracy to commit burglary—Instruction cannot ignore theory of conspiracy.</p> <p>§ 4588. Intoxication at the time of crime—Conspiracy—Intent.</p> <p>§ 4589. When statute of limitation begins to run in conspiracy.</p> <p>§ 4590. Intent to defraud—Reasonable doubt.</p> |
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**§ 4578. Act of One, Act of All Conspirators.** The court instructs the jury that in order to find the defendants in this case guilty of the killing of the deceased, it is sufficient if they combined with those committing the deed to do an unlawful act, such as to beat or rob the deceased, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in furtherance of the original design is, in contemplation of law, the act of all.<sup>1</sup>

**§ 4579. Each Conspirator Guilty of Crime Committed.** If the defendant neither shot old man P, nor instigated or consented to it, nor knew when it was done, nor did not confer with C. nor any one else to do any unlawful act in the prosecution of which the death of old man P. was reasonably in contemplation, and defendant, though present, was not aiding and abetting C. to shoot old man P. then the jury must find the defendant not guilty.<sup>2</sup>

<sup>1</sup>—Cunningham v. People, 195 Ill. 550 (570), 63 N. E. 517.

This instruction, otherwise approved, was held erroneous because there was no evidence in the record that the appellant was an accessory in the commission of the crime.

<sup>2</sup>—Evans v. State, 109 Ala. 11, 19 So. 535 (536).

"This charge was an improper request. In the case of conspirators,

each is responsible for the acts of the others in carrying it out. If a party be killed,—the fact as hypothesized in this charge,—that one of the parties did not instigate, aid, or abet in any way, to do any unlawful act, in the prosecution of which the death of the party slain occurred, and which was not reasonably within the contemplation of the parties, does not excuse the conspir-

**§ 4580. Conspirator not Liable for Crimes by Co-conspirator not within the Probable Execution of the Conspiracy—Accidents.** If the act of one conspirator, proceeding according to the common intent, terminates in a criminal result, though not the particular result meant, all the conspirators are liable; that is a person may be guilty of a wrong he did not specifically intend, if it came naturally or even accidentally through some other specific or general evil purpose.<sup>3</sup>

**§ 4581. Some Act Committed by Defendant Contributing to Death of Deceased.** I charge you, gentlemen of the jury, that, unless you believe from all the evidence that defendant T. committed some act which in fact contributed to the death of H., you should find the defendant T. not guilty.<sup>4</sup>

**§ 4582. Conspiracy not Carried into Effect—Whether Acts Attributable to the Conspiracy Solely or to the Exercise of Self-defense.** If the jury believe from the evidence in this case that B. and F. and A., assaulted and injured Y., in said county, in pursuance of a

actor from criminal responsibility. Defendant might be guilty, if the party went to the P. house for any illegal purpose, although he neither took part in the killing, nor assented to any arrangement beforehand having for its object the death of P. If several conspire to do an unlawful act, and death happens, in the prosecution of the common object, they are all alike guilty of the homicide. Each is responsible for everything done, which follows incidentally in the execution of the common purpose, as one of its probable and natural consequences, even though it was intended, or within the reasonable contemplation of the parties, as a part of the original design. *Williams v. State*, 81 Ala. 1, 1 So. 179; 60 Am. Rep. 133; *Gibson v. State*, 89 Ala. 122, 8 So. 98, 18 Am. St. 96; *Martin v. State*, 89 Ala. 115, 8 So. 23, 18 Am. St. 91; *Tanner v. State*, 92 Ala. 1, 9 So. 613; *Jolly v. State*, 94 Ala. 19, 10 So. 606."

3—*Myers v. State*, 43 Fla. 500, 31 So. 275 (280).

"It is the opinion of this court that the instruction is too broad, in that it holds one conspirator liable for the result of every accident resulting from the acts of a co-conspirator while engaged in the execution of a common purpose, no matter for what purpose the conspiracy was formed, and even though the accident producing the result was one which the parties could not reasonably have anticipated as a result of any act in the execution of the common purpose. To illustrate our meaning take the case put by Mr. Bishop (paragraph 5, § 637, vol. 1 New Crim. Law) that where two combine to fight a third with fists, if death accidentally results from a blow inflicted by one, the other also is answerable for the homicide; but if the one resorts to a deadly weapon without the other's knowledge or consent, he only is liable. In the one case death from a blow with the fist might have

been reasonably apprehended by the parties, even though neither party intended to kill; but in the other case the party who did not strike the blow could not reasonably have foreseen the use of a deadly weapon by his co-conspirator. Now, if the two parties should combine to fight another with fists, and during the encounter a pistol should accidentally drop from the pocket of one of the conspirators, and striking some object discharge its contents into the body of the third party, killing him, we apprehend the other conspirator could not be held guilty of unlawful homicide, if he did not know his co-conspirator was armed with the pistol, for he could not reasonably have foreseen the happening of such an accident during the execution of the conspiracy agreed upon. In our judgment one conspirator cannot be held liable criminally for every accidental result arising from acts of co-conspirators while engaged in the execution of the common purpose, but only for such accidents as could reasonably have been foreseen to occur, or such as would probably happen in the execution of the conspiracy agreed upon. If the instruction complained of had used the expression 'even though accidentally' instead of the words 'or even accidentally' it would have been unobjectionable as applied to cases of unlawful homicide, at least to grades thereof in which no specific intent is required. *Commonwealth v. Campbell*, 7 Allen, 541 (Mass.), 83 Am. Dec. 705; *Lamb v. People*, 96 Ill. 73; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320 and note p. 477; *Stephens v. State*, 42 Ohio St. 150; *State v. Barrett*, 40 Minn. 77, 41 N. W. 463; 1 Bish. New Cr. Law, §§ 636-641. In the opinion of a majority of the court the error found in giving this instruction was upon the facts of the case prejudicial and harmful to plaintiffs in error and therefore ground for reversal."

4—*Thomas v. State*, 124 Ala. 48, 27 So. 315 (317).

combination, conspiracy, or understanding entered into by them, either before they reached the place where said assault was committed, or after they reached there, to do said Y. bodily harm or injury, then it is immaterial who was the aggressor in said conflict, or who brought on said assault and conflict.<sup>5</sup>

§ 4583. **Conspiracy with Parties whose Names and Identity are not Disclosed, Held Error.** (a) If the defendant, and another person, or other persons, engaged in a common purpose, known and understood among themselves and to each other, of killing or of doing great bodily harm to M., or to any other person or persons, and if the defendant, or such other person or persons, who were engaged in such common purpose, if the defendant and any other person or persons were engaged in such purpose, made a dangerous attack upon said M., or upon another person or other persons, in the prosecution of such purpose, and if the defendant was present when such attack was so made, and if he was acting in concert with the other person or persons in making such attack, and if, in said attack and in prosecution of such purpose, one of said persons engaged in such attack in the presence of T., and while said T. was acting in concert with the other person or persons making such attack, shot M., this was a shooting of said M. by the defendant, in the meaning of the law.

(b) If some person other than the defendant shot and killed M., and if the defendant was present and aided and abetted the person who did such shooting, in doing said shooting, yet the defendant is not guilty, if at the time he so aided and abetted the person doing such shooting the defendant believed, and had reasonable grounds to believe, that the person doing such shooting, or that the defendant himself, was in danger of death or of suffering some serious bodily harm at the hands of said M., and it was necessary, or to the defendant reasonably appeared to be necessary, to shoot said M. to avert such danger.<sup>6</sup>

The above charge requested by the defendant was held erroneous because it "required his acquittal, unless in fact he contributed to the death of the deceased. In other words, because the shot fired by him at deceased was inaccurately aimed and went wide of the mark, he should not be convicted, notwithstanding the jury may have believed there was a conspiracy between all the parties who fired at the deceased to take his life, and the shot fired by only one of them was effectual, this is not the law, and the charge was correctly refused."

5—State v. Bingham, 42 W. Va. 234, 24 S. E. 883 (885).

The court held this instruction bad. "Such a conspiracy merely as that charged in the indictment would be indictable under section 9, without acts or execution, and, if the instruction had been limited to a conviction for a misdemeanor, it would be good; but the party was being tried for felony, under section 10. Now, parties, may conspire to do a crime, yet not do it. If, under this statute, they stop before its commission, there is no felony. If B. and his alleged confederates were on the ground, full bent on executing the alleged conspiracy,

yet, before overt act, Y. in fact made an assault on B. justifying self-defense, I do not see how B. would be guilty of the felony contemplated by the statute. I do not see how the wrong of forming a conspiracy would go so far as to taint his whole action with felony, and take away the right of self-defense born of Y.'s act before any overt act of B.'s towards executing the plan of conspiracy. You could not attribute B.'s acts, under such circumstances, solely to the conspiracy, and not to the right of exercise of self-defense. B.'s evidence was that Y. made the first assault, and delivered a blow with his cane; and it was error to tell the jury, as a matter of law, that even if Y. did so the fact was immaterial. The instruction ought not to have been given."

6—Taylor v. Commonwealth, 28 Ky. L. 819, 90 S. W. 581 (583).

"This instruction was an invitation to the jury to give free rein to their imagination or suspicion, and to convict the defendant of a conspiracy with parties whose names the grand jury did not know, and which the evidence failed to disclose to the court. Undoubtedly the instruction refers to persons other than the co-defendants named in



§ 4584. **Killing, Probable and Natural Consequence of an Unlawful Purpose.** (a) The court instructs the jury that before the defendant can be convicted, he himself must have entertained the intent unlawfully to kill old man P., or to do him bodily harm, or he must have known that C. entertained such intent, and if defendant did not shoot old man P., and had no intent to injure old man P. in any way, and did not know that C. entertained the intent to injure old man P., then the jury must find the defendant not guilty.

(b) If P. was killed by C. not in furtherance of the common design, or in carrying it out, but of his own malice, then the defendant is not guilty.<sup>7</sup>

§ 4585. **To Instruct that Evidence of Conspiracy is Usually Circumstantial, is Error.** The court instructs the jury, as a matter of law, that the evidence in proof of a conspiracy will, in general, be circumstantial, and, although the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design, and to pursue it by common means.<sup>8</sup>

§ 4586. **Conspiracy to Bribe and Corrupt Delegates.** The jurors are instructed that unless they believe beyond a reasonable doubt, from all the evidence in the case, that the defendant, on ———, —, had personal knowledge, or had heard prior to ———, —, or learned from M. or S. of the existence of \$—— deposited in the X. Company for the purpose of influencing, bribing or corrupting any member of the house of delegates for his vote or influence in the passage of Council Bill No. —, then defendant is not guilty of the offense charged, and that it is your duty to acquit the defendant; and the court in this connection further instructs you that personal knowledge is not knowledge derived from gossip, rumor or hearsay, but is knowledge which one has from the exercise of his own senses, and that in this case, unless defendant saw S. and M., or either of them, deposit \$—— in a box in the X. Company, he had in law no knowledge that \$—— was deposited in the X. Company, unless said S. or M. told him that said money was so deposited.<sup>9</sup>

the indictment; because, if the latter were meant, their names would have been given. That the court did have in his mind a conspiracy with others than the named co-defendants is shown by the fact that he refused, upon the request of the defendant, to limit the scope and application of the instruction to a conspiracy by the defendant with E. and G. That it was error to instruct as to criminal conspiracy, when not charged in the indictment, was expressly decided in *Twyman v. Commonwealth*, 33 S. W. 409, 17 Ky. L. 1038. There was neither allegation nor proof of a conspiracy with any other than appellant's co-defendants."

7—*Evans v. State*, 109 Ala. 11, 18 So. 535 (536).

"The first charge was improper. It was not necessary for defendant to have entertained the intent to kill P. or do him bodily harm, to render him guilty under the indictment. If he and others went to the house with no such intent, but for

an unlawful purpose, and the killing was incidental to such purpose, as one of its probable and natural consequences, he might still be guilty.

"The second charge limits the common design, in furtherance of which the killing took place, to a purpose which included the homicide, if necessary in carrying it out, whereas, the parties may have had an unlawful purpose in visiting the house, short of a purpose to kill any one, and yet, if in executing such unlawful purpose, the killing occurred as incidental to it, and as a probable and natural consequence of it, the parties might be guilty."

8—*O'Donnell v. People*, 110 Ill. App. 250 (285), aff'd 211 Ill. 84, 71 N. E. 842.

"We think the above instruction is erroneous in stating that, as a matter of law, the evidence in proof of conspiracy will, in general, be circumstantial."

9—*State v. Faulkner*, 175 Mo. 546, 75 S. W. 116 (134).

§ 4587. **Conspiracy to Commit Burglary—Instruction Cannot Ignore Theory of Conspiracy.** (a) I charge you, gentlemen of the jury, that you must believe from the evidence in this case beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to impress the minds of the jury with such belief of his guilt, they should find him not guilty. And, no matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by a full measure of proof which the law requires.

(b) I charge you, gentlemen of the jury, that the humane provision of the law is that upon circumstantial evidence there should not be a conviction, unless it excludes every other reasonable hypothesis than that of the guilt of the accused. No matter how strong may be the circumstances, if they are reconcilable with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof that the law requires.<sup>10</sup>

§ 4588. **Intoxication at the Time of Crime—Conspiracy—Intent.** If you find any conspiracy was formed by the defendant, and one or more of the codefendants for the unlawful purpose claimed by the state, and the conflict was brought on by the parties thereto in the prosecution of the common design and purpose thereof, and you further find that this defendant was the originator of such conspiracy, and brought it about, and was the leader in its execution, then he cannot claim immunity from the consequences of such conspiracy so originated and prosecuted by him, even though he was so intoxicated as to know nothing of it, nor realize what he was doing, and incapable of realizing and knowing that he was committing an unlawful act. But it would be otherwise if the conspiracy was originated by others, and he was led into it by others who formed and prosecuted it, and this defendant was at the time so drunk that he was incapable of realizing and knowing what he was doing, and incapable of forming any intent or design to commit an unlawful act.<sup>11</sup>

"This instruction, so far as it goes, is correct, but, as the state was proceeding on the theory of a conspiracy, the instruction should have gone farther, and stated the further alternative: 'Or that defendant at and prior to the deposit of said \$— by said S. & M. was and had been a member of a criminal conspiracy or combine to obtain said sum under an agreement with said S. in consideration of their votes to pass said Suburban ordinance, and that said M. was also a member thereof; in which case, if they so find, the defendant would be chargeable with knowledge of the acts of said M., and of the knowledge possessed by said M. during the continuance of and in furtherance of said unlawful conspiracy.'"

10—Cowan v. State, 136 Ala. 101, 34 So. 193 (194).

"The evidence by the state tended to show a conspiracy between the defendant and one J. to commit the burglary. If the conspiracy existed, the probability that J. actually did the breaking and entering, though the defendant was not present in person, would not raise a reasonable doubt of the guilt of the defendant, since both would be guilty as principals. Above charges requested by the defendant were, therefore, properly refused by the court. Pickens v. State, 115 Ala. 42 (51), 22 So. 551."

11—State v. Pasnau, 118 Ia. 501, 92 N. W. 682 (684).

"We have some difficulty in determining just what idea the court intended to convey by this instruc-

**§ 4589. When Statute of Limitation Begins to Run in Conspiracy.**

The jury are instructed that the crime of conspiracy is complete when the agreement or confederacy was entered into, and the offense was then committed. You are further instructed that the offense of conspiracy is a misdemeanor, and if the prosecution therefor is not commenced within one year and six months from the time of committing any such offense, there can be no conviction therefor. Therefore, even though the jury may believe from the evidence that the offense of conspiracy was committed by the defendants, or some of them, still, if you believe that such offense was committed more than one year and six months before the — day of —, the day on which the indictment was returned by the grand jury into this court, then you must acquit the defendants.<sup>12</sup>

**§ 4590. Intent to Defraud—Reasonable Doubt.** (a) The fact of conspiracy need not necessarily be established by direct and positive evidence, but may be proved and established by circumstantial evidence. If from the acts and conduct of the defendants, as shown by the evidence, and by the circumstances and transactions admitted in evidence, the nature of the connection between the defendants, and the relation in which they stood to each other in such transactions, the nature of the business in which they were engaged, and the part taken by each of them in the several transactions and delivery of the notes, you are satisfied beyond a reasonable doubt, and believe as reasonable men, that they were working and acting together with the common object and purpose of obtaining said notes by means of false and fraudulent pretenses, and representations, in pursuance of a combination or prearranged plan, then you should find that the conspiracy or combination between them existed, and is established.<sup>13</sup>

tion, and are somewhat puzzled over the distinction made between a conspiracy of which the defendant was the originator, and one into which he was led by others. We are also in doubt about whether the court was referring in this instruction to the condition of the defendant's mind when the conspiracy was formed, or to his condition when the act was committed. But whatever construction be adopted, it is manifest that the rule of law announced in the instruction asked was not given in such a manner as that a jury would understand it. That the rule is correct is shown by a number of authorities. See *Booher v. State*, 156 Ind. 435, 60 N.E. 156, 54 L. R. A. 391, and cases cited. If defendant was so drunk at the time it is claimed the conspiracy was entered into that he did not know what he was doing, and was mentally incapable of concerting his will with that of his co-conspirators, he, of course, should not be held responsible for what they afterwards did, unless he himself had some part in the affray; and if he aided and abetted therein, the degree of his crime, in the absence of proof of a conspiracy, in which he consciously participated, must be determined from what he did at the time the crime was actually

committed. This is clearly pointed out in *State v. Smith*, 100 Ia. 1, 69 N. W. 269."

<sup>12</sup>—*Ochs et al. v. People*, 124 Ill. 399 (428), 16 N. E. 662.

"This instruction was faulty and misleading in telling the jury that the crime of conspiracy was complete and the offense was then committed when the agreement or confederacy was entered into, and that the period of limitation would commence to run from the time of committing the offense. The instruction was calculated to lead the jury erroneously to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy, instead of from the time of the commission of the last overt act in furtherance of the object of the conspiracy."

<sup>13</sup>—*State v. Grant*, 86 Ia. 216, 53 N. W. 120 (123).

"The first exception taken to this instruction is that the words 'and believe as reasonable men,' operate to qualify the preceding words, to the detriment of the defendants. The words objected to, it seems to us, clearly add to what precedes them; that is, literally read, the jury are not only required to be 'satisfied beyond a reasonable doubt,' but they must also in ad-



(b) The court charges the jury, that, before you can convict the defendant, you must believe from the evidence in the case, beyond a reasonable doubt, and to a moral certainty, that the defendant B., had conspired with the defendant L. to commit the assault, and that he went with L. to the scene of the trouble for the purpose of aiding, encouraging and abetting him in the commission of the assault, and that he was there, ready and willing to aid, encourage and abet said L. in the commission of the assault at the time the assault was committed.<sup>14</sup>

(c) The court charges the jury that the jury cannot find the defendant guilty of any offense in this case because of defendant's having conspired with F. to take the life of A. or do him other bodily harm, or because of defendant's having aided or abetted F. in the killing, so long as any one juror may have a reasonable doubt as to whether or not this defendant ever did so conspire with said F. or aid and abet him in such killing.<sup>15</sup>

dition thereto, 'believe as reasonable men.' Technically speaking, the wording of the instruction adds a further requirement to that legally necessary to authorize the jury to find the defendants guilty; hence defendants ought not to object because the state is required to do more to make a case than the law requires. It is also objected that the instruction does not include the thought of the 'intent to defraud.' The instruction charges that if the defendants 'were working and acting together, with the purpose of obtaining the notes by false and fraudulent pretenses,' etc. This sufficiently meets the objection made."

<sup>14</sup>—*Buford v. State*, 132 Ala. 6, 31 So. 714 (715).

This "charge was properly re-

fused. To fix criminal responsibility on defendant it was not necessary for the jury to find both that he conspired to commit the offense before coming to the place of its commission, and that he actually aided L. in committing it, as is assumed in that charge. *Amos v. State*, 83 Ala. 1, 3 So. 749, 3 Am. St. 682; *Raiford v. State*, 59 Ala. 106."

<sup>15</sup>—*Ferguson v. State*, 141 Ala. 20, 37 So. 448 (449).

This "charge was calculated to mislead the jury to believe that either a reasonable doubt that defendant connived to bring about the homicide, or a like doubt of his having aided therein, was sufficient to prevent his conviction, whereas his participation in either of those methods would have authorized his conviction."

## CHAPTER CLXXVII.

### CRIMINAL—EMBEZZLEMENT—FALSE PRETENSES—FORGERY.

See Approved Instructions, Chapter XCVI, Vol. II.

#### EMBEZZLEMENT.

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| <p>§ 4591. Defining embezzlement.</p> <p>§ 4592. Elements of embezzlement—<br/>If jury instructed to find a certain way all elements must be included.</p> <p>§ 4593. Embezzlement — Intent as shown by proof of other embezzlement — Comment on the weight of the evidence.</p> <p>§ 4594. Intent to defraud presumed from the act, not conclusive.</p> <p>§ 4595. Embezzling money "willfully" and "intentionally."</p> <p>§ 4596. Amount of money embezzled.</p> <p>§ 4597. Fraudulent secretion of the money.</p> <p>§ 4598. Immaterial what becomes of the money after its embezzlement.</p> | <p>§ 4599. Assumption of ownership.</p> <p>§ 4600. Embezzlement by employee during employment.</p> <p>§ 4601. Restitution is no defense to the crime of embezzlement.</p> <p>§ 4602. Statute of Limitations against crime of embezzlement.</p> <p>§ 4603. The intent to cheat or defraud is material and should not be omitted.</p> <p>§ 4604. Forging names of witnesses to get their fees—Verbal agreement to give the defendant the witness fees.</p> <p>§ 4605. Overstating the maximum penalty—Forgery of promissory note.</p> <p>§ 4606. Unexplained possession of forged written instrument as evidence of guilt.</p> |
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#### EMBEZZLEMENT.

**§ 4591. Defining Embezzlement.** Embezzlement is the fraudulently removing and secreting of money or personal property with which the party has been intrusted, for the purpose of applying it to his own use.<sup>1</sup>

<sup>1</sup>—McAlee v. State, 46 Neb. 116, 64 N. W. 358 (359).

The court said: "In Chaplin v. Lee, 18 Neb. 440, 25 N. W. 609, 'embezzlement' was defined as 'the act of fraudulently appropriating to one's own use what is intrusted to the party's care and management.' But, as we have stated, embezzlement is an offense created by statute. It has no common-law significance. We must look at our statute to ascertain what here constitutes embezzlement; and while the statute uses the word 'embezzle,' and thereby refers us to the ordinary acceptance of the term for its definition, it at the same time expressly requires that the thing embezzled must have come into the possession or care of the servant by virtue of his employment. It is not sufficient that he has been

intrusted with it, but it must have been in his capacity as a servant,—'by virtue of such employment.' It may be well, in this connection, to call attention to another feature of this instruction. By it the jury is told that it is embezzlement to fraudulently remove and secrete money or personal property with which the party has been intrusted, for the purpose of applying it to his own use, while in Chaplin v. Lee, supra, it is held that it is essential to constitute the crime that the owner should be deprived of the property by adverse use or holding. That is, the secreting of money with intention to convert it is not embezzlement. There must be an actual appropriation thereof. Under an information charging an actual embezzlement, proof of secreting with intent to embezzle is sufficient."

§ 4592. **Elements of Embezzlement—If Jury Instructed to Find a Certain Way all Elements must be Included.** (a) If the jury find from the evidence, beyond a reasonable doubt, that the defendant, on or about the ———, ———, in the county of B., the state of Nebraska, was then the agent of the O. Co., and the said X. then and there having certain money belonging to the O. Co. of the amount of ——— dollars, the property of the O. Co. did unlawfully, fraudulently and feloniously embezzle, and convert to his own use, without the assent of the O. Co., then you should find the defendant guilty.<sup>2</sup>

(b) You are instructed that if you find from the evidence beyond a reasonable doubt that the defendant, within three years prior to the filing of the information in this case and within the time charged in the information was the agent of the F. Ass'n., an incorporated company, and that while such agent he disposed of, or caused to be disposed of, any money or right of action of the said F. Ass'n., or secured credit for the same in his individual capacity and for his own use, or for the use of any other person, except the said F. Ass'n., without the assent of the said F. Ass'n., that would constitute embezzlement of such money or right in action, as the case may be; and it would make no difference whether the amount embezzled, if any, was disposed of in the manner above indicated in one transaction, at one particular time, or consisted of a continuous series of acts.<sup>3</sup>

§ 4593. **Embezzlement—Intent as Shown by Proof of other Embezzlement—Comment on Weight of the Evidence.** The court instructs that in this case the state has introduced evidence tending

2—McAleer v. State, 46 Neb. 116, 64 N. W. 358.

"An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case, and within the evidence. Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Gilbert v. Saddlery Co., 26 Neb. 194, 42 N. W. 11; Bowie v. Spaid, 26 Neb. 635, 42 N. W. 700; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167. The instruction we have quoted purports to state all the elements necessary to a conviction. When we analyze the instruction, we find that it requires the jury to find that there was proved—First, substantially, the time; second, the venue; third, that the defendant was the agent of the Omaha Elevator Company; fourth, that the money was the property of the elevator company; fifth, that he embezzled it, and converted it to his own use; sixth, that it was done without assent of the owner."

3—Higbee v. State, 74 Neb. 331, 104 N. W. 748 (750).

"The jury were told by this instruction that, if they found from the evidence beyond a reasonable doubt certain facts, 'that would constitute embezzlement.' Did it omit

essential elements of the crime charged? To constitute embezzlement there must be a fraudulent intent on the part of the accused to convert the property to his own use. The defendant must have made an intentionally wrong disposal of the property, indicating a design to cheat and defraud the owner. The instruction omits an essential element of the crime of embezzlement, the felonious intent. Not even the word 'wrongful' was used in characterizing the defendant's acts. If the defendant did everything stated in the instruction, he would not be guilty of embezzlement. The attorney general does not defend this instruction, but contends that, when it is read in connection with other portions of the charge, the error, if any, is cured. It is true that the instructions will be construed together, and the charge considered as a whole; but it is firmly established that 'an instruction whereby, the whole case is attempted to be covered, but which omits an essential element is erroneous, and is not cured by another instruction which covers the point. Dobson v. State, 61 Neb. 585, 85 N. W. 843; Bergeron v. State, 53 Neb. 752, 74 N. W. 253; McAleer v. State, 46 Neb. 116, 64 N. W. 358; Barnes v. State, 40 Neb. 545, 59 N. W. 125. For these reasons this instruction was erroneous."



to prove the embezzlement of other money belonging to Mrs. D. than that alleged in the indictment to have been embezzled. You are instructed that you can only consider said testimony for the purpose for which it was admitted—this is, to show the intent with which defendant acted with respect to the money for the embezzlement of which he is now on trial—and you will consider it for no other purpose, for you cannot convict defendant for the embezzlement of any other money than that named in the indictment.<sup>4</sup>

**§ 4594. Intent to Defraud Presumed from the Act, not Conclusive.** In this case there has been no direct testimony offered tending to show a purpose to defraud, which is alleged in the information; but in this connection you are instructed that if you find beyond a reasonable doubt that the defendants purchased the horses mentioned in the information, or any of them, on or about the time alleged in said information, and purchased them with knowledge that they were stolen horses, then the intent to defraud will be presumed, and no direct testimony is necessary upon the question of intent.<sup>5</sup>

**§ 4595. Embezzling Money "Willfully" and "Intentionally."** (a) The court charges the jury that they must believe from the evidence beyond a reasonable doubt that the defendant embezzled the amount of money charged in the indictment, or some part thereof, and he did it willfully and intentionally and converted it to his own use.

(b) The court charges the jury that they must believe from the evidence beyond a reasonable doubt that the defendant embezzled the amount of money or a part of said amount charged in the indictment, and that he did it willfully and intentionally, and converted it to his own use, before they can convict him.<sup>6</sup>

**§ 4596. Amount of Money Embezzled.** The court charges the jury that they must believe from the evidence beyond a reasonable doubt that the defendant embezzled the amount of money charged in the in-

4—Leach v. State, 46 Tex. Cr. App. 507, 81 S. W. 733 (734).

The court said that this "charge has been criticized frequently, and held to be on the weight of the testimony and fatal to the judgment. Santee v. State, — Tex. Cr. App. —, 37 S. W. 436; Hudson v. State, 4 Tex. Ct. Rep. 167, 66 S. W. 668; Reese v. State, 5 Tex. Ct. Rep. 34, 68 S. W. 283; Cavaness v. State, 8 Tex. Ct. Rep. 27, 74 S. W. 908; and Cortez v. State, 8 Tex. Ct. Rep. 27, 74 S. W. 907."

5—Goldsberry v. State, 66 Neb. 312, 92 N. W. 906 (913).

In comment the court said that "it appears by iterative instructions the lower court pressed hard upon the jury the thought that it was their duty to convict if satisfied beyond a reasonable doubt (1) that the horses had been stolen; and (2) that defendants at the time they got possession had knowledge of the theft. In no instruction was it directly and positively stated that the jury could not return a verdict against the defendant without first finding from the evidence the existence of a fraudulent intent. Evi-

dently the court did not consider such a finding essential, for in the above paragraph of the charge, it is, in effect, said that the law would presume a criminal intent if the other elements of the offense were proven. The jury would of course have been warranted in inferring the intent to defraud; but the duty of making the proper inference from the facts proven rested upon them, and not upon the court. There is in such case no absolute and arbitrary deduction. There is neither a conclusive nor disputable presumption of law. For the error committed by the court in taking away from the jury the question of fraudulent intent, and authorizing them to find defendants guilty without finding that the intent charged was proven by the evidence beyond a reasonable doubt, the sentence must be reversed."

6—Willis v. State, 134 Ala. 429, 33 So. 226 (235).

"These charges," said the court, "in the use of the word 'willfully' in conjunction with the word 'intentionally' were bad and calculated to mislead the jury."

dietment, and he did it willfully and intentionally, and converted it to his own use.<sup>7</sup>

§ 4597. **Fraudulent Secretion of the Money.** If the defendant in good faith put the money on the counter for change, and C. got and kept it, and converted it, then the defendant would not be guilty. If there is a reasonable doubt from the evidence as to whether defendant converted it or not, you should acquit him.<sup>8</sup>

§ 4598. **Immaterial What Becomes of the Money after its Embezzlement.** The court instructs the jury that if from all the evidence you cannot say to a moral certainty what became of the \$—, if there was any \$—, then you would not be authorized to convict the defendant.<sup>9</sup>

§ 4599. **Assumption of Ownership.** The jury are instructed that a bailee in the present case is a person who hires a horse, and either at the time of hiring or afterwards conceives a design of stealing him, and actually converts him to his own use, with the intent to convert to his own use, and the bailee in the present case is a person who is intrusted with the possession of a certain wagon and the horse mentioned in the testimony for the purpose of driving over the country selling sewing machines, and which personal property is to be returned to the owner when the agency for the sale of the sewing machine shall cease, if they shall believe from the evidence that the property was delivered to the defendant for that purpose, and that he was the agent of P., the owner thereof, and that the property belonged to and was owned by the said P., then the defendant is a bailee of said property.<sup>10</sup>

§ 4600. **Embezzlement by Employee during Employment.** (a) If the jury believe and find from the evidence that the defendant did,

7—Walker v. State, 117 Ala. 42, 23 So. 149 (151).

"This might have misled the jury to believe that there could be no conviction unless the full sum of \$— was embezzled."

8—Eggleston v. State, 129 Ala. 80, 30 So. 582 (583), 87 Am. St. 17.

"This charge pretermits all reference to a fraudulent secretion of the money, and for this reason, if for none other, was bad."

9—Eggleston v. State, 129 Ala. 80, 30 So. 582 (583), 87 Am. St. 17.

This instruction, "requested by defendant, had a tendency to mislead the jury to the conclusion that the burden of proof was upon the state to show what became of the money after it had been embezzled by defendant. No such burden rests upon the prosecution. But few convictions could ever be had if the state was required to prove what an embezzler had done with the money or property converted by him, or where he had fraudulently secreted it with the intent to convert it. It is utterly immaterial what became of the money after a fraudulent conversion of it, or a fraudulent secretion of it with intent to convert it. It was misleading also in another aspect of the case. The jury, under the evidence, were authorized to find that what

took place between defendant, C., and B. at the lunch stand was merely a piece of jugglery, resorted to and participated in by all of them for the purpose of fraudulently secreting the money with the intent to convert it."

10—State v. Bonner, 178 Mo. 424, 77 S. W. 463 (465).

"The objection that there was not a scintilla of evidence tending to show a hiring of the horse alleged to have been embezzled is well taken. We have gone carefully through the entire record, and there is no testimony of a hiring in it. This instruction is also obnoxious to the charge that it virtually assumed that P. was the owner of the horse and wagon, whereas his ownership was contested throughout the trial; and there was much evidence tending to show that the horse and wagon belonged to B., though he was indebted to P. for aiding him in purchasing them. It was error to assume a controverted fact so vital to the interest of defendant. Moreover, while probably not so intended, there is room for the contention that it practically advised the jury that the horse and wagon were P.'s property. The court properly instructed the jury to acquit of the larceny charged in the third count."

within three years prior to the filing of the information in this cause, receive into his possession the money mentioned in the information, or any portion thereof, to the value of — dollars or more, and that he received the same into his possession by virtue of his employment as the agent and attorney of B., and that he did within three years prior to the filing of the information in this cause, at the county of B. and state of Missouri, feloniously, unlawfully, and intentionally embezzle and fraudulently convert the same to his own use, you will find the defendant guilty of embezzlement, as charged in the information, notwithstanding the jury should believe and find from the evidence that the defendant intended at some future time to restore said money, or that he did thereafter pay or restore same.<sup>11</sup>

(b) The court charges the jury if they believe that if the defendant were given due credit for his commissions and the old machines he did not owe the company anything, the jury must find the defendant not guilty.<sup>12</sup>

**§ 4601. Restitution is no Defense to the Crime of Embezzlement.** The jury are instructed that if you find from the evidence that an amount of money in excess of the amount allowed by law to be deposited in the State Bank of R., Nebraska, the public money of H. county, was so deposited by the defendant, in said bank, and that the board of supervisors of said county requested additional security to secure the deposit of said sums, and afterwards accepted additional security from said bank or its bondsmen to secure the same, in such case the defendant could not be guilty of embezzling such sums or any part thereof, unless you further find from the evidence, beyond a reasonable doubt, that the said defendant withdrew a part of said money and converted the same to his own use.<sup>13</sup>

11—State v. Lentz, 184 Mo. 223, 83 S. W. 970 (971).

The court in comment said that the "statute defining the offense upon which this indictment is predicated provides 'If any agent, clerk, apprentice, servant or collector of any private person, or of any co-partnership except persons so employed under the age of sixteen years, or of any officer, agent, clerk, servant or collector of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use or shall take, make way with or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employer, any money, goods, rights in action, or valuable security or effects whatsoever, belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for stealing property of the kind or the value of the articles so embezzled, taken or secreted.' Section 1912, Rev. St. 1899. It is apparent that the information in this cause is based upon that subdivision of the statute which denounces the embezzlement or conversion of money or property by the agent without the assent of his master or employ-

er. It is essential, first, that the information charge all the elements of the offense as provided by the statute; second, the proof upon the trial must at least make out a prima facie showing of the commission of the offense as charged; thirdly, the instructions of the court must require the jury to find every essential fact necessary to constitute the offense created by the statute. It will be observed that above instruction fails to require the jury to find that the embezzlement or conversion of the money by the agent was 'without the assent of his employer.'"

12—Walker v. State, 117 Ala. 42, 23 So. 149 (151).

The court said that this "ignores all question of honesty or good faith of defendant's claim to the commissions which he was asserting a right to, in opposition to the terms of his written contract, and that was a question for the jury."

13—Whitney v. State, 53 Neb. 287, 73 N. W. 696 (701).

"This instruction lays down a monstrous doctrine. The substance of it all is that, if the defendant embezzled the money of the county when he deposited in the bank an amount in excess of the sum authorized by law, he is not liable therefor criminally in case the county authorities subsequently accepted



§ 4602. **Statute of Limitations Against Crime of Embezzlement.** The court instructs the jury that in this case the statute of limitations against the prosecution of the crime of embezzlement or larceny is three years, and you are further instructed that the statute of limitations began to run in this case when the defendant should have lawfully paid or turned over any moneys in his hands, if there were any, to his lawful successor.<sup>14</sup>

### FALSE PRETENSES.

§ 4603. **The Intent to Cheat or Defraud is Material and Should not be Omitted.** The court instructs the jury that, if you find from the evidence beyond a reasonable doubt, the defendant G. on the — day of —, —, did feloniously, knowingly, designedly represent to one B., president of the corporation known as the B. Company, that a certain corporation known as the S. Company, was a solvent corporation, and was worth over and above all liabilities the sum of \$—, and the pretenses and representations aforesaid were false and fraudulent and known to be so by the said G., and that the said B. then and there acting on behalf of the said B. Company did rely upon and believe the representations aforesaid, if any, to be true, and was deceived thereby and was induced by reason thereof to execute and deliver for said B. Company to the S. Company the promissory note of the said B. Company set out in the indictment herein, then you should find the defendant, G. guilty.<sup>15</sup>

### FORGERY.

§ 4604. **Forging Names of Witnesses to Get Their Fees—Verbal Agreement to Give the Defendant the Witness Fees.** Even though

security for the sum so embezzled. This is not, and never was, the law. The fact that a person who has stolen money afterwards returns the same to the owner, or gives security for its payment, will not relieve him from criminal liability. So, if the owner of a stolen horse should follow the thief, and recover the horse or payment of the value of the animal, it would not defeat a criminal prosecution against the thief. The same principle governs the case at bar. *People v. Royce*, 106 Cal. 175, 27 Pac. 630, and 39 Pac. 524; *Thalheim v. State*, 38 Fla. 169, 20 So. 938. The criminal law was not enacted for the purpose of enforcing civil liabilities as the instruction requested implies. Whether or not H. county has been successful in collecting or securing the payment of the money which the defendant is charged with having embezzled is of no consequence in this case."

In *Walker v. State*, 117 Ala. 42, 23 So. 149, an instruction was held erroneous for the same reason.

<sup>14</sup>—*Weimer v. People*, 186 Ill. 503 (508), 58 N. E. 378.

"This instruction was misleading and erroneous, for, as before shown, the statute began to run against any

embezzlement or fraudulent conversion, when it was committed, and not when it was discovered or made manifest by a failure to pay over on demand."

<sup>15</sup>—*Gregg v. People*, 98 Ill. App. 170 (179).

"The instruction purports to state hypothetically the facts, which, if believed by the jury from the evidence would warrant a conviction, but omits an essential element, viz., the intent to cheat and defraud. The language of the statute is, 'Whoever with intent to cheat and defraud another designedly by any false token,' etc., and the indictment expressly charges that plaintiff in error intended by the false pretenses alleged to cheat and defraud B., and the B. Company. It is evident that the jury, disregarding all other instructions, might have based their verdict on the instruction above quoted, in which case they would not necessarily have found a guilty intent. A hypothetical instruction purporting to state the facts on which a verdict for the plaintiff may be based, but omitting an essential element, is erroneous, even in a civil action, and is incurable by other instructions. *St. L. & S. E. Ry. Co. v. Britz*, 72 Ill. 256."

you may believe that all three of the parties mentioned in the indictment did agree to give their witness fees to defendant, still this would not authorize the defendant to sign and forge their names, or either of them as charged in the indictment; and if you find, beyond a reasonable doubt, that the defendant did forge the names of the said parties, or either of them, as charged in the indictment, you should find the defendant guilty.<sup>16</sup>

§ 4605. **Overstating the Maximum Penalty—Forging of Promissory Note.** The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, M., within three years next before —, —, at the county of H., in the state of Missouri, did forge, counterfeit and falsely make a certain promissory note set forth in the indictment, by which a pecuniary demand and obligation for the payment of — dollars by B. and H. to M. was purported to be created, by attaching as makers thereto the names of B. and H. without the consent of the said B. and H., with intent then and there and thereby to injure and defraud any person, then the jury will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary for a term of not less than five years nor more than ten years.<sup>17</sup>

16—*Kotter v. People*, 150 Ill. 441 (447), 37 N. E. 932.

"Under this instruction, even if the jury were satisfied, from the evidence, that B., S. and K. actually said to the defendant that they gave him their witness fees, or that he, in good faith, believed that they had promised to give him such fees, and were further satisfied, from the evidence, that the defendant honestly and in good faith believed that such action on the part of said witnesses authorized him to sign the names of said several witnesses to the respective receipts, and were also satisfied, from the evidence, that the defendant had no intention to either damage or defraud the said three witnesses, or either of them, or any one else, yet they were bound, if they followed the instruction, to find the defendant guilty and consign him to the penitentiary."

17—*State v. Milligan*, 170 Mo. 215, 70 S. W. 473 (474).

In commenting on this instruction as erroneous the court said: "Section 2001, Rev. St. 1899, reads as follows: 'Every person who shall forge or counterfeit, or falsely make or alter or cause or procure to be forged, counterfeited, or falsely made or altered: First, any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, being or purporting to be made or issued by any bank incorporated under the laws of this state or of any other state, territory, government or country; or, second, any order or check being or purporting to be drawn on any such incorporated bank, or any cashier thereof, by any person, company or corporation, shall, upon conviction, be adjudged guilty of forgery in the

second degree.' Section 2009 is as follows: 'Every person who with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument of writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, discharged, or diminished, or by which any rights or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased, or in any manner affected, the falsely making, altering, forging or counterfeiting of which is not hereinbefore declared to be a forgery in some other degree, shall, on conviction, be adjudged guilty of forgery in the third degree.' It will be observed that the promissory note or other evidence of debt mentioned in section 2001, supra, must be one being or purporting to be made or issued by some incorporated bank or cashier thereof, and that any person guilty of violating its provisions is guilty of forgery in the second degree. Section 2009, supra, is leveled at persons who, with intent to injure and defraud, shall falsely make, alter, forge, or counterfeit any instrument of writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, and provides that any person violating its provisions shall be guilty of forgery in the third degree. The punishment under our statute (section 2024, Rev. St. 1899) for forgery in the second degree is imprisonment in the penitentiary for not less than five nor more than ten years, and for forgery in the third degree by the like imprisonment not exceeding seven years. It is too

§ 4606. **Unexplained Possession of Forged Written Instrument as Evidence of Guilt.** You are further instructed that if you find from the evidence that the deed in question, purporting to have been made by F. to H., as introduced in evidence, is not in fact the deed of the said F., but a forgery, then the possession of said forged instrument, if unexplained by the defendant, is evidence to be considered by you as tending to prove that defendant had the same in his possession, with knowledge of its false character, and for an unlawful purpose.<sup>18</sup>

clear for argument that the indictment was drawn under section 2009, while the instruction under consideration was in accordance with the indictment; that is, for forgery in the third degree, with the exception of the punishment, with respect to which the jury were inadvertently told that, if they found the defendant guilty, they would assess his punishment at imprisonment in the penitentiary for a term of not less than five nor more than ten years, instead of two to seven years. They assessed defendant's punishment at imprisonment in the penitentiary for a term of five years, which was within the maximum and minimum limit. How was defendant injured? In the case of *State v. Sands*, 77

Mo. 118, an instruction which overstated the maximum fine, and omitted to state the minimum term of imprisonment for the offense, was held erroneous, although the punishment assessed by the jury was within the limit, as in the case at bar, as to the imprisonment prescribed by the law, both as to fine and imprisonment. There is no difference in principle between the rule announced in that case and the one at bar. To the same effect is *State v. McNally*, 87 Mo. 658."

18—*State v. Hathhorn*, 166 Mo. 229, 65 S. W. 756 (759).

"This instruction requires defendant to explain away his supposed guilt, and thus nullifies his presumptive innocence."



## CHAPTER CLXXVIII.

### CRIMINAL—HOMICIDE.

See Approved Instructions, Chapter XCVII, Vol. II.

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| <p>§ 4607. Murder—Killing policeman who attempts illegal arrest.</p> <p>§ 4608. Homicide—Preventing escape of prisoner.</p> <p>§ 4609. Murder—Causing death of child after its birth by beating its mother before its birth.</p> <p>§ 4610. Whether killing was justifiable or manslaughter.</p> <p>§ 4611. Accidental homicide.</p> <p>§ 4612. Shooting of third person accidentally while shooting at another.</p> <p>§ 4613. Burden of proving defense of accidental killing—Preponderance.</p> <p>§ 4614. Homicide with revolver—Assuming facts and argumentative.</p> <p>§ 4615. Murder—Formed design not an essential element—Alabama statute.</p> <p>§ 4616. "Deliberately" shooting not necessarily a crime.</p> <p>§ 4617. Killing with pistol in mutual combat not necessarily murder.</p> <p>§ 4618. Immaterial whether defendant could see deceased or not.</p> <p>§ 4619. Correct statement of abstract proposition of law sometimes error.</p> <p>§ 4620. Insulting words — Invading province of jury.</p> <p>§ 4621. Jury considering insults by deceased not limited to the time of killing.</p> <p>§ 4622. Murder committed while engaged in robbery.</p> <p>§ 4623. Duel.</p> <p>§ 4624. Right to carry arms.</p> <p>§ 4625. Murder—Error to prevent verdict in lesser degree.</p> <p>§ 4626. Importance of case—Homicide.</p> <p style="text-align: center;"><b>MURDER IN FIRST DEGREE.</b></p> <p>§ 4627. Erroneous definition of murder in first degree may not reverse conviction of murder in second degree.</p> <p>§ 4628. The intention to kill must be the result of deliberate premeditation to be murder in first degree.</p> | <p>§ 4629. Murder in first degree—Intent inferred from killing.</p> <p>§ 4630. Killing deceased with a willful purpose and intention to take his life—Form of verdict.</p> <p>§ 4631. Killing with deadly weapon not prima facie evidence of murder in first degree.</p> <p>§ 4632. Inflicting mortal wound with deadly weapon—Instruction must refer to the evidence as the source of jury's belief.</p> <p>§ 4633. Killing policeman after escape from custody.</p> <p>§ 4634. Killing by poison—Instruction varying from indictment.</p> <p>§ 4635. Taking deceased to a secluded place with intent to kill — Omitting reasonable doubt.</p> <p style="text-align: center;"><b>MURDER IN SECOND DEGREE.</b></p> <p>§ 4636. Murder in second degree—Definition of.</p> <p>§ 4637. Murder in second degree presumed in the absence of proof to the contrary—State must prove killing was intentional.</p> <p>§ 4638. Murder in second degree—Degree of proof required—The phrase "fail to establish" held erroneous.</p> <p>§ 4639. Murder in second degree—Premeditation not requisite.</p> <p>§ 4640. Murder in second degree—Variance from statute definition—Florida.</p> <p>§ 4641. Murder in second degree—Texas.</p> <p style="text-align: center;"><b>MANSLAUGHTER.</b></p> <p>§ 4642. Manslaughter defined.</p> <p>§ 4643. Statutory definitions of crime not always applicable.</p> <p>§ 4644. Intent to take life not necessary—Alabama statutes.</p> <p>§ 4645. Intent to kill necessary to convict—Texas.</p> <p>§ 4646. Sudden passion and malice not inconsistent with each other.</p> |
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| <p>§ 4647. In sudden heat of passion or sudden affray, not both, to constitute crime.</p> <p>§ 4648. Killing through fright or excitement.</p> <p>§ 4649. Defendant the aggressor—When not barred from defense of sudden passion.</p> <p>§ 4650. Manslaughter—Instruction as to should not misplace the burden of proof.</p> <p>§ 4651. Manslaughter—Error to direct verdict.</p> <p>§ 4652. Concealment of the body—Drawing inferences of fact by the court.</p> <p>§ 4653. Provocation—Jury may consider preceding as well as attending circumstances.</p> | <p>§ 4654. Manslaughter — Policeman who kills in making an arrest.</p> <p>§ 4655. Manslaughter — Killing seducer of defendant's daughter.</p> <p>§ 4656. Manslaughter — Defendant striking deceased with his hand not necessarily liable for the killing of deceased by another.</p> <p>§ 4657. Horse-racing on public highway—Alabama statute.</p> <p>§ 4658. Manslaughter in second degree—Missouri statute.</p> <p>§ 4659. Manslaughter in third degree—Instructions as to, not supported by evidence killing in self-defense.</p> |
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**§ 4607. Murder—Killing Policeman who Attempts Illegal Arrest.**

(a) The law esteems human liberty, when the citizen is in the peace of its commonwealth, so highly that any attempt to arrest without authority of law is plainly speaking a great provocation; and if such citizen kills an officer attempting to make an illegal seizure of his person, although such killing will be neither excusable nor justifiable, yet will not amount in law to more than manslaughter.<sup>1</sup>

(b) The court instructs the jury that although they may believe from the evidence that the accused had been guilty of an infraction of the law of the town of E. by firing a gun on the highway, and although they may further believe that the deceased was chief of police of said town, still the accused could not have been legally arrested and placed in jail for such an offense unless the jury still further believe from the evidence that such offense had been committed in the presense of said officer, or unless said officer had a warrant of arrest, properly issued upon complaint, commanding such arrest to be made.<sup>2</sup>

(c) You are instructed that the law provides that it is the duty of every peace officer, when he may be informed in any manner that a threat has been made by any person to do some injury to the person or property of another, to prevent the threatened injury if within his power, and, in order to do this, he may call in aid any number of citizens in his county; and if you shall believe from the evidence in this case, beyond a reasonable doubt, that deceased, as deputy marshal, and R., as marshal of the city of H., had been informed that defend-

1—Roberson v. State, 145 Fla. 94, 34 So. 294 (297), affirming conviction of murder. Citing same case on former appeal. Roberson v. State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751.

Held "properly refused because it erroneously converts every killing of an officer making an illegal arrest without warrant into manslaughter, regardless of the presence or absence of premeditation in such killing, which is not the law."

2—State v. Davis, 52 W. Va. 224, 43 S. E. 99 (100).

"This instruction does not fit the case. According to the defense, the accused was publicly intoxicated, and he was carrying a revolver contrary to law, as shown by the fact that he used it to shoot the officer. Therefore the officer had a right to arrest him without a warrant. For two reasons he was subject to arrest on sight. No warrant was necessary. Nor would the fact that he was illegally arrested justify the killing of the officer. The instruction was only calculated to mislead the jury, and hence it was properly refused."

ant, A., had seriously threatened to take the lives of R. and his wife, and to burn their house, then the deceased and said R., as peace officers, had a right to go to the house where he and R. had been informed said A. could or might be found to investigate the truth or falsity of said information, as to such threats, and, if found to be true, to prevent the threatened injury, if within their power, to the extent of arresting said A. to prevent the accomplishment of said threats, and to summons other persons to their aid; and if the defendant A. knew that deceased and R. and other parties with them were peace officers, and a posse summoned to their aid, and were there for a lawful purpose, and that said parties were doing no violence or attempting to do any violence to defendant's person, or attempting to effect any unlawful or violent entrance into said house, and that said defendant shot and killed deceased, then said defendant would be guilty of murder, if you should believe from the evidence beyond a reasonable doubt the existence of malice upon the part of said defendant, or of manslaughter as you may find the existence of sudden passion aroused by adequate cause upon the part of said defendant.<sup>3</sup>

§ 4608. **Homicide—Preventing Escape of Prisoner.** The court further instructs the jury that, as a matter of law, the defendant being a peace officer in the town of H. at the time of the killing of the deceased, G., he had the right to arrest the deceased, if he was drunk or committing a breach of the peace in his presence, without any warrant, and had the right to take deceased before the police judge of the town of H. to be dealt with according to law. And if the said G., after having been arrested by the defendant, refused to submit to said arrest, or to remain in the defendant's control, as marshal, or refused to continue in his control as marshal then the defendant had the right to use reasonable force to compel said G. to submit to his authority and to continue in his control, and, if the jury believe from the evidence that the deceased, G., refused to continue in the control of the defendant as marshal, and assaulted said marshal, the defendant in this action, the defendant, S., had the right to defend himself from said assault, and to use such force as was reasonably or apparently necessary to repel said assault, but the defendant S. had no right, even if assaulted by said G., after he had been arrested, to use any more force than was reasonably or apparently necessary to protect himself from great bodily harm or

3—Allen v. State, — Tex. Cr. App. —, 66 S. W. 671 (673).

"This charge is not the law. . . . If the city marshal had been told, as he testified, that defendant had made serious threats against the life of himself and his wife, he could have had an affidavit filed against defendant, and upon the filing of the same the magistrate could have issued a warrant for the arrest of defendant on said charge. Without such warrant, the marshal would have no more right to go to the house of defendant and intrude upon his premises than any other citizen. For a full discussion of the rights of a peace officer to arrest without warrant, see *Montgomery v. State*, 3 Tex. Ct. Rep. 497,

65 S. W. 537. In that case we held that if a felony is committed in the presence of a peace officer, or an offense against the public peace, he may arrest without warrant. Article 342, Pen. Code, authorizes a peace officer to arrest without warrant a party for carrying a pistol, where such fact is known of his knowledge, or upon information of some credible person. But these three are the only instances we are aware of that the Code authorizes the arrest of a person without warrant. It follows, therefore, that the court should not have submitted the question as to whether R. was marshal and peace officer to the jury, since he had no more rights in the premises than any other citizen."



death at the hands of deceased, G., or to overcome the force, if any, offered by the said G. in his resistance of said arrest, or continued control after the arrest. And the court further instructs the jury that the defendant had no right to kill the said G. in order to retain custody of his person after having arrested him, charged with disorderly conduct or drunkenness, or breach of the peace, except as the said G. was assaulting the defendant as supposed in these instructions.<sup>4</sup>

§ 4609. **Murder—Causing Death of Child after its Birth by Beating its Mother before its Birth.** Although the jury may believe from the evidence that defendant inflicted wounds or bruises upon C., while quick with child, intentionally and willfully, and that the child, after birth, died from the effect of the beating and bruises on C., still, if defendant did not intend to take life, and did not so beat and bruise C. in reckless disregard of the life of the child, then he cannot be convicted of murder in the first or in the second degree.<sup>5</sup>

§ 4610. **Whether Killing Was Justifiable or Manslaughter.** (a) If the evidence shows an unlawful killing, then, in order for such unlawful killing to be manslaughter and not murder, there must have been shown by the evidence to have been a serious and highly provoking injury inflicted upon the person killing . . . or an attempt by the person killed to commit a serious injury upon the person killing.<sup>6</sup>

4—*Stevens v. Commonwealth*, 30 Ky. L. 290, 98 S. W. 284.

"Under the facts appearing in the record there can be no doubt that appellant had, as a peace officer, the right to arrest deceased without a warrant, as he was both drunk and disorderly in the officer's presence. Appellant's right to take him to the depot and hold him in custody until the police judge could be sent for in order that he might try him for the offense committed in the presence of the officer, or commit him to prison in default of bail until the next day, is also free from doubt. It is the theory of the defense that, after the arrest of the deceased had been properly made by appellant, he forcibly resisted the latter in the attempt to release himself from arrest, that is, from appellant's custody as a peace officer, by assaulting him, and that appellant in the effort to retain him in custody and to protect himself from danger of death or great bodily harm, or what reasonably appeared to him to be such danger, shot and killed him. It was for the jury to determine from the evidence introduced by appellant in support of this theory whether the killing was or was not justifiable. It is, however, patent that the above instructions confined appellant's right to kill deceased to the single ground of self-defense, which was error. For, though he may not have had any reason to fear death or bodily harm at the hands of deceased, if the latter was attempting to release himself from arrest by forcibly overpowering appellant, the latter had the right to use such force as

was reasonably necessary to overcome that being used by deceased to effect his release, even to the extent of shooting and killing the latter, if it reasonably appeared to appellant that that was the only way to prevent his release from his (appellant's) custody, though he would have had no right to shoot deceased if he had gotten away from him, and was fleeing to escape."

5—*Clarke v. State*, 117 Ala. 1, 23 So. 671 (672).

"The offense is murder, not manslaughter, upon the settled principle of the common law, that where death ensues from an act done without lawful purpose, dangerous to life, malice, the essential ingredient of murder, is implied. *Commonwealth v. Parker*, 9 Metc. (Mass.) 263-265, 43 Am. Dec. 396; *State v. Moore*, 25 Ia. 134; 1 Whart. Cr. Law (9th ed.), par. 316; 1 Bish. Cr. Law, par. 328 et seq." The opinion fully states the authorities as to the competency of the wife as witness against her husband, and holds her to be competent in this case.

6—*State v. Crea*, 10 Idaho 88, 76 Pac. 1013 (1017).

The court said: "The vice of the instruction is in charging that one who kills another while resisting an attempt to commit a serious injury on his person is guilty of manslaughter, when as a matter of fact such killing would be justifiable." Reference was made to § 6570, Idaho Rev. Stat., which defines justifiable homicide thus: "Homicide is also justifiable when committed by any person in either of the following cases. (1) When resisting any attempt to murder any person, or to

(b) The jury are instructed that if they shall find and believe from the evidence that at the time and place charged in the indictment the defendant assaulted and killed the deceased, B., in a heat of passion, upon a sudden provocation, or upon a sudden combat, without any undue advantage being taken of said B., and without using any dangerous weapon upon him, and not in a cruel or unusual manner, and that said B. was, by accident of misfortune, killed by defendant in such assault so made upon him by defendant, then your verdict should be that the defendant is not guilty, because the killing done, under such circumstances, is excusable in law.<sup>7</sup>

§ 4611. **Accidental Homicide.** (a) The court instructs the jury that accidental killing is not such a matter of defense as throws upon the prisoner the burden of proving it by a preponderance of the evidence; that it is the duty of the state to allege and prove in this case that the prisoner killed P. intentionally or willfully; and, if the evidence in this case, taken all together, raises in the minds of the jury a reasonable doubt as to whether the prisoner killed P. intentionally or accidentally, they should not find the prisoner guilty of anything higher than involuntary manslaughter or assault and battery.<sup>8</sup>

(b) If the jury believe from the evidence that the killing of the deceased was the result of criminal negligence,—gross negligence in the handling of his rifle while it was pointing in her direction, in the direction of her body,—it would constitute the offense of murder.<sup>9</sup>

§ 4612. **Shooting of Third Person Accidentally While Shooting at Another.** You are instructed, if you believe from the evidence that defendant, S., shot N. with a pistol and killed him, and that while shooting at said N., if he did, he also shot and wounded a child who was in the same room, then the jury are further instructed that defendant cannot be convicted for unlawfully shooting said child (if he did) in this procedure, and the jury are instructed not to consider that (if it has been established), except as a circumstance in the case, which they should consider along with all other facts and circumstances in evidence in the case, if any, in determining whether defendant was guilty of murder in killing N., if he did.<sup>10</sup>

commit a felony or to do some great bodily injury upon any person . . .

(2) When committed in the lawful defense of such persons. . . .

When there is reasonable ground to apprehend a design to commit . . . some great bodily injury and imminent danger of such design being accomplished."

7—State v. Reed, 154 Mo. 122, 55 S. W. 278 (280).

Held properly refused because "it does not define the meaning of the expression, 'in the heat of passion' nor 'upon a sudden provocation,' nor do the state's instructions, though employing these and similar expressions, give them definition." See State v. Strong, 153 Mo. 548, 55 S. W. 78, to same effect.

8—State v. Dodds, 54 W. Va. 289, 46 S. E. 228 (232).

"Although an instruction, considered by itself, is too general, yet, if it is properly limited by others given on the other side, so that it is not

probable it could have misled the jury, judgment will not be reversed on account of such instruction. The other instructions given by the court, state the law correctly, and were properly allowed."

9—Roberts v. State, 112 Ga. 542, 37 S. E. 879. Citing Austin v. State, 110 Ga. 748, 36 S. E. 52, 78 Am. St. 134.

"On the trial of one accused of murder, who set up as his defense that the gun, a shot from which inflicted the fatal wound, was accidentally discharged, it was error to charge the jury as above."

10—Stevison v. State, — Tex. Cr. App. —, 89 S. W. 1072.

"This charge is erroneous. It is not proper to draw any such legal conclusion from the accidental (as the record before us shows) shooting of the child. It would be proper to tell the jury that defendant could not be convicted of any offense, except the one for which he was then

§ 4613. **Burden of Proving Defense of Accidental Killing—Preponderance.** (a) The court instructs that the defendant, in addition to the plea of not guilty, sets up the plea of accidental killing. Now, where a person comes into court, whether in a civil or criminal case, and sets up an affirmative defense—where he comes in and says that the charge against him would be true, but for certain facts which he relies upon—he must establish those facts by the preponderance of the evidence. The rule is the same in a criminal case as in a civil case, and, so far as a defendant is concerned, in a criminal case the state must prove beyond a reasonable doubt its side of the case. The defendant is only required to prove by the preponderance of the evidence—which means the greater weight of evidence—the facts that he relies upon by way of excuse or justification. In this case, therefore, the defendant must establish the facts upon which the plea of accidental killing rests by the preponderance of the evidence, and, if he has established his plea of accidental killing to that extent, then he is entitled to a verdict of not guilty.

(b) So if he has established his plea of accidental killing by the preponderance of the evidence, you must find a verdict of not guilty. If you have a reasonable doubt whether he has established the plea by the preponderance of the evidence, you must give him the benefit of the doubt, and find he has established it, and still find a verdict of not guilty. If he has failed to establish the plea of accidental homicide, then you disregard that plea, and determine, from his other plea of not guilty to the indictment, whether the state has established its case beyond a reasonable doubt or not; and, if it has not, you must give him the benefit of the reasonable doubt, and find a verdict of not guilty.

(c) So if you should conclude, in this case, that the defendant was resisting an unlawful arrest, or if you should conclude, he was defending himself against unnecessary violence, and thus engaged in a lawful act, and that while so engaged he unintentionally, accidentally, took the life of the defendant, that would be an accidental homicide, or a homicide by misfortune, which the law will excuse. But if the defendant has failed to show that to your satisfaction by the preponderance of the evidence, then you, as a matter of course, will disregard that plea of accidental killing, and determine whether he is guilty of murder, manslaughter or not guilty, upon the indictment and upon the plea of not guilty. Give the defendant the benefit of every reasonable doubt.<sup>11</sup>

on trial. But the accidental shooting of the child would not necessarily show or tend to show that appellant was guilty of murder in shooting deceased. The shooting of the child occurring contemporaneous with the shooting of deceased, it would be a provable fact, because a part of the *res gestae*; and it would be well for the court to state, as indicated, that the jury should not convict appellant for any offense except the one on trial, and not then, except under the rules of law prescribed in the charge."

<sup>11</sup>—*State v. McDaniel*, 68 S. C. 304, 47 S. E. 384 (388), 102 Am. St. 661.

"The rule has been established in this state that, where self-defense is pleaded to an indictment, the defendant must establish it by the preponderance of the evidence, but at the same time the guilt of the accused must be made to appear beyond a reasonable doubt. *State v. Welsh*, 29 S. C. 4, 6 S. E. 894; *State v. Bodie*, 33 S. C. 132, 11 S. E. 624. Whether such a rule, as applied to self-defense, is sound or practically useful, we need not now inquire. If there is no distinction between self-defense and homicide by accident, when set up by plea and evidence, then, unquestionably, the circuit court charged the jury correctly, as



§ 4614. **Homicide with Revolver—Assuming Facts and Argumentative.** The court instructs the jury that in this case has been produced a leaden bullet, said to have caused the death of N., and to have been found in his body, and that in determining whether or not this bullet was shot from a revolver by one of the defendants, they are to consider all the evidence of the case, and in deciding whether or not the said bullet was shot from a 38 revolver in the hand of one of the defendants, they are to consider in connection with all the other evidence in this case the testimony of the expert witnesses, and in determining which of them is correct in his statement of opinion, the jury may consider the appearance of the bullet, the absence from it of any distinguishing mark, if there be such absence, and the fact that it was shown to such witnesses and produced before the jury, separated from the shell which contained it, and that such shell was not shown to any of the expert witnesses nor produced before the jury.<sup>12</sup>

§ 4615. **Murder—"Formed Design" not an Essential Element—Alabama Statute.** Unless you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased with malice aforethought, and under a formed design, you cannot convict the defendant of murder in either degree.<sup>13</sup>

he charged in accordance with the law as laid down in repeated decisions concerning self-defense as an affirmative defense. But we do not think that a defense that the homicide was accidental is in any sense an affirmative defense. It is distinguishable from self-defense as a plea, which admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional. In *Commonwealth v. McKie*, 1 Gray 61, 61 Am. Dec. 410, the logical rule is thus stated: 'Where the defendant sets up no separate independent fact in answer to a criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains on the government to satisfy the jury that the act was unjustifiable and unlawful.' In the case of *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, the court held that the defense of accidental killing is a denial of the criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony. It was error, therefore, to instruct the jury to disregard the plea of accidental homicide if the defendant failed to establish it by the preponderance of the evidence. It is true, the charge did finally impose upon the state the duty of establishing the charge beyond a reasonable doubt, but it will be observed that this last instruction was conditioned on defendant's

failure to establish an accidental killing by the preponderance of the evidence. The error consisted in charging that the burden of proof had shifted to the defendant at all on the question whether the killing was accidental. For this material error, in an otherwise exceedingly clear and able charge, the judgment must be reversed."

12—*Healy v. People*, 177 Ill. 306 (323), 52 N. E. 426.

"This instruction is open to more than one objection. It assumes the ball had been contained in the shell of a cartridge, which was a strongly contested question of fact. It selects particular alleged features of the testimony not conclusive in character but merely evidentiary and directs the special attention of the jury thereto and thereby gives such parts of the testimony undue prominence, the effect of which is to impress the jury with the belief that the court attaches special significance thereto. It is argumentative in form, structure and effect. Such instructions have been frequently condemned by this court."

13—*Wilson v. State*, 128 Ala. 17, 29 So. 569 (572).

Of this the court said: "The term 'formed design' employed in the above charge has sometimes, even by this court, been deemed expressive of the willful, deliberate, premeditated purpose which characterizes murder in the first degree. *Mitchell v. State*, 60 Ala. 26. In more recent cases it has been held that such meaning does not necessarily attach to the term. See *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *Martin v. State*, 119 Ala. 1, 25 So. 255; *Miller v. State*, 107 Ala. 40, 19 So. 37. A term giving rise to

§ 4616. "Deliberately" Shooting not Necessarily a Crime. The court instructs the jury for the state that if they believe from the evidence in this case, beyond a reasonable doubt, that defendant deliberately shot M. with a gun, intending to kill him, he is guilty as charged, and the jury should find him guilty.<sup>14</sup>

§ 4617. Killing with Pistol in Mutual Combat not Necessarily Murder. If the jury shall believe from the evidence, beyond all reasonable doubt, that there was trouble or misunderstanding at the time of the homicide between B. and R., and that they agreed to face each other about it, and that, in pursuance of the purpose to meet and face each other, each of them armed himself with a deadly weapon, to-wit, a pistol, and that they then met and faced each other, and that R. in that meeting shot and killed B., he is guilty of murder, and the jury should so find.<sup>15</sup>

§ 4618. Immaterial Whether Defendant Could see Deceased or Not. If the jury believe from the evidence that, at the time the defendant fired the first two shots, that there was an obstruction which prevented the said defendant from seeing H., then, although the evidence shows that the pistol ball struck the store within about 3 feet of said H., they cannot believe that said defendant aimed the said two shots at H.<sup>16</sup>

§ 4619. Killing with Depraved Heart, Regardless of Human Life—Correct Statement of Abstract Proposition of Law Sometimes Error. The court instructs the jury that the killing of a human being without authority of law, when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual is murder.<sup>17</sup>

§ 4620. Insulting Words—Invading Province of Jury. Although the jury may believe, from the evidence, that the opprobrious

views so divergent would probably have confused the jury, and misled them to believe that premeditation was a necessary ingredient of murder in the second degree, whereas malice which may arise on the instant, and without deliberation, when concurring with an intention to kill may constitute that offense. *Gilmore v. State*, 126 Ala. 20, 28 So. 596, and *Martin v. State*, supra.

14—Held error in *Johnson v. State*, — Miss. —, 27 So. 880 (881), where evidence had been offered and excluded tending to support defendant's theory of killing in self-defense.

15—*Rogers v. State*, 82 Miss. 479, 34 So. 320 (321).

"There is no evidence that the parties had agreed to such a meeting. The preliminary negotiations of the friends and relatives of the unfortunate girl, and the part played in this effort to get matters amicably adjusted, by R., were all consistent with a lawful purpose. Such a meeting as subsequently took place between R. and B., in which B. lost his life, falls far short of a prearranged meeting for a duel. In the one case the meeting was to adjust a misunderstanding, and

remove if possible, all stain from the character of the girl. But in the other all efforts to peaceable settlement are known to have passed, and the parties meet only to do battle."

16—*Gater v. State*, 141 Ala. 10, 37 So. 692 (693).

"Whether defendant saw H. when he fired any of the shots was wholly immaterial, if he fired them with the intent to kill him. The above charges were therefore properly refused."

17—*Wood v. State*, 81 Miss. 408, 33 So. 285, 13 Am. Cr. Rep. 399.

"It was not proper in this case, where the evidence showed shooting with specific intent to kill some one of a group of assailants, to give this instruction, correct in the abstract, but applicable only where the evidence shows a shooting with a reckless disregard of life by one of wanton and depraved mind; not with specific purpose to kill some assailant, but with utter recklessness as to who might be killed. The vice of this instruction in such a case is set in very clear light in the very accurate opinion of our Brother Terral in *Strickland v. State*, 81 Miss. 134, 32 So. 921."

epithets were used by the deceased to the defendant, yet if the jury further believe, from the evidence, that the defendant immediately revenged himself by the use of a dangerous and deadly weapon in a manner likely to cause the death of the said B., and did thereby cause his death as charged, then the defendant is guilty of murder and the jury should so find by their verdict.<sup>18</sup>

**§ 4621. Jury Considering Insults by Deceased not Limited to the Time of the Killing.** (a) The jury are instructed that if they believe that deceased immediately before the killing insulted defendant's wife, and, under the immediate influence of sudden passion provoked by such insults, appellant killed deceased, to find him guilty of manslaughter.

(b) The jury are further instructed that if M. killed deceased by shooting him with a gun, under the influence of sudden passion, and that such passion was not, however, produced by the insult of H. to his wife at the time, but by reason of former insults offered him and his wife, he would be guilty of murder in the second degree.

(c) The jury are further instructed that if deceased killed H. by shooting him with a gun, with a deliberate mind, and in pursuance of a formed design, with intent to revenge former insults and wrongs of deceased . . . he would be guilty of murder in the first degree.<sup>19</sup>

**§ 4622. Murder Committed While Engaged in Robbery.** It being charged in the information that the deceased, A, came to his death at the hands of the defendants, H. & B., while they, the defendants, were engaged in the common purpose of committing a robbery upon the said deceased, you are instructed that, as a matter of law, robbery is the felonious taking of money, goods or other valuable things from the person of another by force or intimidation, and that under our statutes the crime of robbery is a felony, punishable by imprisonment in the penitentiary of the state. Therefore, in this connection, you are further instructed that when an unlawful intentional killing of a human being occurs, or is committed by one or more persons while engaged in an attempt to rob the person so killed, such killing would be murder in the first degree, and that all who are present, engaged in the common design of robbery, aiding and abetting therein, in furtherance of the common purpose of robbery, are equally guilty

18—In *Lynn v. People*, 170 Ill. 527 (537), 48 N. E. 964, reversing conviction of murder, the court said: "The last clause of this instruction was condemned in *Panton v. People*, 114 Ill. 505, 2 N. E. 411, where the court said (p. 509), 'The last clause of the second above instruction was wrong in saying you should find him guilty of murder. Under an indictment for murder, a defendant may be found guilty of manslaughter, and the jury here should have been left free to find in that respect without being directed by the court how they should find. The court should have said no more in such respect in the instruction than that the jury should find the defendant guilty.' The direction by the court in the case at bar was erroneous for the same reason."

19—*Martin v. State*, 40 Tex. Cr. App. 660, 51 S. W. 912. Citing *Tucker v. State*, — Tex. Cr. App. —, 50 S. W. 711; *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333; *Eanes v. State*, 10 Tex. App. 421.

"Defendant had the right to have the law in regard to insulting conduct as a provocation given in charge to the jury, not limited, under the facts of this case, to the insulting language used at the time of the homicide. The jury could look to the previous insults as well. This question has been frequently decided. As we understand the law, defendant had the right to have the insulting conduct given at the time of the killing viewed in the light of the former provocation and insulting conduct. Such are the authorities in this state."



with the one who actually does the killing. You are therefore instructed in this case, if you believe from the evidence, beyond any reasonable doubt, that at the time of the alleged killing of A. the defendant H., with B., had entered his dwelling house, armed with a deadly weapon or weapons, for the purpose of intimidating the deceased, for the furtherance of their purpose to steal, take and carry away by force and violence the money or any article of personal property of the deceased's dwelling house, and that in the prosecution of that purpose and design the defendants, or either of them, shot the deceased, and thereby caused his death, or that one of the defendants fired the fatal shot which caused the death of the deceased, and that the other defendant was there present, aiding, abetting and assisting in the perpetration of the felony, and in the commission of the act which caused the death of the deceased, then you are instructed, should you so find, that such killing would be murder in the first degree; for the law presumes, where human life is taken under such circumstances and in furtherance of the purpose to commit a robbery, that the person or persons committing such felony contemplate and intend such killing as a natural and probable result of their intent to rob.<sup>20</sup>

§ 4623. **Duel.** The court instructs the jury that he who slays another in a duel, whether formally or suddenly improvised, and however fairly conducted, is legally a murderer, and is guilty of murder. And even though the jury may believe that, in the altercation with J., D. fired one shot at J. with a pistol, yet if the jury believe from the evidence, beyond a reasonable doubt, that J. said, "Dan, did you bring that pistol here to shoot me?" and then said further, "You just wait here. I am going to get my gun and kill you"—or words to that effect—and then turned and went into the house and procured his gun, and came back into the lot and willfully and deliberately shot and killed D., he is guilty of murder, and the jury should so find. And this is so even though the jury may believe from the evidence, beyond a reasonable doubt, that D. was still standing in the road with his pistol, ready and willing to enter into a mutual combat with J.<sup>21</sup>

§ 4624. **Right to Carry Arms.** Every citizen of this state has a perfect right under the laws thereof to own arms, and to use them in a lawful manner; and the mere fact that the defendant was in possession of a pistol at the time of the killing amounts to no evidence of his guilt, unless it is shown to the satisfaction of the jury that he had it at the time of the fatal difficulty and intended to un-

20—Hill v. State, 42 Neb. 503, 60 N. W. 916 (1922).

"There appears to have been an error or omission in the transcribing of the above instruction, wherein the court is made to say that the accused might be convicted if he feloniously killed the deceased while engaged with his codefendant in attempting forcibly to take, steal or carry away 'any article of personal property of the deceased's dwelling house.' . . . The taking of the property of the deceased from his dwelling under the circumstances

indicated would have been robbery. It would also have sustained a conviction for larceny. Brown v. State, 33 Neb. 354, 50 N. W. 154."

21—Springer v. State, — Miss. —, 38 So. 97.

"It was fatal error to give this instruction for the state. The instruction assumes that there was a duel, and, in addition to this picks out a fragment only of the testimony of the witness S., and puts the case to the jury on that fragment of evidence. This practice has been condemned over and over again."

lawfully use it in the conflict which resulted in the killing of the deceased.<sup>22</sup>

§ 4625. **Murder—Error to Prevent Verdict in Lesser Degree.** If you find from the evidence, beyond a reasonable doubt, that the defendant is guilty of murder in the second degree, as I have defined it, committed, in the manner charged in the information, upon the person of said A., and at the time and place therein named, then you should return a verdict against the defendant of murder in the second degree; but, if you do not so find, then you should acquit the defendant.<sup>23</sup>

§ 4626. **Importance of Case—Homicide.** Of course it is not necessary for me to say to you that this is a very important case. On the one hand stands the commonwealth of Wisconsin, demanding that its laws shall be executed, that crime shall be punished; and representatives of the people are asking at your hands a verdict of guilty of whatever offense you may find the evidence to warrant.<sup>24</sup>

### MURDER IN FIRST DEGREE.

§ 4627. **Erroneous Definition of Murder in First Degree May Not Reverse Conviction of Murder in Second Degree.** The court instructs the jury that under the law a person is presumed to intend that which he does, or which is the immediate and necessary consequences of his acts; and if the jury believe from the evidence in this case that the prisoner, D. with a deadly weapon, without any or upon slight provocation, intentionally shot and killed P. in M. County, then the prisoner, under the law, is presumed to be guilty of murder in the first degree.<sup>25</sup>

22—Klyce v. State, 78 Miss. 450, 28 So. 827 (828).

The court said that "it was manifest error to refuse the defendant an instruction that he was not to be convicted of manslaughter because he had a pistol on his person, and attended the services with it, unless he had it with both a purpose to use it and to make occasion for its use. He was not on trial for carrying a concealed weapon and he had given a reason for having it, which he was not bound to give."

23—State v. Buffington, 66 Kan. 706, 72 Pac. 213.

"The defendant in a criminal prosecution has a right to have the court instruct the jury in the law applicable to his contention, if supported by substantial evidence, however weak, unsatisfactory, or inconclusive it may appear to the court. To refuse to so instruct the jury would be to invade its province in the trial of a case. The question is not whether, in the mind of the court, the evidence, as a whole, excludes the idea that the defendant is guilty of an inferior degree of the offense charged, but whether there is any substantial evidence tending to prove an inferior degree of the offense. If there is, then the

question of such degree should be submitted to, and left for the determination of the jury. The unsupported testimony of the defendant alone, if tending to establish such inferior degree, is sufficient to require the court to so instruct. We have examined this evidence carefully, and believe the court erred in not giving the instructions requested by the defendant upon the inferior degrees of homicide, and also erred in giving the instruction above quoted."

24—Ryan v. State, 115 Wis. 488, 92 N. W. 271 (275).

"This was a mere general observation, calculated to impress upon the jury the importance of the responsibility resting upon them. It might better have been omitted; but it is not 'equivalent to saying that the state had already decided the defendant's guilt of some degree of homicide' and 'that the state demanded a verdict of guilty,' as claimed by counsel."

25—State v. Dodds, 54 W. Va. 289, 46 S. E. 228 (229, 231).

Held that giving this instruction, if erroneous under the West Virginia statutes, would not reverse a conviction of murder in the second degree, which conviction the court accordingly affirmed.

§ 4628. **The Intent to Kill Must be the Result of Deliberate Premeditation to be Murder in First Degree—Elements Omitted Supplied by Other Instructions.** (a) Except as explained in the instructions, the unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.<sup>26</sup>

(b) To be murder in the first degree, the killing must have been done after deliberation, and deliberation means a cool state of the blood.<sup>27</sup>

§ 4629. **Murder in First Degree—Intent Inferred from Killing.** The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believe from the evidence that H., with a deadly weapon in his possession, without any or upon very slight provocation, gave to R. a mortal wound, the said H. is *prima facie* guilty of willful, deliberate and premeditated killing; and the necessity rests upon H. of showing extenuating circumstances. As they appear from the case made by the state, H. is guilty of murder in the first degree.<sup>28</sup>

§ 4630. **Killing Deceased with a Willful Purpose and Intention to Take His Life—Form of Verdict.** In the case at bar, if you are satisfied from the evidence, under these instructions, that the defendant, at the time and place mentioned in the indictment, shot and killed M. the deceased as charged in the indictment, and that, before or at the time the fatal shot was fired, the defendant had formed in his mind a willful purpose and intention to take the life of the deceased, and the fatal shot was fired in furtherance of such unlawful purpose, and that, the deceased M. was killed then and there, then

26—State v. Martin, 29 Mont. 273, 74 Pac. 725 (727).

The court said that this "is the same as the first half of the erroneous instruction quoted in State v. Shafer, 22 Mont. 17, 55 Pac. 526, except that the instruction in the case at bar is preceded by a reference to other instructions, which does not appear in the Shafer instruction. To the Shafer instruction is also added this further statement: 'It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree.' The instruction in the Shafer case was held erroneous by reason of this latter clause being added to it; that it was not a correct definition of murder in the first degree, for the reason that it did not contain the words 'malice aforethought.' The only part of the instruction, however, which the court held erroneous in the Shafer case is that last quoted, and the court then expressed some doubt as to whether 'this error standing alone would be considered sufficient to authorize a

reversal of the case.' We do not find any error in the action of the court in giving this instruction, but will add that the above quoted instruction would be insufficient but for the fact of supplementary instructions used in connection with it, which cure the omissions apparent in it."

27—Thayer v. State, 138 Ala. 39, 35 So. 406 (408).

"In the charge the words 'cool state of the blood' are employed. Whether they mean the same thing as 'deliberation' also therein employed and no more, we need not now determine. The direct effect of giving such a charge would have been to confuse and mislead the jury. Cleveland v. State, 86 Ala. 2, 5 So. 426."

28—State v. Hertzog, 55 W. Va. 74, 46 S. E. 792 (794).

Held erroneous. The court said the last sentence should read: "And unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state. State v. Cain, 20 W. Va. 681; State v. Welch, 36 W. Va. 690, 15 S. E. 419; State v. Dodds, 54 W. Va. 289, 46 S. E. 228 (231); Hill's Case, 2 Gratt. 595."



you may and should find the defendant guilty of murder in the first degree, in which case the form of your verdict may be, "We, the jury, find the prisoner at the bar guilty of murder in the first degree; so say we all" one of you signing as foreman and dating it.<sup>29</sup>

§ 4631. **Killing With Deadly Weapon not Prima Facie Evidence of Murder in First Degree.** If a man is seen, within shooting distance of another, to raise his gun, take aim and fire, and the man at whom he fires is seen to stagger, the ball having inflicted a mortal wound, the taking aim and firing such a weapon, if it be one from which death would likely ensue, would of itself be *prima facie* evidence that he intended the result of his acts, and it would therefore be a willful, deliberate and premeditated killing.<sup>30</sup>

§ 4632. **Inflicting Mortal Wound with Deadly Weapon—Instruction Must Refer to the Evidence as the Source of Jury's Belief.** The court instructs the jury that if they believe to a moral certainty, beyond a reasonable doubt, that the defendant, S., on the night of the — day of —, —, gave to A. a mortal blow on the head with a deadly weapon inflicting a mortal wound, from which she lingered until the last day of —, —, and died from the effect of said mortal blow, then the prisoner is *prima facie* guilty of willful, deliberate and premeditated killing, and unless the defendant prove extenuating circumstances, or they appear from the case made by the state, he is guilty of murder in the first degree, and the jury should so find.<sup>31</sup>

§ 4633. **Killing Policeman After Escape From Custody.** If the jury find from the testimony that the defendant was in the physical custody of S. and J., or either of them, and that he by physical exertion broke away from such physical custody, and then and there

<sup>29</sup>—Adams v. State, 34 Fla. 185, 15 So. 905 (909).

"It would have been better to add that such killing must have been done without 'justification or excuse,' and from it to omit telling the jury what particular degree of murder their verdict should find; and too, we think it would have been better to have omitted from it the form that the verdict should be, especially as the court had in a formal charge, already given formulas for verdicts in such cases."

<sup>30</sup>—State v. Phillips, 118 Ia. 660, 92 N. W. 876 (881).

"The thought here expressed, if we correctly interpret it, is that the aiming and firing of a gun, with fatal effect upon the person thus assaulted is 'of itself' evidence of an intent to kill, and 'therefore of a willful, deliberate and premeditated killing' or murder in the first degree. This we think, cannot be the law. Indeed, the great weight of authority is that proof of intentional homicide, without circumstances of mitigation or excuse, affords a presumption of malice, and therefore of murder; but that presumption is of murder in the second, not in the first degree. Dains v. State, 2 Humph. 439; 21 Am. & Eng. Enc. Law 163-170; 1 McClain Cr. Law 365. It is true we are permitted to infer that one who shoots and kills another intends the fatal

result thus produced; but to go further, and say that having thus found the intent, we may therefore draw the inference of deliberation and premeditation is to make one inference the basis of another, which is a violation of the fundamental principles of evidence. U. S. v. Ross, 92 U. S. 281, 23 L. Ed. 707.

... A vigorous battle with deadly weapons was going on, beginning with the advance of the posse upon the suspected men, followed by a siege of the station and a running fight into the open country. All these things, together with the attempted arrest, and the manner and circumstances thereof, have an intimate bearing upon the question of deliberation and premeditation, and should not have been divorced therefrom in the submission to the jury. Whatever may be the rule in the absence of any combat, it cannot be said that where parties armed with loaded guns are arrayed against each other, firing rapidly back and forth, with evident deadly intent, any presumption of premeditation and deliberation arises from the mere fact that one of the persons so contending is seen to shoot and kill an antagonist."

<sup>31</sup>—In State v. Sheppard, 49 W. Va. 532, 39 S. E. 676 (686), the above was held bad because it does not refer to the evidence.

fired the shot that killed the deceased S., you will not be justified in finding the defendant guilty of murder in the first degree.<sup>32</sup>

**§ 4634. Killing by Poison—Instruction Varying From Indictment.** If you believe from the evidence beyond a reasonable doubt that defendant, about the time and place stated in the indictment, and with a sedate and deliberate mind and formed design to kill the man mentioned in the indictment, did unlawfully give to said man, and cause him to swallow it, a poison mentioned in the indictment, mixed with beer, and that same was calculated and likely to produce death, and thereby kill deceased, then find defendant guilty of murder in the first degree, and assess his punishment at death or by confinement in the state penitentiary for life.<sup>33</sup>

**§ 4635. Taking Deceased to a Secluded Place with Intent to Kill—Omitting Reasonable Doubt.** (a) If the jury believe from the evidence that the defendant went with M. for over one mile, no one with them except themselves, until they reached the spot on the road near the five-mile post, as shown by the evidence, and during the time he was going there, or during any portion of the time he was going there, had the intent to kill her there, and did kill her there, the jury are authorized to find him guilty of murder in the first degree.<sup>34</sup>

(b) If the jury believe from the evidence beyond a reasonable doubt that the defendant induced E. to go with him to a secluded place, and that defendant there shot him with a gun or pistol and killed him, and that he did the act with formed design, and that it occurred in

32—Roberson v. State, 42 Fla. 223, 28 So. 424 (426), 52 L. R. A. 751.

"Premeditation is a question of fact for the jury to determine from all the testimony in the case. The facts hypothesized in the charge do not, as a presumption of law, exclude a premeditated design, and the court was clearly right in refusing to give it."

See also State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 535 and notes, and State v. Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673 and notes, as to killing officer making arrest.

33—Brooks v. State, 42 Tex. Cr. App. 347, 60 S. W. 53.

"This is objected to because it submits a different case than that set out in the indictment. The indictment charged appellant with murder of an unknown man, by mingling and causing to be mingled certain poison called 'laudanum,' and certain poison called 'morphine' and certain poison called 'opium' with a certain drink, to-wit, beer, with intent then and there to injure and kill and murder the aforementioned unknown human being; he and his codefendants well knowing that said party would drink and swallow said poisoned beer, and then and there intended that he should drink said poisoned beer, etc. Appellant was indicted under articles 647 and 649 of the Penal Code. The charge given would have justified a

conviction without reference to these articles or the allegations contained in the indictment. Under the charge given, it was not necessary to his conviction that appellant should have mingled the poison with the beer. It was only necessary that he should have given deceased the poisoned drink. Had appellant given the poisoned beer, and the party died from it, he would have been guilty of murder, though he had not mingled the poison with the beer under this instruction."

34—Green v. State, 97 Ala. 59, 15 So. 242.

The court said: "In a criminal prosecution it is not enough that the jury 'believe from the evidence' that the constituents of the offense have been proved; they must be convinced beyond a reasonable doubt of the existence of every material element of the offense before they are authorized to find a verdict of guilty, and that conviction must be produced by testimony. This rule applies to every species of prosecution known to the criminal calendar. Childs v. State, 53 Ala. 349; McAnnally v. State, 74 Ala. 9. . . . The subphrase 'as shown by the evidence' should have been omitted. Marble v. Lypes, 82 Ala. 322, 2 So. 701; Joyner v. State, 78 Ala. 448; Herges v. State, 30 Ala. 45. . . . The language should have been 'and pursuant to such intent did kill her there.'"

C. county, Ala., and before the finding of this indictment, you should find the defendant guilty of murder in the first degree.<sup>35</sup>

### MURDER IN SECOND DEGREE.

**§ 4636. Murder in Second Degree—Definition of.** (a) The burden of proof is on the state to show beyond a reasonable doubt every material ingredient of the offense charged; and, before you can convict the defendant of murder in the second degree, you must be satisfied beyond a reasonable doubt, from all the circumstances attending the killing, that, at the time the fatal blow was struck, it was done maliciously, and with a previously formed design to take the life of the deceased.<sup>36</sup>

(b) Before the jury can convict the defendant of murder, they must believe from the evidence, beyond all reasonable doubt, to a moral certainty, that at the time of the shooting the defendant had determined to take the life of the deceased, maliciously and with premeditation.<sup>37</sup>

**§ 4637. Murder in Second Degree Presumed in the Absence of Proof to the Contrary—State Must Prove Killing was Intentional.** If the jury believe and find from the evidence in the case that the defendant shot with a pistol, and by such shooting killed G., the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary, and in such case the burden of proof devolves upon the defendant to show to the reasonable satisfaction of the jury, from the evidence in the case, that he is guilty of a less

35—*Burton v. State*, 107 Ala. 108, 18 So. 284 (289).

"We are of opinion the court erred in giving above charge. If the jury believed beyond a reasonable doubt, that defendant induced E. to go with him to a secluded spot for the purpose of taking his life, and in pursuance of such purpose or design, killed him with a gun or pistol, the offense would be murder in the first degree. A charge similarly defective as to the intent was considered in the case of *Green v. State*, 97 Ala. 59 (65), 12 So. 416, 15 So. 242. In the charge murder in the first degree as a conclusion of law, is predicated on the fact that the killing was done, with formed design, with a deadly weapon in a secluded spot. These are pregnant facts for the consideration of the jury, but these facts do not raise the conclusive presumption, as matter of law, that the offense was murder in the first degree. The meeting in the secluded spot may have been for a friendly purpose. It was for the jury to say, under all the circumstances. If the defendant committed the act, there is no known eyewitness living, other than himself. The guilt of the defendant depends upon circumstantial evidence and his confession. Where one intentionally kills another with a deadly weapon, there is a formed design to kill,

and the law presumes malice, unless the evidence which proves the killing rebuts the presumption. Whether the formed design to take life is the offspring of the elements that constitute murder in the first degree—that is, willful, deliberate, malicious and premeditated,—or from the facts which constitute murder in the second degree, or from sudden passion upon sufficient provocation, or from self-defense, is a question of fact for the jury, acting under the presumptions of law from the facts as declared and instructed by the court. *Hornsby v. State*, 94 Ala. 55, 10 So. 522. In either case the formed design may exist but a moment before the fatal act, but the character of the offense is determined by the elements which called into existence the 'formed design.'"

36—In *Titus v. State*, 117 Ala. 16, 23 So. 77 (78), the insertion of the words "previously formed design" rendered the above charge erroneous as a definition of murder in the second degree.

37—*Gilmore v. State*, 126 Ala. 20, 28 So. 595 (601).

Held properly refused. "To render the defendant guilty of murder in the second degree, it is not necessary that he had determined to take the life of the deceased both 'maliciously and with premeditation.'"



crime than murder in the second degree, or that the homicide was excusable.<sup>38</sup>

§ 4638. **Murder in Second Degree—Degree of Proof Required—The Phrase "Fail to Establish" held Erroneous.** The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that defendant with a gun (the same in your opinion being a deadly weapon), with intent to kill, did shoot and thereby kill H., as charged in the indictment, and if the evidence fails to establish to your satisfaction beyond a reasonable doubt the existence of expressed malice, that the killing was upon express malice, as express malice is defined in this charge on the law of murder in the first degree, and if the evidence further fails to establish that the defendant was justified in killing deceased on the ground of self-defense, as self-defense is explained to you in this charge, and if the evidence further fails to establish the killing was manslaughter, as the law of manslaughter is defined and explained to you in this charge, then the law implies malice, and the defendant would be guilty of murder in the second degree, and you will so find.<sup>39</sup>

§ 4639. **Murder in Second Degree—Premeditation not Requisite.**  
(a) If the defendant killed the deceased in the heat of passion, aroused by sudden anger produced by the resistance of the boy to being chastised, then the killing would not be murder, unless at the time of the shooting, the defendant was prompted by a willful, intentional, malicious and premeditated design to take the life of the deceased, and if every reasonable hypothesis of the innocence of the defendant is not broken down, the crime of murder is not made out.  
(b) If defendant was moved by sudden anger or passion provoked by his attempt to chastise his son, the deceased, and the latter's resistance, to fire the gun, but that no malice entered into it, then the defendant could not rightfully convicted of murder. He might be convicted of manslaughter but nothing more.<sup>40</sup>

38—State v. Minor, 193 Mo. 597, 92 S. W. 466.

"This instruction is erroneous since it authorized the jury to convict the defendant of murder in the second degree without finding that the killing was intentional, which was the one disputed fact in the case. Intention to commit a crime, like intention to commit a fraud, need not be proven by direct evidence, but may be inferred from the circumstances provided the circumstances are such as that such inference may fairly be drawn and provided the triers of the fact draw such inference. But it is for the triers of the fact to draw such inference, and not for the court to do so. If the court is of the opinion that the circumstances are such as that such an inference may be fairly drawn, it may submit the question to the jury, but there its control of the point, for the time being, ends. A man is ordinarily presumed to have intended to do that which he has done and that presumption may have its influence in weighing the evidence, but, after all, the intention is a fact to be found from the circumstances. See

State v. Evans, 124 Mo. 397, 28 S. W. 8; State v. McKenzie, 102 Mo. 620, 15 S. W. 149."

39—Casey v. State, — Tex. Cr. App. —, 90 S. W. 1018.

"Exception was reserved to that portion of the charge which requires the jury to believe, in order to convict of murder in the second degree, that the evidence should 'fail to establish' manslaughter, and 'fail to establish' self-defense. The contention is that this is an infringement upon the reasonable doubt, and requires more of the evidence than the law authorizes. We believe this contention is correct."

40—Johnson v. State, 133 Ala. 38, 31 So. 951 (953).

Of these two instructions the court said: "Premeditation is not an essential element of murder in the second degree, as is assumed by charge (a). That charge and charge (b) each rebut the principle that heat of passion to rebut a presumption of malice once raised, so as to reduce a homicide to manslaughter, must be the result of reasonable provocation. As said in Prior v. State, 77 Ala. 56, there must be a concurrence of adequate provocation

§ 4640. **Murder in Second Degree—Variance From Statute Definition—Florida.** Such killing, when perpetrated by an act imminently dangerous to others, evincing a depraved mind, with utter disregard for human life, without any premeditated design to effect the death of any particular individual, is murder in the second degree.<sup>41</sup>

§ 4641. **Murder in Second Degree—Texas.** If, therefore, you believe from the evidence that defendant unlawfully killed deceased, and in doing so did not act under the immediate influence of sudden anger, rage, resentment or terror, arising from an adequate cause—that is, such cause as would commonly produce such passion in the degree that would in a person of ordinary temper render the mind incapable of cool reflection—the killing under such circumstances would be upon implied malice, and he would be guilty of murder in the second degree; and if you so find beyond a reasonable doubt you will find defendant guilty of murder in the second degree, etc.<sup>42</sup>

### MANSLAUGHTER.

§ 4642. **Manslaughter Defined.** (a) If you do not find the defendant guilty of murder in either of the first or second degrees, but do find from the evidence introduced upon the trial, under these instructions, beyond a reasonable doubt, that the defendant, in B. County, Iowa, on or about —, —, —, did unlawfully kill B., without malice either express or implied, and without deliberation, by resorting to any other or all of the methods alleged in the indictment, then you ought to find the defendant guilty of manslaughter, whether such killing was voluntary or involuntary. Otherwise you should not so find.<sup>43</sup>

and ungovernable passion. Whether such provocation existed was, under the evidence in this case, a question for the jury. Charge (b) also lacks some word in the phrase 'could not rightfully convicted of murder' to give the expression meaning."

41—Cook v. State, 46 Fla. 20, 35 So. 665 (670).

Held properly refused. The court said: "This charge differs from the definition of murder in the second degree contained in Section 2380, Rev. St. 1892, in several particulars, viz.: It substitutes 'imminently dangerous to others' for 'imminently dangerous to another' and 'utter disregard for human life' for 'regardless of human life.'"

42—Spivey v. State, 45 Tex. Cr. App. 496, 77 S. W. 444 (445).

The court said: "Various objections are urged to this charge, which we think are well taken. The jury were required here to find affirmatively that defendant did not act under the immediate influence of sudden passion before they could relieve him from punishment for murder in the second degree. This is a change of the doctrine of reasonable doubt. If there was a reasonable doubt upon this proposition, appellant was entitled to it. Again, if the jury found that he did not

act under sudden passion, then, of course, they could not convict him of murder in the first degree, which they promptly did. A charge upon manslaughter was not given, nor was a definition of adequate cause; and the failure to do so left but two degrees of culpable homicide for the investigation of the jury, to wit, murder in the first and second degrees. So, if they found he acted under sudden passion produced by an adequate cause, being guilty of some offense he was necessarily guilty of murder in the first degree, because, under the charge given, he could not be guilty of murder in the second degree, inasmuch as the jury are affirmatively charged that, if they found he did not act under immediate influence of sudden passion, he would be guilty of murder in the second degree. Therefore, if he acted under the immediate influence of sudden passion, and being guilty of some offense, it would necessarily follow he would be guilty of murder in the first degree. See Neyland v. State, 13 Tex. App. 546; Pollard v. State, 45 Tex. Cr. App. 121, 73 S. W. 955; Whitaker v. State, 12 Tex. App. 443; Brunet v. State, Id. 535."

43—State v. Busse, 127 Ia. 318, 100 N. W. 536 (539).

The court said: "In Bishop's New

(b) If you believe from the evidence beyond a reasonable doubt that the defendant, M., in W. County, Ky., before the — day of —, —, unlawfully, feloniously, willfully—that is, intentionally,—either with or without his malice aforethought, and not in his necessary self-defense, discharged a pistol loaded with powder, leaden balls, or other explosive and hard substance, against the body of W., thereby inflicting a wound from which the said W. died within a year and a day thereafter, you will find him guilty of murder if the shooting was done with malice aforethought; guilty of voluntary manslaughter if done without such malice.<sup>44</sup>

(c) You are instructed that manslaughter is the unlawful killing of a human being without malice either expressed or implied; that manslaughter must be voluntary, upon the sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible; and if you believe from the evidence that deceased assaulted the defendant with a knife in such a manner as would be apparently sufficient to arouse in defendant such passion, and that it did arouse such passion in him, and that while in this condition, and that the defendant was not the aggressor at the time, and before a sufficient time had elapsed for his passion to cool, he armed himself, pursued and unlawfully and without justification killed the deceased, he would not be guilty of either degree of murder, but would be guilty of voluntary manslaughter only.<sup>45</sup>

Criminal Procedure, par. 878, the learned author says: 'The law of the case which the judge is to lay down to the jury is not the abstract law, such as a statute or common law definition of a crime, but the law's conclusion from the several, and perhaps varied, facts which the evidence tends to establish, viewed in connection with the pleadings. Therefore no abstract proposition, however correct, should be given in the charge; not only because it would be confusing to the jury, who, being unused to legal disquisitions, would not know how to apply it, but also because its combination with the special facts might render it erroneous.' In *State v. Glynden*, 51 Ia. 463, 1 N. W. 750, it was said of the instructions: 'These are rather general and abstract propositions of law, correct enough in the main, but on account of their generality, their bearing and force may not have been fully understood and correctly applied by the jury. In this respect the instructions are capable of great improvement. These remarks are made, not because we think the instructions are absolutely erroneous, but because we believe justice would be more surely administered were instructions given to the juries of the character we have indicated they should possess.' If the jury did not fully understand, from the instructions given, the relations which the exculpatory facts contained in the confession bore to the degree of the crime charged in the indictment, the defendant's legal rights were not properly guarded, and the verdict should not stand.

*State v. Hevlin*, 65 Ia. 289, 21 N. W. 645; *State v. Hathaway*, 100 Ia. 225, 69 N. W. 449. And such is the conclusion of some members of the court."

44—*Martin v. Commonwealth*, 25 Ky. L. 1928, 78 S. W. 1104.

This was the only instruction given which had any application to the definition of murder or manslaughter, and was calculated to mislead the jury. It would have been better to have given an instruction on the question of murder, and another instruction on the question of voluntary manslaughter. The words, 'that is, intentionally,' interpolated in this instruction, were improper and calculated to mislead the jury, and the only definition of manslaughter as used in this instruction was given in the last sentence, namely, 'manslaughter if done without malice.' The elements of 'affray,' 'sudden heat and passion' and 'provocation ordinarily calculated to excite passion beyond control,' necessary to make it a proper definition, were entirely omitted."

45—*Noble v. State*, 75 Ark. 246, 87 S. W. 120.

"The modifying words (and that the defendant was not the aggressor at the time) are somewhat awkwardly inserted, but we think the idea is conveyed with reasonable certainty that, if appellant was the aggressor in the first encounter, in which the alleged provocation for the killing was given by the deceased, then such provocation would not reduce the grade of the offense from murder to manslaughter. A person



**§ 4643. Statutory Definitions of Crime Not Always Applicable.**

The court charges the jury that manslaughter is the killing of a human being without malice, in the heat of passion, but in a cruel and unusual manner, without authority of law, and not in necessary self-defense; or the killing of a human being in the heat of passion, without malice, by the use of a dangerous weapon, without the authority of law, and not in necessary self-defense. And if the jury believe from the evidence, beyond a reasonable doubt that defendant so killed M., they will return the following verdict: "We, the jury find the defendant guilty of manslaughter."<sup>46</sup>

**§ 4644. Intent to Take Life not Necessary—Alabama Statutes.**

(a) To convict the defendant of manslaughter in the first degree the jury must believe from the evidence in the case that defendant killed S. purposely—that is, he voluntarily took his life without just cause—and intended to kill him at the time he struck the fatal blow.

(b) It is for the jury to say under all the evidence whether defendant voluntarily took the life of S.; that is, whether at the time he struck the fatal blow he had the purpose and will to wound him and deprive him of life, and if he did not have that intention he is not guilty of manslaughter.<sup>47</sup>

cannot take advantage of a provocation, invited and brought about by his own unlawful aggression, in order to reduce the grade of his crime from murder to manslaughter, when he has not in good faith attempted to retire from the encounter. If appellant was the aggressor in the first difficulty, and was assaulted and cut by deceased while so engaged, and killed deceased upon a sudden heat of passion aroused by the assault made by deceased, the grade of his offense was not thereby reduced to manslaughter. This is because malice, which is an essential element of murder, is implied from the fact that he sought the difficulty in which provocation for passion was given and became the aggressor therein. But this rule is subject to a qualification, stated by Mr. Bishop as follows: 'Where an assault, which is neither intended nor calculated to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter,' 2 Bishop, Cr. Law, §703. This qualification is sustained by the great weight of authority *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; *Cotton v. State*, 31 Miss. 504; *State v. Hill*, 20 N. C. 629, 34 Am. Dec. 396; *Daniel v. State*, 10 Lea (Tenn.) 261; *Horrigan & Thompson's Cases Self Def.*, p. 227.

"There is a conflict in the testimony as to whether the appellant entered the first encounter with any malice, or with any intention to kill or to do great bodily harm to deceased. There is also conflict in the testimony as to whether deceased did or not, in repelling the aggression of appellant, use violence

greatly disproportionate to the aggression. Yet the court, by this modification of the instruction asked, cut off all avenue for the jury to find appellant guilty of manslaughter only, even though they may have found that he brought on the first difficulty without malice, and without intent to kill or do great bodily harm, and even though deceased may have committed an assault upon him disproportionate to his aggression. We think the court erred in making the modification without the further qualification herein indicated."

46—*Klyce v. State*, 78 Miss. 450, 28 So. 827 (828).

"In this particular case we would not reverse because of the giving of the first instruction for the state. In many cases however a court might be compelled to reverse because of such a charge. We cannot see what that clause of the statutory definition of manslaughter in reference to killing in 'a cruel and inhuman manner' has to do with the case at bar. Shooting a man with a pistol while the man, according to the testimony of the defense, who was much the more powerful man, was choking the slayer to death, can hardly be called 'a cruel and inhuman manner.' The second clause in the charge under the statutory definition about killing with a dangerous weapon was surely enough for the case and the only one really applicable."

47—*Thayer v. State*, 138 Ala. 39, 35 So. 406 (408).

The court said that "defendant might have been guilty of manslaughter in the first degree, if he had no actual intention to take life. *Lewis v. State*, 96 Ala. 6, 11 So. 259, 38 Am. St. 75."

§ 4645. **Intent to Kill Necessary to Convict—Texas.** If you believe from the evidence beyond a reasonable doubt that defendant with a stick or club, which you find was a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, aroused by adequate cause, as the same is herein explained, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury, did in F. county, Texas, at any time prior to ———, ———, unlawfully strike and kill M., the deceased, as charged in the indictment, you will find defendant guilty of manslaughter, etc.<sup>48</sup>

§ 4646. **Sudden Passion and Malice Not Inconsistent With Each Other.** A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment and dominates volition, so as to exclude premeditation, and a previously formed design, although it does not entirely dethrone reason, is sufficient to reduce killing to manslaughter.<sup>49</sup>

§ 4647. **In Sudden Heat of Passion or Sudden Affray, Not Both, to Constitute Crime.** Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the deceased, yet, if you believe from the evidence, beyond a reasonable doubt, that the defendant in the county of P., and before the finding of the indictment in this case, did unlawfully, willfully, feloniously, in sudden heat of passion, and in sudden affray, and not in his necessary, or apparently necessary, self-defense, shoot with a gun or pistol and killed L., you should find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the State penitentiary for a term not less than 2 years, nor more than 21 years, in your discretion.<sup>50</sup>

48—Perrin v. State, 45 Tex. Cr. App. 560, 78 S. W. 930 (931).

"The charge given is not the law applicable to the facts of this case, as appellant insists, since the statute provides that where a party with a weapon not calculated to kill, in a sudden transport of passion, does kill, he is not guilty of manslaughter, unless the intent to kill evidently appears. This charge would authorize the jury to convict defendant of manslaughter if the facts existed; that is, if defendant, in a sudden transport of passion, struck deceased with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, and killed the adverse party, then, in that event, he would be guilty of manslaughter. This would be true if he intended to kill, but, without this intent, he would not be guilty of manslaughter. We think the charge is subject to appellant's criticism."

49—Gilmore v. State, 126 Ala. 20, 28 So. 595 (601). Citing Martin v. State, 119 Ala. 1, 25 So. 255.

Held properly refused. The court said: "Premeditation and a previously formed design may be excluded by a sudden transport of passion on adequate provocation, and yet malice

may remain. Such sudden passion is not inconsistent with malice."

50—Smith v. Commonwealth, 29 Ky. L. 231, 92 S. W. 610.

"Under this instruction, before the jury could have found the defendant guilty of manslaughter, it was required to believe that the killing was done 'in sudden heat of passion and in sudden affray.' If the killing was done 'in sudden heat of passion' it reduced the offense from murder to manslaughter. If it was done 'in sudden affray,' it would also have reduced the offense from murder to manslaughter. Under the instruction the jury was not authorized to find him guilty of manslaughter, unless he did the killing in sudden heat of passion and in sudden affray. The jury might have concluded from the evidence that the killing was in sudden affray, but they could not have found him guilty of manslaughter, unless they also believed that it was done in sudden heat of passion. There is evidence tending to show that the appellant had made threats against the deceased, and from the above testimony recited as to his conduct with the children the jury might have inferred that he had a pre-determination to kill the deceased, and that he did so, in sudden heat

§ 4648. **Killing Through Fright or Excitement.** If from the facts and circumstances in this case the jury believe that the defendant whilst laboring under the influence of fright or excitement shot and killed the deceased, then they cannot convict the defendant as charged in the indictment.<sup>51</sup>

§ 4649. **Defendant the Aggressor—When Not Barred from Defense of Sudden Passion.** If a person himself is the aggressor, and commits an assault and battery on another, then the fact that such other person strikes the aggressor, and causes him to suffer pain or loss of blood, will not constitute adequate cause to produce passion in the aggressor that will reduce a subsequent killing of such other person from murder to manslaughter.<sup>52</sup>

§ 4650. **Instruction as to Manslaughter Should Not Misplace the Burden of Proof.** The court further instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that in the county of D., and before the finding of the indictment herein, the defendant did unlawfully, willfully and feloniously kill and slay one C., by shooting him to death with a pistol loaded with powder and ball, or other hard substance, of which shooting and wounding said C. did die within a year and a day thereafter, but they further believe from the evidence, to the exclusion of a reasonable doubt, that said shooting was not done maliciously and with malice aforethought, but do believe beyond a reasonable doubt that same was not done in his necessary self-defense, or what appeared to him at the time to be his necessary self-defense, but was done in a sudden heat and passion, or sudden affray, and under such provocation as was reasonably calculated to excite an ungovernable passion, then they should acquit him of the charge in the indictment, and find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a period of not less than two years nor more than twenty-one years, in the discretion of the jury.<sup>53</sup>

of passion. The jury having reached this conclusion, it would not have found the appellant guilty of manslaughter, although it believed the homicide was the result of a sudden affray. The foregoing instruction was erroneous and prejudicial to the substantial rights of the appellant."

51—*Golson v. State*, 24 Ala. 8, 26 So. 975 (1898).

Held "vicious throughout, not only for what it contains but for what it omits."

52—*Spears v. State*, 41 Tex. Cr. App. 527, 56 S. W. 347 (1898).

Held erroneous in failing to state the character of the original assault but judgment affirmed nevertheless because the jury were also "distinctly told that the assault on his part which would deprive him (defendant) of the defense of manslaughter must have been a deadly assault; that if the slayer was the aggressor, and the assault by him was not made with the intent of bringing on a conflict for the purpose of killing, and he was in turn assaulted by deceased in a violent manner and with a deadly weapon, such assault might be adequate

cause to arouse passion which would reduce a subsequent killing from murder to manslaughter."

53—*Connor v. Commonwealth*, 26 Ky. L. 398, 81 S. W. 259 (1896).

"The court apparently meant to tell the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant shot and killed C., and had a reasonable doubt as to whether the shooting was done with malice aforethought, but believed from the evidence, beyond a reasonable doubt, that the shooting was done in a sudden heat and passion or sudden affray, and not in his necessary or apparently necessary self-defense, they should find him guilty of voluntary manslaughter. The instruction, as given, required the jury apparently to find from the evidence, to the exclusion of a reasonable doubt, that the shooting was not done maliciously or with malice aforethought, in order to reduce the crime from murder to manslaughter, and, if the jury had found the defendant guilty of murder, the error would be material. But the jury only found him guilty of manslaughter."



§ 4651. **Manslaughter—Error to Direct Verdict.** If you find that the killing was done under the heat of passion your verdict should be "guilty of manslaughter." If you find that the accused had reason to believe that he was in danger of bodily harm, and killed the deceased under that belief, you should acquit.<sup>54</sup>

§ 4652. **Concealment of the Body—Drawing Inferences of Fact by the Court.** If, gentlemen, you find from the evidence that the human body found in the grave beneath the buried body of a mule was, in fact, the dead body of B., then you are justified in finding that a murder had been intentionally committed, and that the person or persons who undertook to conceal the body of B. by burying it in this manner were connected criminally in some manner with the murder. It follows that if you can determine from the facts and circumstances before you, as shown by the evidence, who were the persons or who was the party that so buried the body of B., you will be able to determine who the person or persons are who had taken part in the murder.<sup>55</sup>

§ 4653. **Provocation—Jury May Consider Preceding as Well as Attending Circumstances.** If from all the facts and circumstances in evidence, you believe beyond a reasonable doubt that defendant, J., did, in T. county, Texas, on or about the — day of —, —, and before the filing of this indictment, unlawfully kill R., by shooting him with a pistol, and that such killing was committed under the immediate influence of sudden passion on the part of the defendant, as the expression "under the immediate influence of sudden passion" is above defined, and that the same arose from an adequate cause, as the expression "adequate cause" is above defined, then it will be your duty to find defendant guilty of manslaughter.<sup>56</sup>

§ 4654. **Manslaughter—Policeman Who Kills in Making an Arrest.** The defendant had the right to use such a degree of force as was reasonably necessary to reduce said D. to submission; and if resistance—if any there was—was violent and determined, the de-

54—State v. Baum, 51 La. Ann. 1112, 26 So. 67 (69).

Held properly refused. "They were preceded by no recitals to serve as a predicate for the same, and unless modified, qualified and explained would be utterly wrong. State v. West, 45 La. Ann. 18, 12 So. 7; State v. Cancienne, 50 La. Ann. 847, 24 So. 134; State v. Harris, 51 La. Ann. 1105, 26 So. 64. The trial judge has the right, but is not forced, to give a charge which requires qualification, limitation or explanation." State v. West, supra; State v. Jackson, 35 La. Ann. 769; State v. Riculfi, 35 La. Ann. 770."

55—Sutherland v. State, 148 Ind. 695, 48 N. E. 246 (247).

"The province of the court was to advise in matters of law only, and it here advised, not as to a legal inference, but as to an inference of fact. Can it be said that the jury accepted the instruction as upon a question of fact, and, because it invaded their province, declined to be controlled by it? Or can we say that it was not accepted as a conclusion of law? We think not. Not

that the jury may not have been able to make the nice discrimination between those propositions in instructions which may be inferences of fact and those which may be conclusions of law, but the danger that they may not illustrates the wisdom of denying to the court the privilege of instructing upon the weight of evidence or the ultimate conclusion from primary facts or the evidence of such facts."

56—Johnson v. State, 46 Tex. Cr. App. 291, 81 S. W. 945 (946-947).

Held error because too restrictive. The court held: "Appellant had the right, under our decisions and law, to have the jury view not only the facts and circumstances immediately attending the killing, but also those which preceded the difficulty, showing adequate cause, or tending to render his mind incapable of cool reflection. The decisions on this question are unbroken. Bracken v. State, 29 Tex. App. 366, 16 S. W. 192; Orman v. State, 24 Tex. App. 495, 6 S. W. 544; Spangler v. State, 41 Tex. Cr. App. 424, 55 S. W. 329."

defendant was not required to make nice calculation as to the degree of force necessary to accomplish the purpose. But, to excuse the taking of life in making an arrest in cases of misdemeanor, it must be shown that the killing was necessary to effect the object. Hence if you find from the evidence in this case beyond a reasonable doubt that the defendant, whilst making the arrest of D., struck him with a club or billy, and that D. died from the effects of such blow, and you further find that it was not necessary to strike and kill D., if he did, in order to effect such arrest, you will find the defendant guilty of manslaughter.<sup>57</sup>

**§ 4655. Manslaughter—Killing Seducer of Defendant's Daughter.**

If you believe that defendant did, in J. county, Texas, on or about the — day of —, —, with a gun shoot and kill S., and if you believe that shortly before the killing the wife of the defendant informed him (defendant) that the said S. had ruined B., the daughter of defendant; and if you believe that defendant believed that such information was true, and if you believe that the defendant, upon being so informed, went to the home of the said S., in J. county, Texas, and did, with a gun, shoot and kill said S.; and if you believe that at the time of such shooting the mind of the defendant was so aroused by reason of such information as to render it incapable of cool reflection—you will find the defendant guilty of manslaughter.<sup>58</sup>

**§ 4656. Manslaughter—Defendant Striking Deceased With His Hand Not Necessarily Liable for the Killing of Deceased by Another.**

If you find from the evidence beyond a reasonable doubt that the defendant provoked the difficulty with the deceased, C., by unlawfully striking him a blow with his fists, but without any intention to inflict upon the said C. death or serious bodily injury; and if you further find that in the difficulty so occasioned that W. and S. unlawfully and willingly engaged, and that during the progress of the difficulty so produced that W. or S. cut the deceased with a

57—State v. Phillips, 119 Ia. 652, 94 N. W. 229 (230), 13 Am. Cr. Rep. 225, reversing conviction of manslaughter.

It was insisted that this instruction was faulty in that (1) it requires a finding of absolute necessity in order to justify the taking of D.'s life and (2) it excludes all questions with reference to the result being accidental. Held, that the objections were well taken. Deceased was drunk at the time and his skull was unusually thin. With reference to the first sentence of the instruction the court said: "This general statement of the right of the officer finds support in many authorities. See State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359; State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. 380; 2 Bish. New Cr. Law, § 650; 1 Bish. Cr. Proc., § 161; 1 Whart. Cr. Law 402 et seq.; note to Hawkins v. Com., 53 Ky. 474-476, 61 Am. Dec. 163. On the other hand, some authorities, while admitting that the officer is never required to retreat, and may meet force with force, seem to hold that in arrest-

ing for a misdemeanor only as well as preventing the escape of a person after being arrested therefor, life may not be taken, even though necessary to make the arrest or prevent the escape, save when the officer has the reasonable apprehension of peril to his own life or great bodily harm. 1 McClain Cr. Law, § 298; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. 68; Brown v. Weaver, 76 Miss. 7, 23 So. 388, 42 L. R. A. 423, 71 Am. St. 512; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; U. S. v. Clark (C. C.), 31 Fed. 710; 2 Am. & Eng. Ency. Law 849, and cases cited. But the correctness of the instruction in this respect is not challenged, for it was, if anything, too favorable to the defendant."

58—Freeman v. State, 46 Tex. Cr. App. 318, 81 S. W. 953 (955).

"Nowhere in the charge does the court authorize the jury to look to any other facts and circumstances in evidence concerning the killing which they could use to intensify the provocation at the time."

knife, and thereby killed him,—then the defendant will be guilty of manslaughter, and you will so find.<sup>59</sup>

§ 4657. **Horse Racing on Public Highway—Alabama Statute.** Gentlemen of the jury, even if you believe from the evidence that although the defendant was running his horse at an unusual speed along the public highway at night, and that his horse ran against the mule of the deceased, C., and thereby caused the death of the said C., yet, unless from all the evidence you believe beyond a reasonable doubt, and to a moral certainty that the defendant was running his horse at such a furious and reckless rate of speed so as to be grossly negligent of the consequence to the lives of others, then you should find the defendant not guilty.<sup>60</sup>

§ 4658. **Manslaughter in Second Degree—Missouri Statute.** Manslaughter in the second degree for the purposes of this trial, is the killing of a human being unnecessarily, while resisting an attempt by such human being to commit felony.<sup>61</sup>

§ 4659. **Manslaughter in Third Degree—Instruction as to, Not Supported by Evidence—Killing in Self-Defense.** If you shall find from the evidence that the defendant at the county of J. and state of Missouri, at any time within three years next before the — day of —, —, shot and killed S. in the heat of passion, without a design to effect death, but not under such circumstances as to justify him on the ground of self-defense, then you should find him guilty of manslaughter in the third degree, and so state in your verdict.<sup>62</sup>

59—Bibby v. State, — Tex. Cr. App. —, 65 S. W. 193 (194).

"If W. or S. used a knife in the difficulty without the knowledge or consent of appellant, he is not responsible for the homicide. Or, to put it more strongly, the proof must show beyond a reasonable doubt that he knew W. was to use the knife beforehand, or that he had knowledge W. was using the knife at the time he was so using it, and by some act of his aided and abetted him in the use of said knife. This phase of the case should have been presented to the jury in clear and unmistakable language. The charge of the court, as given in paragraph first above quoted, is directly in contravention of this doctrine, for it makes defendant responsible for the death of C. if he provoked the difficulty by striking C. a blow with his fist, and W. and the others joined in the conflict, and W., during the progress of the same, stabbed deceased; and this whether appellant had any preconceived design that W. should stab him or that he had any knowledge that he was so stabbing him, and consenting thereto."

60—Thompson v. State, 131 Ala. 18, 31 So. 725 (726).

"Horse racing along a public road is unlawful, and if the homicide was caused by such unlawful act, it may have amounted to manslaughter in the second degree, regardless of whether the running was furious,

reckless and grossly negligent. For this reason the charge was properly refused."

61—State v. Harper, 149 Mo. 514, 51 S. W. 89 (93).

Held error to give this instruction where defendant killed deceased while deceased was in the act of striking defendant's father with a fence rail. See also State v. Evans, 158 Mo. 589, 59 S. W. 994 (999); State v. Dierberger, 96 Mo. 666, 10 S. W. 168.

62—State v. Hollingsworth, 156 Mo. 178, 56 S. W. 1087 (1090).

"Looking carefully through this record, we think we find the basis of this instruction in an answer given by defendant to a question propounded by the court, wherein the defendant said to the court he did not intend to kill deceased. Upon full consideration, however, we think that, according to defendant's own evidence, he intentionally shot deceased to save his own life. That he intended merely to disable him or cripple him did not make it manslaughter. This instruction could only have been predicated upon defendant's evidence, and, taking this testimony, it made out a clear case of self-defense, but in no sense one of manslaughter in the third degree. The court, therefore, erred in giving this instruction, which unquestionably brought about the verdict rendered. State v. Pettit, 119 Mo. 410, 24 S. W. 1014; State v. Nocton, 121 Mo. 551, 26 S. W. 551."



## CHAPTER CLXXIX.

### CRIMINAL—HOMICIDE—ELEMENTS OF.

See Approved Instructions, Chapter XCVIII, Vol. II.

#### INTENT.

- § 4660. Specific intent—Malice aforethought.
- § 4661. Specific intent deliberately formed.
- § 4662. Intent to kill not the criterion of murder.

#### MALICE.

- § 4663. Malice defined.
- § 4664. Malice need not be "expressed" to make homicide murder.
- § 4665. Whether death of deceased evidence of malice.
- § 4666. No malice without deliberation.

#### DEADLY WEAPON.

- § 4667. Deadly weapon defined—Dangerous weapon.
- § 4668. Whether there is a presumption of law of malice from killing with a deadly weapon.

#### MOTIVE.

- § 4669. Motives that actuated defendant.
- § 4670. Calling attention to absence of apparent motive—Insanity.
- § 4671. State failing to prove motive.

#### PREMEDITATION.

- § 4672. What amounts to premeditation and deliberation.
- § 4673. Time required to constitute premeditation.
- § 4674. Opportunity for deliberation not equivalent to fact of deliberation.
- § 4675. Homicide cannot be "willful, deliberate and premeditated" and still no crime.

- § 4676. Knowledge of identity of person killed not essential.

#### PROVOCATION.

- § 4677. Provocation — Specifying what acts constitute.
- § 4678. Discovery of wife in adultery not sufficient provocation.
- § 4679. Referring to great provocation as slight.
- § 4680. Provocation necessary to reduce crime to manslaughter —Acting in self-defense.
- § 4681. Provocation — Mere words not sufficient.
- § 4682. Mere threats not sufficient provocation.
- § 4683. Insulting conduct.
- § 4684. Cooling time — Whether a question for the jury or for the court —Cooling down after previous difficulty.
- § 4685. Cooling time — Not shown necessarily by hostile acts.

#### DYING DECLARATIONS.

- § 4686. Dying declarations not of highest order—To be received with caution.
- § 4687. Premotion of death, not a guarantee of truth; credibility for the jury.
- § 4688. Declaration under clear conviction of impending death —Referring to competency of evidence to jury.
- § 4689. Repetition by witness of dying declaration—How such repetitions are to be considered by the jury.
- § 4690. State may rely on dying declarations—Need not produce eye-witnesses.

#### INTENT.

§ 4660. **Specific Intent—Malice Aforethought.** You are instructed that, before you can find the defendant guilty of assault to murder, you must believe from the evidence that the defendant fired his pistol at the said M. with the specific intent then and there to kill the said M. Therefore, unless you find and believe from the evidence, beyond a reasonable doubt, that defendant did not accidentally

discharge his said pistol, without intent to kill or inflict serious bodily injury upon the said M., you will find the defendant not guilty.<sup>1</sup>

§ 4661. **Specific Intent Deliberately Formed—Error to Ignore the Lower Degrees of Homicide.** The court charges the jury that, before they can find the defendant guilty as charged in the indictment, they must believe, beyond a reasonable doubt, and to a moral certainty, and to the exclusion of every other hypothesis, that the defendant at the time of the killing had the specific intent to take the life of the deceased, and that such specific intent to take the life of the deceased by the defendant was deliberately formed, and that the defendant acted upon this deliberately formed intent when he did take the life of the deceased.<sup>2</sup>

§ 4662. **Intent to Kill Not the Criterion of Murder.** The court instructs the jury if one person attacks another without justifiable cause, and from the violence used death ensues, the question which arises is whether it be murder or manslaughter. If the weapon used was a deadly weapon, it is reasonable to infer that the party intended death, and if he intended death, and death was the consequence of his act, it is murder.<sup>3</sup>

### MALICE.

§ 4663. **Malice Defined.** (a) The court instructs you that the

1—Carr v. State, — Tex. Cr. App. —, 87 S. W. 346.

"As to the first portion of the charge, it is urged that it authorized a conviction of appellant if he fired the pistol with the specific intent to kill; omitting that, in order to constitute an assault with intent to murder, the specific intent must also be attended by malice aforethought. We believe this objection is well taken. Under the circumstances, had the killing occurred, the issue of manslaughter would have been strongly suggested by the evidence; and appellant could have fired with the specific intent to kill, and, had the killing occurred, it might have been no greater offense than manslaughter. At least, this issue was in the case. It occurs to us that this charge intended to submit the issue of accidental discharge of the pistol. To say the least, this charge is confusing on this question. The issue of an accidental discharge of the pistol is very clearly raised by the evidence; and the jury should have been informed clearly and pertinently in regard to that phase of the law, and not in the confused and uncertain manner as was done. Issues, when raised by the evidence, should be clearly and definitely charged, and in such manner that the jury will not be confused. If the issue of accidentally firing the pistol was in the case, the jury should have been told that, if they find the pistol was accidentally discharged, they should acquit, and, if they had a reasonable doubt on the issue, defendant was entitled to the benefit of the doubt. We are not here prescribing the form of charge, but simply suggesting that the law

should be pertinently and plainly stated."

2—Ford v. State, 129 Ala. 16, 30 So. 27 (29).

This "charge requested by defendant was erroneous, if for no other reason, in that it required the acquittal of the defendant notwithstanding he may have been guilty of murder in the second degree, which was included in the charge preferred in the indictment."

That such specific intent to kill the deceased was not essential see Webb v. State, 135 Ala. 36, 33 So. 487 (489).

3—Smith v. People, 142 Ill. 117 (123), 31 N. E. 599.

Holding this erroneous, the court said: "Suppose the defendant did attack the deceased without justifiable cause 'but without malice express or implied and without any mixture of deliberation whatever,' would he be guilty of murder? . . . In every case of manslaughter, the attack is without justifiable cause, but with due regard to the frailties of human passion, the statute says the killing of a human being under the circumstances therein stated shall be manslaughter only. This instruction makes the intention to kill the distinguishing feature of murder. That is not the test. A person may intentionally take human life without being guilty of any crime, and certainly he may do so and not be guilty of murder. Under this instruction, if the jury believed beyond a reasonable doubt that the plaintiff killed the deceased without justifiable cause with a deadly weapon, they had no choice but to find him guilty of murder."

word "malice" imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.<sup>4</sup>

(b) Malice means ill will, hatred, ill-natured willfulness, a willful intention to do an unlawful act, a willful act done intentionally without just cause or excuse. It also denotes a state of mind from which acts are done regardless of the rights of others.<sup>5</sup>

(c) The court further instructs you that the word "willful" and "willfully," as used herein, means intentional, and not accidental, and that by the phrase "malice aforethought," as used herein, is meant a predetermination to do the act of killing, and it is immaterial how recently or suddenly such determination was formed before the act was done.<sup>6</sup>

§ 4664. **Malice Need Not Be "Expressed" to Make Homicide Murder.** If you find from the evidence that the prisoner killed deceased without at the time having expressed malice towards him, and fired the fatal shot while resisting such arrest, such killing would not amount to murder in either degree, but would constitute the crime of manslaughter.<sup>7</sup>

§ 4665. **Whether Death of Deceased Evidence of Malice.** (a) The fact that S. died from the wound is not evidence of ill will or malice or premeditation, and should not influence the jury when considering the elements of murder and manslaughter.<sup>8</sup>

4—*People v. Waysman*, 1 Cal. App. 246, 81 Pac. 1087.

"If the jury had been left to be guided alone by this instruction as to what would constitute malice when applied to the charge of murder, we should be inclined to hold it prejudicial. The instruction is taken from section 7 of the Penal Code, where certain terms are defined in the senses in which they are used in this Code. We do not think the definition found in section 7 appropriate in a case of this kind, and would be better omitted altogether."

5—*Downing v. State*, 11 Wyo. 86, 70 Pac. 833 (834).

"The claim is made that in using the above language the court said 'malice means a willful act done intentionally without just cause or excuse.' . . . Such a definition of malice would be bad in law if standing alone, and might have effected the verdict as rendered; but an inspection of the other definitions of malice given by the court leads us to the conclusion that the word 'willful' was not intended, but that 'wrongful' was in some unaccountable way displaced by it."

6—*Hill v. Commonwealth*, 28 Ky. 1320, 91 S. W. 1123 (1124).

"It will be observed that the court omitted the words 'without legal excuse' after the word 'killing' in this instruction. Doubtless this was an inadvertence upon the part of the court. The court properly told the jury that malice aforethought, as used in the instruction, meant a predetermination to do the

act of killing. While this is true, yet the party who did it would not be guilty of murder, if he had a legal excuse for doing so. The jury might have concluded from the instruction given that the appellant did the killing with malice aforethought and was thus guilty of murder, regardless of his right to do so in defense of his mother."

7—*Roberson v. State*, 40 Fla. 94, 34 So. 294 (297).

"Properly refused because of its requirement that the defendant should at the time of the killing have 'expressed' malice towards the deceased before the jury could convict of murder in either degree." Malice may be inferred from circumstances.

8—*Thayer v. State*, 138 Ala. 39, 35 So. 406 (408).

Held properly refused. "It is misleading and invasive of the province of the jury. It is always competent to prove that death resulted from a wound voluntarily inflicted by the defendant, and such evidence, together with all the other evidence in the case is a matter for the consideration of the jury, in determining the guilt or innocence of defendant, and the grade of the offense,—if found to be guilty of any, in the infliction of the wound. It cannot be said as a matter of law, that the deadly character of the wound, furnished no inference of malice and premeditation, when considered with reference to all the evidence. Moreover it singled out and sought to lay stress upon a single phase of the evidence. *Oliver v. State*, 17 Ala. 583."



(b) Deliberate malice is manifested by external circumstances. Thus, the killing of C. is an external circumstance, from which you shall infer whether it was done with or without malice prepense.<sup>9</sup>

§ 4666. **No Malice Without Deliberation.** (a) The court instructs the jury as a matter of law that the words "malice aforethought" do not necessarily imply deliberation or the lapse of a considerable time between the malicious intent to take life and the actual execution of that intent. Whether the design to effect death is formed on the instant or had been previously entertained is immaterial, for the malicious killing, if proven from the evidence beyond reasonable doubt, in either case is murder under the laws of the state.<sup>10</sup>

(b) Malice aforethought means an unlawful act intentionally done.<sup>11</sup>

### DEADLY WEAPON.

§ 4667. **Deadly Weapon Defined—Dangerous Weapon.** The court charges you as a matter of law that a deadly weapon is any weapon which is likely from the use made of it at the time, to produce death or to do great bodily harm.<sup>12</sup>

§ 4668. **Whether There Is a Presumption of Law of Malice from Killing With a Deadly Weapon.** (a) If the jury believe from the evidence and circumstances, beyond a reasonable doubt, that defendant unlawfully killed H. with a deadly weapon, the law presumes that such killing was done with malice.<sup>13</sup>

(b) If you believe from the evidence beyond a reasonable doubt, that the defendant killed the said V. wantonly and cruelly, without excuse or justification therefor, or without considerable provocation,

9—State v. Reed, 50 La. Ann. 990, 24 So. 131 (132).

"The statement challenged undoubtedly assumes the killing of C., and that since one of the questions arising in the case, and presented to the jury, was whether C. was killed or not by a passing train (his body having been found on or alongside of a railway track) it was prejudicial error. The statement challenged undoubtedly assumes the killing of C. More than that, it implies that he was killed by the accused. It is error on both grounds."

10—Marzen v. People, 173 Ill. 43 (58), 50 N. E. 249.

The court said: "It is true that it is not necessary that the party should have entertained a malicious intent for any considerable time. Weaver v. People, 132 Ill. 536, 24 N. E. 571. But it is none the less true that malice involves deliberation. Davison v. People, 90 Ill. 221; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320."

11—Johnson v. State, — Miss. —, 30 So. 39 (40).

Holding this definition erroneous the court said: "This leaves out the essential of deliberation, which must exist, though it need only be for a moment. One may intentionally kill another in a struggle in the heat of passion, and the killing

be unlawful, and may yet be only manslaughter. This error is liable to be, and no doubt was, fatally damaging to the accused in this case, where the homicide occurred in a struggle; and it warranted a conviction of murder upon a mere intent to kill under circumstances where he and the slain man each had hold of a pistol, and each was striving for its possession."

12—Clemons v. State, 48 Fla. 9, 37 So. 647 (649).

"We find no error in the charge of which defendants can complain though it would be more correct to say 'a dangerous weapon is one likely to produce death or do great bodily harm.'"

13—Darden v. State, 73 Ark. 315, 84 S. W. 507 (508).

Held error. The court said that this "deprived the defendant of the benefit of any provocation or mitigating circumstances connected with the killing that tended to mitigate the offense. There was evidence adduced at the trial tending to show that a few hours before the killing the deceased grossly insulted and abused the defendant, and shortly thereafter shot at him, and that thereupon he killed the deceased by shooting him. The effect of the instruction was to withdraw this evidence from the consideration of the jury." Contra, Mitchell v. State, 129 Ala. 23, 30 So. 348 (352).

or that he killed the said V. with a deadly weapon, then the law presumes that it was done maliciously, and you should so find, unless you further believe from the evidence, that it was done without any malice in fact.<sup>14</sup>

(c) The court charges the jury that the law does not presume the existence of malice from the use of a deadly weapon when all the facts and circumstances of the killing are in evidence; but in cases where they are in evidence the law makes no presumption as to the existence of malice, but it is then a question of fact for the jury to say whether or not the killing was the result of the malice, and the jury cannot find such to be the fact until the state has proven it beyond all reasonable doubt.<sup>15</sup>

### MOTIVE.

§ 4669. **Motives that Actuated Defendant.** In all cases, and especially in cases depending on circumstantial evidence, an inquiry into the motives actuating the accused is always important, because human experience shows that men do not commit crimes without a motive therefor.<sup>16</sup>

§ 4670. **Calling Attention to Absence of Apparent Motive—Insanity.** It will be proper for you to enquire what motive, if any, consistent with sanity is shown by the evidence to have existed in the mind of the defendant for taking the life of the deceased in the way, place and circumstances in which the act was done; and if there is a want of such motive, as shown by the whole evidence, for the alleged crime, the fact that it was done under circumstances which rendered detection and arrest inevitable, if it was so done, are important points for your consideration, especially when coupled with evidence of insanity on any particular point.<sup>17</sup>

14—Territory v. Gutierrez, — N. M., —, 79 Pac. 717.

The court said: "It is a serious question whether the use of a deadly weapon under the circumstances of this case would justify the instructions given, and in fact it may well be questioned whether there is a presumption of law arising in any criminal case as against the accused in the general acceptance of the term. Trumble v. Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384. This court held in Territory v. Lucero, 8 N. M. 543, 46 Pac. 18, that the presumption of malice from the killing of a human being is a presumption of fact for the jury, and not a presumption of law. . . . Here appellant was an officer of the law attempting to arrest deceased. He had a right to carry the weapon, and use it if necessary to prevent an escape or overcome resistance where his life or the lives of members of his posse seemed in danger. Territory v. McGinnis, 10 N. M. 280, 61 Pac. 208. . . . In ordinary cases of homicide the fact of the use of a deadly weapon may be a circumstance from which together with all the other facts and circumstances in the case the jury might

infer malice, but it certainly had no application here; and where such inference does arise it is rebutted and controlled by the presumption of innocence in favor of the defendant until all the facts and circumstances of the case corroborate and strengthen such inference raising it to the dignity of proof beyond reasonable doubt." See to same effect Davis v. United States, 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499; Chaffee v. United States, 18 Wall 516, 21 L. Ed. 908.

15—Mitchell v. State, 129 Ala. 23, 30 So. 348 (352).

The court, holding this erroneous, said: "The law presumes malice from an intentional use of a deadly weapon in the commission of homicide, unless the existence of malice is rebutted by the evidence which proves the killing. Hornsby v. State, 94 Ala. 55, 10 So. 522; Miller v. State, 107 Ala. 40, 19 So. 37." Contra, Darden v. State, 73 Ark. 315, 84 S. W. 507 (508).

16—Held properly refused as an argument in Dennis v. State, 118 Ala. 72, 23 So. 1002 (1003).

17—Goodwin v. State, 96 Ind. 555 (565).

Held properly refused. The court

§ 4671. **State Failing to Prove Motive.** (a) The court charges you that as reasonable men usually have a motive for what they do, or act from or by virtue of a motive, and that whereas men rarely, if ever, commit a grave offense like the one with which the defendant is charged, that therefore you are authorized to look to the fact, if it be a fact, that the state has failed to show a motive on the part of the defendant for the killing of H. in making up your verdict, and in determining whether the defendant is guilty as charged.

(b) Any evidence indicating consciousness of guilt, of itself, should weigh but little, and ought to be considered by the jury with great caution.

(c) If the evidence fails to show any motive on the part of the defendant to commit the crime, I charge you that in the absence of positive proof of defendant's guilt, authorizing a conviction, such absence of motive is a strong circumstance in the defendant's favor, and may be considered by you, in connection with the other exculpatory evidence to generate a reasonable doubt of defendant's guilt.<sup>18</sup>

(d) If the evidence fails to show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence, and should be considered.<sup>19</sup>

## PREMEDITATION.

§ 4672. **What Amounts to Premeditation and Deliberation.** The court instructs the jury that the drawing of the pistol shows pre-

said: "It would have been proper for the court to instruct the jury that evidence of the absence of motive was entitled to consideration upon the question of mental capacity, but we are inclined to the opinion that it would not have been proper to characterize it as important evidence. . . . Absence of motive and the manner of slaying are grouped with evidence of insanity, thus asserting that the latter fact is entitled to consideration and important consideration upon the question of mental capacity. Putting these facts together as the instruction does, gives the jury an erroneous view of the law. *Clough v. State*, 7 Neb. 320."

18—In *Bonner v. State*, 107 Ala. 97, 18 So. 226 (229), the court held the above instructions refused to the defendant, to be "invasive of the province of the jury, and for that, if not also for other reasons, were properly refused. The court cannot tell the jury that a certain fact should 'weigh but little' against the defendant, or that a certain other assumed fact 'is a strong circumstance in the defendant's favor.' Among other faults of the third charge requested by the defendant it is open to the criticism that it is a pure argument." For another erroneous instruction on this subject, see *Brunson v. State*, 124 Ala. 37, 27 So. 410; also *Clifton v. State*, 73 Ala. 473; *Stone v. State*, 105 Ala. 60, 17 So. 114.

19—*People v. Glaze*, 139 Cal. 154, 72 Pac. 965 (969).

The constitution declares that "judges shall not charge juries with respect to matters of fact." Article 6, par. 19. A statement to the jury that the failure to prove the existence of a motive impelling the defendant to commit the crime is a "circumstance in favor of his innocence," while perhaps a correct statement of the view to be taken by the jury of such failure of proof, is nevertheless an instruction with respect to a matter of fact. As such, the court was not bound to give it. While an instruction of this character may be, and usually is, harmless, it is not error to refuse it.

In *State v. Brown*, 168 Mo. 449, 68 S. W. 568 (576), a similar instruction was held properly refused "because a man is not to be acquitted of crime simply because his motive for perpetrating it cannot be discovered." Citing *State v. David*, 131 Mo., loc. cit. 397, 33 S. W. 28.

In *Jackson v. State*, 136 Ala. 22, 34 So. 188 (190), it was held that the following instruction was properly refused because argumentative and misleading: The court instructs the jury that "the absence of any evidence suggesting a motive is a circumstance in favor of the accused, to be given in such weight as the jury deems proper." Citing, *Hornsby v. State*, 94 Ala. 55 (67), 10 So. 522.



meditation; the cocking of it, leveling it at a particular vital spot, shows deliberation. The conclusion is irresistible that under the law, and the undisputed facts in this case, the killing of A. was an act possessing all the elements of murder in the first degree, as defined by our statutes. It was murder in the first degree. It is nothing less.<sup>20</sup>

§ 4673. **Time Required to Constitute Premeditation.** No specific time is required to constitute premeditation. If the mind of the accused was in a condition to form a purpose, and there was sufficient time for the forming of that purpose, and for the mind to be conscious of that purpose to kill, it is sufficient time to constitute premeditation; and if the jury believe from the evidence beyond a reasonable doubt, that the defendant had fully formed a purpose to shoot and kill S., and that he was conscious of that purpose when he fired the shot, they will find the defendant guilty of murder in the first degree.<sup>21</sup>

20—State v. Cater, 100 Ia. 501, 69 N. W. 880 (883).

"The instruction settled, in advance of the jury's retiring for deliberation, the fact that A. did not die by his own hand; thus entirely depriving the defendant of the consideration by the jury of the only defense in the case. There can be no question that it was erroneous, and highly prejudicial."

21—Cook v. State, 46 Fla. 20, 35 So. 665 (671).

The court said "that this charge does not afford a clear and correct interpretation of the meaning and design of our Legislature in the use of the phrase 'premeditated design' in its statutory definition of the crime of murder in the first degree. The statute reads: 'The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed in the perpetration of, or in the attempt to perpetrate any arson, rape, robbery or burglary, shall be murder in the first degree.'" A similar statute had been previously enacted in Wisconsin by which state it had been borrowed from New York. The purpose of the New York legislators was to express the original meaning of the common law term "malice aforethought," but that purpose was defeated by the Court of Appeals in *People v. Clark*, 7 N. Y. 385, which held "that 'premeditate' was simply the 'prepnese' of the common law, which by a process of construction had come to have no meaning at all, and that 'design' was only the 'malice' of the common law, with an added qualification of 'intentional,' and concluded that 'premeditated design to kill' meant only an intention to kill. In thus construing the statute the Court of Appeals put into operation those technical principles of construction which the Supreme Court had stated it was the purpose of the revision to avoid. The result of

this decision was that the Legislature of New York, evidently dissatisfied with the state of the law as it was left by this decision, amended the law of murder in the first degree by using the words 'when committed from a deliberate and premeditated design.' This emendation struck the courts with some force and since then the Court of Appeals of New York has adopted a definition of murder in the first degree which construes the words of the statute in their 'untechnical' meaning. The definition is as follows: 'Under the statute there must not only be an intention to kill, but there must also be a deliberate and premeditated design to kill. Such decision must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection or consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate or premeditated design to kill was formed must be determined from all of the circumstances of the case.' *People v. Malone*, 91 N. Y. 211; *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018. . . . We think the object of the statute was to divide the cases embraced in the common-law definition of murder, classing the most atrocious under murder in the first degree in which the death penalty is inflicted, and grading down the punishment of other classes according to their relative heinousness. We think the meaning of the words 'premeditated design' not being technical words of the common law, is to be found in the meaning of those words as used in the best dictionaries and standard authorities. Premeditation is composed of 'pre' and 'meditation' and means the act of premeditating; previous deliberation, forethought,

§ 4674. **Opportunity for Deliberation Not Equivalent to Fact of Deliberation.** If you believe from the evidence beyond a reasonable doubt that a purpose or design to kill was distinctly formed in the minds of the defendants at any moment before, or even at the time, a revolver was fired by the defendants or either of them but long enough prior to the shooting to admit of deliberation and premeditation, if any such revolver was fired at S. and did kill him, it was willful, deliberate, and premeditated killing, and therefore murder in the first degree, and you should convict the defendants of murder in the first degree, as charged in the indictment.<sup>22</sup>

§ 4675. **Homicide Cannot Be "Willful, Deliberate and Premeditated" and Still No Crime.** (a) A homicide may be willful, deliberate, and premeditated, and still not unlawful or wrong in the eye of the law; and if the only evidence of malice in the case is the use of a deadly weapon, and there are circumstances in evidence, which, if believed, tend to show a justification for the use of the deadly weapon, and the jury do believe such evidence, the killing, though willful, deliberate and premeditated, and done with a deadly weapon, and used for the specific purpose of destroying the life of the deceased, would be excusable, and a verdict of acquittal should be given by the jury.

(b) This killing may have been willful, deliberate, premeditated, and done with a deadly weapon used for the specific purpose of killing deceased, and still be lawful.

(c) This killing must have been without sufficient legal excuse or provocation, before you can find the defendant guilty, even though

'Deliberation' and 'premeditation' are synonymous. Cent. Dictionary. 'And Isaac went out to meditate in the field at eventide.' Gen. xxiv, 63. 'This book of the law shall not depart out of thy mouth, but thou shalt meditate thereon day and night.' Josh. i, 8. 'Meditate upon these things; give thyself wholly to them.' 1 Tim. iv, 15. 'Let the words of my mouth and the meditations of my heart be acceptable,' etc. Psalm xix, 14. The word 'meditate' as thus used in the Bible, implies all the thoughts which can be generated in the mind by the exercise of the discursive or regulative faculties. It certainly implies everything that is implied in the word 'deliberate' and more. It is not necessary to say that the Bible furnishes a high standard of the English language, or that it is the book from which the masses of the people derive their notions of the meaning of words."

<sup>22</sup>—State v. Phillips, 118 Ia. 660, 92 N. W. 876 (883).

The court said:

"We think this paragraph fails to observe the proper distinction between the degrees of murder. The effect of the rule here stated is that if the purpose to kill was formed in the mind of the defendants any length of time before or even at the instant of firing the fatal shot, and

the jury find there was time in which they might have exercised deliberation and premeditation, then the conclusion of the existence of such deliberation and premeditation follows as a matter of law. Killing in pursuance of a malicious purpose is murder, but without proof of other facts it is as we have seen murder in the second degree. The additional facts or elements necessary to sustain a conviction of the first degree—deliberation and premeditation—must be established by the evidence; they cannot be inferred from the wrongful intent or malicious purpose, for to do so would be to require the state to do no more than prove the lower degree, and permit the jury therefrom to convict of the higher degree. These distinguishing elements of the higher degree of the crime are fact elements to be found by the jury, and it is not within the province of the court to say that the fact of deliberation or premeditation is conclusively established by the proof of any other fact. It is doubtless true that if the jury believe there was time to exercise deliberation or premeditation they may therefrom, in view of all the circumstances, conclude that it was in truth exercised; but the conclusion when reached must be the judgment of the jury."

you may believe from the evidence that the killing was willful, deliberate, premeditated, and done with a deadly weapon.<sup>23</sup>

**§ 4676. Knowledge of Identity of Person Killed Not Essential.** (a) Premeditation means the prior determination on the part of the defendant to take the life of W.; and if the jury are not satisfied from all the evidence in the case, beyond all reasonable doubt, and have an abiding conviction to a moral certainty that defendant had a prior determination to take the life of W. before he fired the shot, the jury cannot convict him of murder in the first degree.

(b) Premeditation means to think on or revolve in the mind beforehand, and unless the jury are satisfied beyond all reasonable doubt and have an abiding conviction to a moral certainty, from all the evidence in the case that defendant had time to think and revolve, or turn over in his mind the probable consequences of his act before he fired the shot, and that defendant contrived and designed, previous to the firing of the shot, to take the life of deceased, the jury cannot find the defendant guilty of murder in the first degree.<sup>24</sup>

### PROVOCATION.

**§ 4677. Provocation—Specifying What Acts Constitute.** The court instructs you that in order to constitute this reasonable provocation it is not necessary that the deceased should actually have used violence upon defendant's person, but acts indicating an intention to use a deadly weapon and to fire within shooting distance would be a sufficient provocation.<sup>25</sup>

**§ 4678. Discovery of Wife in Adultery Not Sufficient Provocation.** If the jury find from the evidence that the accused had good reason to believe that his life was in danger, or that he was in great danger of serious bodily harm, he had a right to use such force as might

23—Gafford v. State, 125 Ala. 1, 28 So. 406 (409).

The court said of these:

"To say the least of charges (a), (b) and (c) refused to defendant they tended to confuse and mislead the jury. A man may form and entertain a design to take life to save himself from grievous bodily harm or death, and may in pursuance of such design actually take life in self-defense, and be justified therein; but to say that a homicide may be willful, deliberate and premeditated and yet justifiable—to use the statutory words defining murder in the first degree to characterize under certain conditions a lawful homicide,—is a practice well calculated to confound the jury and to lead to wholly unwarranted results. And in a legal sense, moreover, one cannot be said to act with willfulness, deliberation and premeditation, when his act, though according with his intent at the moment, is coerced by an impending and immediate necessity to take life that his own life may be preserved. These charges were properly refused."

24—Webb v. State, 135 Ala. 36, 23 So. 487 (489).

\* The court said:

"Except a change in the name of the person slain, the charges refused to defendant are copies of charges which, in Daughdrill v. State, 113 Ala. 9, 21 So. 378, were condemned as having a tendency to mislead the jury as to what constitutes the deliberation and premeditation which are necessary ingredients of murder in the first degree. The charges are bad for the reason given in the opinion in Daughdrill's Case and in view of the circumstances disclosed by the evidence the charges were bad for the reason that they each assume a specific intent to kill the deceased was essential to make the defendant guilty of murder in the first degree, whereas neither the fact nor degree of his guilt depended on whether he knew the identity of the person at whom he shot."

25—Mitchell v. State, 129 Ala. 23, 30 So. 348 (352).

Held properly refused because it would have "invaded the province of the jury, in specifying what acts of provocation would reduce the offense below murder."



have been necessary to protect his life or save himself from great bodily harm, even though to accomplish this it were necessary to slay his wife.<sup>26</sup>

§ 4679. **Referring to Great Provocation as Slight.** If the provocation be great, it will be but manslaughter; but if the provocation be but slight, and the killing be done out of all proportion to the provocation, it will be murder in the second degree.<sup>27</sup>

§ 4680. **Provocation Necessary to Reduce the Crime to Manslaughter—Acting in Self-Defense.** In cases of manslaughter there must be shown to you some provocation justifying the accused to believe that he was in fear of great bodily harm, or that his life was in danger at the moment that he acted. The provocation must arise from overt act or demonstration on the part of the deceased, which should convince the ordinary person of ordinary courage, that then and there his life was in danger, or that then and there he was about to suffer great bodily harm. If these facts and circumstances do not exist at the moment and time, then the person committing the act resulting in death is guilty of murder, because the provocation justifying him to act does not exist.<sup>28</sup>

§ 4681. **Provocation—Mere Words Not Sufficient.** (a) The jury are instructed that words as well as acts constitute in law a provocation for one person to assault another and thereby mitigate the crime, and if you believe that D. used words towards defendant which to your minds was a reasonable provocation for an assault by defendant upon D., the defendant is not guilty of murder, but is only guilty of manslaughter in the fourth degree, and this even though you may believe defendant did actually assault said D.<sup>29</sup>

26—State v. Cancienne, 50 La. Ann. 847, Am. 24 So. 134 (135, 137).

Held properly refused. "It assumed as a fact, that a husband, called to face such a scene as that referred to in the different bills of exception, must be so wrought up by excitement as to make him irresponsible for his acts to the full extent of justification. There is no claim that there was any testimony in the case as to insanity. We have said that a husband would not be justified, to the extent of an acquittal, for killing a man whom he discovered in actual adultery with his wife. If this be so, he would not be justified by acting under a delusion that such act was being committed."

27—State v. Castle, 133 N. C. 769, 46 S. E. 1 (4).

The court said:

"The error in this instruction consists in assuming that the jury could find that there was slight provocation. If the jury found that there was any provocation, it consisted in a deadly assault by the deceased upon the defendants; and it would be difficult to conceive how the jury, in the light of all the evidence, could find that the means used by the defendants was 'out of all proportion to the provocation.'"

28—State v. Halliday, 111 La. 47, 35 So. 380 (381).

"The jury might well have as-

sumed from this charge, as applied to the facts disclosed, that the accused was guilty of manslaughter although he may have acted in self-defense, and have made out a case of justifiable or excusable homicide."

29—State v. Gartrell, 171 Mo. 489, 71 S. W. 1045 (1052).

"In Wharton's Criminal Law (9th Ed.) par. 455, it is said: 'Neither words of reproach, how grievous soever, nor indecent, provoking actions or gestures, however much calculated to excite indignation or arouse the passions, are sufficient to free the party killing from the guilt of murder. To have the effect to reduce the guilt of killing to the lower grade (manslaughter), the provocation must consist of personal violence.' In State v. Starr, 38 Mo. 271, Judge Warner, speaking for this court, after adopting Wharton's statement, above quoted, said: 'The rule is well established, and we imagine it would not be the part of wisdom to substitute in its place one fluctuating or less right, which would require the accused to be judged in each case according to the excitement incident to his natural temperament, when aroused by real or fancied insult given by words alone. Kely, 135. There must be an assault upon the person, as where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway (Lanure's case,

(b) The jury may look to any evidence in the case tending to show that H. used opprobrious words or abusive language to defendant at or about the time of the fight, together with the other evidence in this case; and, if you believe such words or language was used, you may consider the same in justification or extenuation of the offense, and may acquit the defendant.

(c) If the jury believe from the evidence, that, at or about the time of the difficulty, H. used abusive language or opprobrious words to the defendant, you may justify the assault and battery, if one is proved, on account of such language or epithets, and find the defendant not guilty.

1 Hale P. C. 455) or other direct and actual battery (Reg. v. Stedman, Foster, Crown Law, 292). In *State v. Branstetter*, 65 Mo. 149, this court unanimously approved Judge Wagner's statement of the law on this point in *State v. Starr*, supra. In *State v. Hill*, 69 Mo. 451, in discussing an instruction which declared that 'provocation, to be sufficient to mitigate or extenuate homicide, as applicable to this case, should amount to personal violence or injury to the defendant; and mere words of reproach, how abusive soever they may be, are no provocation sufficient to free the party killing from the guilt of murder, this court said: 'The first clause of the instruction declares that no provocation will mitigate or extenuate a homicide, unless it amounts to personal violence or injury to defendant. The contrary was held in *State v. Wieners*, 66 Mo. 13; and while this court may not have intended, and probably did not intend, that no provocation less than personal violence or injury to defendant would reduce the crime from murder of the first to murder of the second degree, but that no other provocation would reduce it to manslaughter, the instruction was so worded and constructed as to be calculated to mislead the jury.' In *State v. Kotovsky*, 74 Mo. 247, this court said, 'Deliberation, as defined by this court, was not an essential element of murder at common law; but the man who, in a passion engendered by opprobrious words, or other just provocation, slew the one who uttered them, at the instant, was deemed guilty of murder, although the passion engendered by the insult was as great as that produced by a blow, and yet the latter provocation reduced the homicide to manslaughter, while the other did not mitigate the offense. Our statute declares murders committed by lying in wait, by poison, and in an attempt to perpetrate certain specified felonies, and all other willful, deliberate and premeditated murders, to be of the first degree, and all other kinds of murder at common law not herein declared to be manslaughter or justifiable or excusable homicide, to be murder in the second degree. Those murders committed in a heat of passion en-

gendered, not by what was legal provocation at common law to reduce a homicide from murder to manslaughter, but by opprobrious epithets or other insults, sufficient to arouse the same heat of passion which would be caused by a technical legal provocation, are of second degree. What is such provocation? An insult to a person, either by accusing him or a member of his immediate family of some infamous act, opprobrious words, or indecent gestures which convey imputations of criminal baseness against a person or his family, sufficient to arouse in a man of ordinary pride and self-respect a high state of passion and a spirit of resentment, are of such provocation, and the sufficiency of the provocation is to be determined by the court.' In *State v. Elliott*, 98 Mo. 150, 11 S. W. 566, this court again said: 'The principle of law is too well established to admit of question that words alone, however provoking or insulting, will not reduce the killing to manslaughter. They alone do not furnish an adequate cause.' It would be a work of supererogation to cite all the cases in which this court has reiterated the statement that provocation consisting of provoking and insulting words or opprobrious epithets, alone, will not reduce the homicide to manslaughter. We cite, in addition to those from which we have already quoted, *State v. Ellis*, 74 Mo. 207; *State v. Curtis*, 70 Mo. 599; *State v. Robinson*, 7 Mo. 306; *State v. Howard*, 102 Mo. 142, 14 S. W. 937; *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830; *State v. Martin*, 124 Mo. 514, 28 S. W. 12. Conceding that certain of our sister states have by their statutes so modified the law that insulting remarks concerning a female relative are made sufficient provocation, that fact only goes to prove the general doctrine as uniformly announced by this court was the recognized rule at common law, and in those states until modified by statute, and to that extent only. It follows that the circuit court did not err in refusing the instruction, and it was not error to refuse to permit the jury to determine for themselves whether such words were such reasonable provocation as would reduce the homicide to manslaughter.'

(d) If opprobrious words or abusive language were used by H. towards the defendant at or near the time of the assault, and defendant struck on account thereof, you may consider the use of such words or language in extenuation or justification of the assault, as you may determine.

(e) You may take into consideration the opprobrious words or abusive language used by H. towards defendant at or near the time of the difficulty, if any such were used, in extenuation or justification of the assault, if you believe an assault was made.<sup>30</sup>

(f) If you believe that the words and acts of A. H. immediately preceding the shot by defendant amount to an assault upon defendant then you ought not to find the defendant guilty of an offense greater than manslaughter in the first degree, if you believe that the shot fired by defendant was fired solely from passion aroused by those words and acts.<sup>31</sup>

§ 4682. **Mere Threats Not Sufficient Provocation.** The court instructs the jury that you should consider all threats which you may believe from the evidence were made by the deceased against the defendant, and give them such weight in determining the nature of the transaction giving rise to the charge for which the defendant is now on trial as you deem proper. Mere threats, however, will not justify, on the ground of self-defense, the shooting alleged in the indictment; nor will threats alone warrant the party against whom they were made in killing the party who made them.<sup>32</sup>

§ 4683. **Insulting Conduct.** (a) The words and conduct of another, under some circumstances, may be of such an insulting and provoking character as to kindle sudden passion, and provoke immediate resentment, to the taking of life; and if the deceased, by

<sup>30</sup>—Johnson v. State, 136 Ala. 76, 34 So. 209.

The court said that these four instructions "ignore that phrase of the testimony tending to prove that defendant was the first to use insulting language. They proceed upon the idea that if the prosecutor made use of insulting language to the defendant, he is entitled to the benefit of the statute, notwithstanding the jury may have, under the evidence, found that he (defendant) made use of such language first. Their refusal was therefore proper."

<sup>31</sup>—Thomas v. State, 126 Ala. 4, 28 So. 591 (593).

"The law is too well settled in this state to admit of controversy, or to call for citation of authority, that mere words, however insulting of abusive, will not serve to reduce a homicide from murder to manslaughter. The evidence does not show any act on the part of the deceased that possibly under the law, could be considered by the jury as sufficient to engender that sudden passion or heat of blood which the law says may under some circumstances reduce the homicide from murder to manslaughter."

<sup>32</sup>—State v. Evans, 158 Mo. 589, 59 S. W. 994 (999).

The court said:

"We think the view of the court is unhappily expressed. The threats,

if any, by deceased, were not communicated to defendant; but, as it was very doubtful who was the aggressor when the homicide occurred, it was proper enough to advise the jury that they might consider these uncommunicated threats, if any there were, in determining who was the aggressor that night, and in characterizing the conduct of deceased towards defendant, and in reaching a conclusion as to the reasonableness or unreasonableness of defendant's conduct. The court properly told the jury that mere threats by deceased, without any effort to carry them out, would be no defense to defendant, but if the jury found deceased had made threats against defendant, and before the encounter, and was the aggressor in the difficulty in which he was shot, they might reasonably find that he intended to execute them. . . . The only effect the threats of deceased could have in this case would be to enable the jury to determine who was the aggressor, and whether, in connection with the conduct of deceased, they afford a reasonable cause of apprehension of danger by defendant when the difficulty began. The defendant, being ignorant of them, could not and did not act upon them. The court can readily modify the instruction to meet these views."



insult, or provocation of such character as would reasonably be calculated to kindle passion and provoke sudden resentment, and if the jury believe from the evidence that such insult or provocation by A. had the effect to provoke sudden resentment, and that the killing was traceable solely to the influence of the passion by such insult and provocation, then the killing of A. would not be willful, malicious, deliberate and premeditated, and is not murder in the first degree.<sup>33</sup>

(b) If you further believe and find from the evidence that at the time of such shooting and wounding the defendant, C., was so far under the influence of passion, aroused by any previous conduct of the deceased towards the defendant or others, as to make the defendant incapable of thinking coolly of the natural consequences of his acts,—then you should convict the defendant of manslaughter in the fourth degree.<sup>34</sup>

§ 4684. **Cooling Time—Whether a Question for the Jury or for the Court—Cooling Down After Previous Difficulty.** (a) I charge you that whether there has been cooling time, such as to make a killing murder which would otherwise be manslaughter, is a question for the jury.<sup>35</sup>

(b) You are instructed that, although you may find that defendant was struck by said W., thereby causing pain or bloodshed, but if there had sufficient time elapsed thereafter, and before said shooting, in which time sufficient had passed for the defendant's passion or emotion to have cooled or subsided, and his reason to have resumed its sway, then and in that event you will not consider that portion of this charge relating to sudden passion and adequate cause; but otherwise, if you find that it had not, and in judging thereof you will consider the condition and temper of the defendant at that time and in connection with all the facts and circumstances in evidence.<sup>36</sup>

33—Held argumentative and properly refused. *Eatman v. State*, 139 Ala. 67, 36 So. 16 (18).

34—*State v. Callaway*, 154 Mo. 91, 55 S. W. 444 (449).

"Under this instruction, 'any previous conduct of the deceased towards defendant and others,' no matter what it was,—the refusal to dismiss her divorce suit against him, the writing of a note years before to a gentleman in F., the going out walking the year before with C. or with D. at her husband's instance, or the hiring herself out to S. in order to earn a meager support for herself and little one,—any such item of conduct would amount to such 'provocation' as would be sufficient to raise defendant's venous and arterial circulation to the point of 'hot blood,' while it lowered his crime to the lowest degree of manslaughter."

35—*Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1030).

Held that this "should not have been given. Taking into consideration that phase of the tendency of the evidence that defendant killed the deceased solely on account of his refusal to marry the girl, or because of his statement to the defendant that he had impregnated the

girl with child, or on account of deceased's statement to others to that effect, if believed by the jury, his offense could not have been of less degree than murder."

36—*Cooper v. State*, — Tex. Cr. App. —, 89 S. W. 1068.

"This charge is criticised for several reasons. The writer has always thought, and the rule has been so enunciated until the recent case of *Franks v. State*, — Tex. Cr. App. —, 88 S. W. 923, that cooling time was a question of fact and not of law; and where passion was created by adequate cause, and the mind was therefore incapable of cool reflection, and the shooting occurred with the mind in this condition, the killing would be manslaughter; and if the mind was enraged without adequate cause, and the shooting occurred, it would be murder in the second degree. But, without entering into a discussion of that matter, it is clear that this charge is wrong from any standpoint. Adequate cause and cooling time are here limited to the first difficulty; and adequate cause is thus eliminated from the second difficulty, because the court informs the jury that, if sufficient time had elapsed for the defendant's passion or emotion to

§ 4685. **Cooling Time—Not Shown Necessarily by Hostile Acts.** The court instructs the jury that, when anger is shown to have existed between the parties to the killing, before there could be deliberation and premeditation, growing out of the killing, the slayer should have had time for his passion to cool, and to deliberate in his rational moments over his trouble, before he could be convicted of murder in the first degree, if he subsequently slew the party with whom he had the trouble; and, if you find from the evidence that prior to the killing the deceased and the defendant had some difficulty, then, before the jury could find any deliberation or premeditation, they (the prosecution) must prove some act of hostility either committed or threatened by the defendant towards the deceased before they (the jury) could find that the act committed, by which the deceased lost his life, was committed with deliberation and premeditation.<sup>37</sup>

### DYING DECLARATIONS.

§ 4686. **Dying Declarations Not of Highest Order—To Be Received With Caution.** (a) Dying declarations are not the highest and best evidence known to the law, but such declarations must be received with great caution. It is not the law that dying declarations are the highest and best evidence known to the law.<sup>38</sup>

(b) The court instructs the jury that the dying declarations of the deceased, made to his wife, are not entitled to the same credit and force as if the deceased was still alive and testifying in the presence of the jury, under oath; that it is a species of hearsay evidence, and is intrinsically weaker than if the declarant was pres-

cool and subside and his reason to resume its sway, then they would not consider the question of sudden passion and adequate cause; but if they believed otherwise, and found that sufficient time had not elapsed, in judging of it they could consider the condition and temper of defendant at the time, and in connection with all the facts and circumstances. What is meant is not clear. If the mind was excited beyond cool reflection, by reason of the previous difficulty, from the pain and the blow, and but two minutes had elapsed, then it was hardly possible the mind could have become cool. In fact, it would have been a very remarkable statement that the mind could become cool under these circumstances within the short space of two minutes. If, as a matter of fact, 15 or 20 minutes had elapsed, and the jury had concluded that in that time the mind had become cool, sufficiently at least for reason to resume its sway, and permit him to have cooled, then this charge cuts the jury off from the consideration of any and all the facts that occurred upon the second meeting; and it further cut off the consideration of aggravated assault, viewed from the standpoint of the second difficulty. If, when appellant re-

turned the second time to secure the poison, his reason had resumed its sway, and Jones threw the cleaver at him, and, having missed him, picked up the knife and started towards him, and appellant shot while Jones was 10 or 12 feet away, it occurs to us that adequate cause can become a part of this case from these facts. The jury may have thought, as they evidently did, that he fired too quick; that he was 12 feet away with a knife with which he could not reach defendant, or at least was not within sufficient proximity to use the knife, and appellant fired too quick. But in any event a man's mind would hardly be sufficiently cool under those circumstances to authorize the jury to withdraw the question of adequate cause from their consideration and place it back upon the first meeting."

37—*Savary v. State*, 62 Neb. 166, 87 N. W. 34 (37).

"The instruction is an incorrect statement of the law. We know of no rule of law that requires proof of some act of hostility committed or threatened, as an evidence that irresistible passion has subsided, and reason resumed her sway."

38—This instruction was held "argumentative, and there was no error in its refusal. *Tarver v. State*, 137 Ala. 29, 34 So. 627 (628)."

ent and subject to cross-examination; and the jury alone are the judges of its weight and force.<sup>39</sup>

39—*Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (212).

A minority of the court criticised this instruction and said: "We all concur that if it be the true purport of the instruction that it is intended to point out, by way of precaution, the inherent qualities which by law pertain to all dying declarations, and be held to refer to the source, rather than the matter, of the testimony, it would, in that view, not be upon the weight of evidence, within the meaning of the statute. In cases of perjury, seduction, and the like, requiring corroborative evidence as to certain testimony, and in cases involving the testimony of accomplices and evidence of admissions made by a party against his interest, and the life, it is entirely proper to point out to the jury the circumstances affecting the source or character of the evidence, which, according to settled rules, operate to its disparagement; being careful to leave to the jury the untrammelled right to consider the testimony, and give it what weight they may deem it worthy. Abstractly, it is true, as a matter of law, that a dying declaration is a species of hearsay testimony, and of itself is not entitled to the same force as if the witness was living and testifying and subject to a cross-examination. *Lambeth's case*, 23 Miss. 322. The question presented by this instruction involves a consideration of the law applicable to the admission of dying declarations, and the reasons upon which they are founded, and which determine the character of such testimony from a legal standpoint. Dying declarations constitute the only exception to the constitutional right of the accused to be confronted with the witnesses against him, and be afforded the right to cross-examine them. In all trials and on all issues the cross-examination is the most effective means of eliciting and ascertaining the truth. While the solemnity under which they are usually made is deemed in some sense an equivalent for the sanctity of an oath, yet their admissibility rests upon the grounds of necessity and public policy, and upon the presumption that, in the absence of other proof, crimes might go unpunished. The rules which govern the admission of such testimony are familiar and rudimental.

(1) They must be made under the realization and solemn sense of impending death, when the motive for falsehood may be presumed to be lost in the despair of life.

(2) They must be the utterance of a sane mind.

(3) They are restricted to the act of killing, and the circumstances immediately attending it and forming a part of the *res gestae*.

(4) No declaration or any part of it is admissible, unless competent and relevant, if made by a living witness.

(5) That great caution should be observed in the admission of such testimony, and the rules which restrict it be carefully guarded.

"The authorities abound with discussion of the reasons and considerations upon which these rules are founded, looking to the conservation of truth and that justice might prevail. The circumstance that the declaration is hearsay, and is without the essential element of cross-examination, stands, facile princeps, the most important of these reasons, and incidentally and necessarily involves other considerations. *Greenleaf* says (1 *Greenl. Ev.*, par. 162): 'it is always to be recollected that the accused has not the power of cross-examination, a power quite as essential to the eliciting of all the truth as the obligation of an oath can be.' 1 *Phil. Ev.* 300; *People v. Sanchez*, 24 Cal. 17. 'The admission of dying declarations as evidence being in derogation of the general rule which subjects the testimony of witnesses to the two important tests of truth, and oath and a cross-examination, it is obvious that such evidence should be admitted only upon the grounds of necessity and public policy, and should be restricted to the act of killing and *res gestae*.' *Lieber v. Com.*, 9 Bush 11, 1 Am. Cr. Rep. 309.

"Judge Cooper in *Bell v. State*, 72 Miss. 513, 17 So. 234, 10 Am. Cr. Rep. 276, says: 'The gravity of the issues involved in that class of cases, in which alone this character of hearsay evidence is admissible; the fact that the defendant is deprived of the opportunity of cross-examination; that the declaration is usually that of a hostile party, and is very generally proved by the testimony of his friends or relatives,—has justly caused the courts to restrict its admissibility within well-defined limits, and to require clear proof of those conditions the existence of which are essential to its competency.' There are other considerations which have been dwelt upon by law writers and judges. Statements made under the shadow of approaching death may come with the infirmity of inattention, when the mind is diverted to the thoughts of future; the vigor of the mind may be impaired; facts may be but partially stated; inferences and opinions may be stated as facts; the passions of anger and revenge may linger after all hope of life is fled, and affect the truth of the statement. It must come as the memory of those who heard it, subject to all the uncertainties of a correct understanding of the



(c) I instruct you that this class of evidence is not so satisfactory as the evidence of the witnesses upon the stand, and it should therefore be carefully scrutinized.<sup>40</sup>

§ 4687. **Premonition of Death Not a Guaranty of Truth—Credibility for the Jury.** The jury are instructed that it is the experience of mankind that the premonition of immediate death, from which

speech as made, and of a correct reproduction by the memory of what was truly said. Mr. Roscoe says: 'Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered that they cannot be subjected to the power of cross-examination,—a power quite as necessary for securing the truth as the religious obligation of an oath can be.' Rosc. Cr. Ev., p. 35.

"The foregoing principles are repeated, iterum, iterumque, in varying phrase, in numerous authorities and cases, and are the well-settled law of this state. Bell v. State, supra; Lambeth v. State, 23 Miss. 350; Nelms v. State, 13 Smedes & M. 501, 53 Am. Dec. 94; Brown v. State, 32 Miss. 433; Merrill v. State, 58 Miss. 66; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; Moore v. State, 12 Ala. 764; Binns v. State, 46 Ind. 311. In State v. Vansant, 80 Mo. 78, it is said: 'Besides such declarations are afflicted with the common infirmity which attaches to all oral statements or verbal admissions, reduced to writing or repeated by another, and are liable to be colored or deflected by the medium through which they are transmitted to the jury.' And in Lambeth's Case, supra, Mr. Justice Yerger said that a dying declaration was not entitled to the same weight and force as if delivered by a living witness. In Brown v. State, 32 Miss. 442, it is said, after commenting upon the nature of dying declarations, that 'it is therefore the dictates of reason and common sense that declarations of this character, in all cases and under any circumstances, should be admitted with caution, and weighed by the jury with the greatest deliberation.' 1 Greenl. Ev., par. 162.

"We all concur that it is clear that as to dying declarations it would not be objectionable if the jury be charged that while they are the sole judges of the weight and effect to be given to a dying declaration, and that it is to be determined like any other evidence, in the light of all the evidence of the case, and to caution them, in determining its effect, that they should weigh it with great deliberation and care, and take into consideration the circumstances of its being hearsay; that it is the statement of one not subject to cross-examination, or such other relevant circumstances

in that regard as may exist in any given case; and that it is the duty of the court to lay before the jury, by precautionary instructions, when asked, the inherent elements of weakness which the law recognizes in certain classes of evidence, but in such form as not to invade the province of the jury. The majority of the court hold that this instruction is not upon the weight of evidence; that its true purport is cautionary, and refers rather to the source, than to the effect, of the testimony. For myself, I do not concur in this view. It embodies argumentative statements of the law abstractly correct, but so stated as to bear upon the weight of evidence, and, in my opinion, was properly refused. In Lewis v. Christie, 99 Ind. 377, an instruction which followed the text of the most authoritative writer in the language on evidence (Greenleaf) was condemned, and it was said that argumentative statements of the law, though correct, may not always be an accurate rule of guidance to a jury. 1 Thomp. Trials, par. 640."

40—Shenkenberger v. State, 154 Ind. 630, 57 N. E. 519 (523).

"In Doles v. State, 97 Ind. 561, the court instructed the jury that dying declarations should be weighed by the ordinary rule governing the admission of other evidence. Counsel for the defendant urged that the court should have said that 'such declarations should be cautiously received and carefully scrutinized.' In overruling the objection to the instruction as given, this court said: 'The caution and care with which dying declarations should be received and scrutinized seem to us to be questions for the court upon preliminary proof, but, when they are received and admitted, their credibility and weight are the principle questions for the jury.' See, also, DuRose v. State, 120 Ala. 300, 25 So. 185. It is a well established rule in this state that an instruction containing language which casts suspicion upon or disparages or discredits any class of evidence is erroneous. Slater v. State, 56 Ind. 382; Line v. State, 51 Ind. 172; Lewis v. Christie, 99 Ind. 377 (381, 383); Finch v. Bergins, 89 Ind. 360; Davis v. Hardy, 76 Ind. 272; Garfield v. State, 74 Ind. 60. The said third instruction clearly violated this rule, and the court, therefore, did not err in refusing to give the same to the jury."

there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth.<sup>41</sup>

§ 4688. **Declaration Under Clear Conviction of Impending Death—Referring to Competency of Evidence to Jury.** The court charges the jury that unless they believe from the evidence, beyond a reasonable doubt, that the person alleged to have been killed in the indictment made the declarations in evidence under a clear conviction of impending death, they cannot consider such declarations as evidence in this cause.<sup>42</sup>

§ 4689. **Repetition by Witness of Dying Declaration—How Such Repetitions Are to Be Considered by the Jury.** The jury are instructed that the statements of the witnesses purporting to be repetitions of the dying declarations of the deceased are liable to much imperfection and mistake, through a lack of clear and exact expression of the meaning of deceased, and also through a misunderstanding by the witnesses of the statements actually made by the deceased, or by them unintentionally altering or failing to remember some of the expressions used by deceased, whereby an effect is given to the dying declarations at variance with what the deceased actually did

41—*People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (1029), 11 Am. Cr. Rep. 487.

"The court cautioned the jury not to give as much weight to such evidence as if the same statement had been testified to by the deceased when in health and subject to cross-examination. He also left it to them to decide whether the deceased was without hope of recovery when he made the declarations, and told them that such declarations were to be taken with great caution, as they might be misunderstood, or might have been made in response to suggestive questions. The instruction, however, above quoted, was left substantially unchanged. In *People v. Kraft*, 91 Hun 474 (476), 36 N. Y. Supp. 1034, aff'd 148 N. Y. 631, 43 N. E. 80, it was said by the supreme court that 'it is not the experience of mankind that the apprehension of immediate death, from which there is no hope of escape, is always sufficient to induce persons so situated to speak the truth. Criminals convicted on the most convincing evidence often assert their innocence while standing face to face with their executioners.' We held in that case that it was reversible error to charge the jury that a dying declaration should be 'given all the sanction of evidence which the law can give to evidence.' Dying declarations are received from necessity in order to prevent a failure of justice, upon the theory that the belief of impending death is equivalent to an oath. This rule, as we understand it, goes no further. The fear of punishment by the law for perjury furnishes no safeguard that the declarant will speak the truth, and hence such evidence has no sanction except a belief in responsibility

after death. All men, however, do not entertain that belief. Moreover, as was pointed out by Judge Gray in *People v. Kraft*, supra, the power of cross-examination, which is wholly wanting, is quite as essential in the process of eliciting the truth as the obligation of an oath. We recently reversed a judgment of death in a case in which the dying declaration of the deceased seemed utterly unreliable. *People v. Carbone*, 156 N. Y. 413 (415), 51 N. E. 23. Courts of high standing have held that an instruction that dying declarations are to receive as much credit as testimony given under oath in open court is erroneous. *State v. Van Sant*, 80 Mo. 67 (77); *State v. Mathes*, 90 Mo. 571 (573), 2 S. W. 800; *Lambeth v. State*, 23 Miss. 322 (359). It has happened that a dying declaration accusing the defendant made one day was contradicted by another dying declaration of the same person made on a subsequent day, stating that the defendant 'did not do it.' *Moore v. State*, 12 Ala. 764. So dying declarations have been shown to be positively untrue. *White v. State*, 30 Tex. App. 652, 18 S. W. 462. The elementary writers upon the subject dwell upon the infirmities of this kind of evidence, and all authorities agree that the credibility of the declaration is wholly for the jury. *Underh. Cr. Ev.*, par. 110; 3 *Rice Ev.* 336; *Rosc. Cr. Ev.* 35."

42—*Tarver v. State*, 137 Ala. 29, 34 So. 627 (628).

"It is the province and duty of the court to pass upon the competency of evidence. This charge requested by the defendant violated this rule of law, in referring the question of the competency of the evidence to the jury, and was for that reason, if no other, properly refused."

say; and they are therefore instructed that, while such repetitions of the dying declarations of the deceased are admissible in evidence, yet they should be received and considered by the jury with great caution and subject to close scrutiny, and given such consideration as they are entitled to in view of all other evidence in the case.<sup>43</sup>

§ 4690. **State May Rely on Dying Declarations—Need Not Produce Eye-witness.** When a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power relies upon that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded, but this presumption may be rebutted.<sup>44</sup>

43—State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (1908).

"As to the above instruction requested by defendants, it will be noted that appellants insist that the same rule should apply to the repetition by the witnesses as of the statements of the deceased. This is not true. The same reasons do not exist for applying the same rule to the repetition of dying declarations. Dying declarations are not to be classed with simply casual conversations of the defendants. These declarations are of a more solemn character, and are usually made only a short time before the witnesses are called upon to repeat them in the trial of the case. There was no error in the refusal of this instruction."

44—Harper v. State, — Ga. —, 59 S. E. 792. "Counsel requested the court to charge Pen. Code 1895, § 989, as above. It was contended that this section was applicable, inasmuch as it appeared from the testimony that one C. was present and witnessed the homicide, and that his name appeared upon the indictment

as a witness. It also appeared that the witness was under subpoena, and was in court. The plaintiff in error insists that his request should have been given because the prosecution, instead of introducing an eyewitness to the homicide, relied upon the dying declarations of the deceased and other circumstances, to establish the defendant's guilt. In a criminal case the prosecution is not called upon to produce every eyewitness to the transaction. Although the evidence tends to show that C. was near the deceased at the time he received the mortal wound, it does not show that C. really saw or heard what transpired at the time. Besides, the witness was in court, accessible to the accused, and could have been called by him. It is sometimes the case that the only eyewitness to a crime is unfriendly to the state, and his sympathies are enlisted in the defendant's behalf."

A similar charge was held correctly refused in Lee v. State, — Ga. —, 58 S. E. 676.



## CHAPTER CLXX.X.

### CRIMINAL—HOMICIDE—SELF-DEFENSE.

See Approved Instructions, Chapter XCIX, Vol. II.

- § 4691. Self-defense—Elements of.
- § 4692. Self-defense—Instruction requiring acquittal must include all essential elements.
- § 4693. Self-defense must be defined or explained to the jury.
- § 4694. Self-defense—Assuming that danger existed.
- § 4695. Defendant must believe himself in peril.
- § 4696. "Honest" belief in danger not enough.
- § 4697. Defendant must have reasonable grounds for his fear.
- § 4698. Whether defendant may act upon mere threats and appearances.
- § 4699. The danger need not be real.
- § 4700. Danger must be shown by overt acts of deceased and be "imminent."
- § 4701. Danger need not be "manifest."
- § 4702. Not necessary that there should be an actual "assault."
- § 4703. Imminence of the peril must be submitted to the jury.
- § 4704. Motives of defendant not determined from motives of deceased.
- § 4705. Does not depend on correctness of defendant's apprehension of danger.
- § 4706. Defendant need not act as a "brave" man.
- § 4707. If danger is actual, appearance and strength of deceased are immaterial.
- § 4708. Instruction supposing certain circumstances must leave inference of danger therefrom to the jury.
- § 4709. Defendant may use more force than actually necessary.
- § 4710. Aggressor cannot plead self-defense.
- § 4711. What acts of defendant make him the aggressor—Felonious intent not necessary.
- § 4712. What constitutes provoking the difficulty.
- § 4713. Bringing on a difficulty for the purpose of killing.
- § 4714. Provoking quarrel without felonious intent.
- § 4715. Self-defense—Mere intent by defendant to provoke difficulty does not bar plea of.
- § 4716. No intention to kill but killing accidentally in resisting assault.
- § 4717. Self-defense — Accidentally killing another while preparing for.
- § 4718. Self-defense—Gives no right to kill former assailant on sight.
- § 4719. Defendant previously arming himself, whether evidence of malice.
- § 4720. Self-defense—Aggressor previously arming himself not necessarily barred from pleading.
- § 4721. Procurement of arms as affecting motive.
- § 4722. Assumption that deceased was the aggressor must rest upon evidence.
- § 4723. Not enough that defendant "reasonably" free from fault.
- § 4724. Self-defense—When defendant in fault, abandoning the conflict, may plead.
- § 4725. Aggressor must give deceased to understand he has abandoned the contest.
- § 4726. Defendant pursuing and beating with deadly weapon.
- § 4727. Self-defense — Previously formed design does not bar plea of.
- § 4728. Whether engaged in mutual combat bars plea of self-defense.
- § 4729. Both parties to mutual combat may act in self-defense.
- § 4730. Defendant provoking attack by slandering deceased's family.

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| <p>§ 4731. Dangerous character of deceased—Overt acts.</p> <p>§ 4732. Threats by deceased may be considered by jury but court should not single out and give undue prominence to them.</p> <p>§ 4733. Threats by deceased against defendant, for what purposes admissible.</p> <p>§ 4734. Threats by deceased against defendant when not admissible.</p> <p>§ 4735. Defendant cannot act on mere threats, must await overt acts.</p> <p>§ 4736. Lawful to fire to scare another and prevent attack.</p> <p>§ 4737. Killing policeman who attempts to arrest.</p> <p>§ 4738. Self-defense—Plea not necessarily barred because policeman kills in making arrest.</p> <p>§ 4739. Duty of retreat — Assault with deadly weapon.</p> <p>§ 4740. Common law doctrine of retreat qualified by modern cases.</p> <p>§ 4741. Retreat necessary unless it would increase defendant's peril.</p> <p>§ 4742. Retreat unnecessary when more dangerous than to fight.</p> <p>§ 4743. Doctrine of retreat does not apply to policeman lawfully making arrest.</p> <p>§ 4744. No duty of flight when defendant attacked without fault on public highway.</p> <p>§ 4745. Duty to retreat a question for the jury.</p> <p>§ 4746. Duty of retreat when attacked on defendant's own ground.</p> <p>§ 4747. Error to omit duty of retreat in instruction to acquit.</p> | <p>§ 4748. Self-defense — "All other means" need not be resorted to before killing.</p> <p>§ 4749. Defendant's right to fire first.</p> <p>§ 4750. Assuming that a resentful and unlawful purpose existed when the evidence does not show it.</p> <p>§ 4751. Instructions in words of statute not always correct.</p> <p>§ 4752. Self-defense — If plea of, made out, jury must be ordered, not merely permitted to acquit.</p> <p>§ 4753. Ignoring the theory of self-defense held erroneous.</p> <p>§ 4754. Hypothesizing instructions on fragments of the evidence.</p> <p>§ 4755. Self-defense — Need only raise, not prove beyond, a reasonable doubt.</p> <p>§ 4756. State need not prove that defendant was aggressor beyond a reasonable doubt.</p> <p>§ 4757. Killing by son to protect his father.</p> <p>§ 4758. Defense of daughter by father.</p> <p>§ 4759. Husband striking in defense of his wife.</p> <p>§ 4760. Killing in defense of sister need not be proven "necessary."</p> <p>§ 4761. Self-defense—Defendant attacking another to protect a woman not estopped to plead.</p> <p>§ 4762. Killing in defense of the domicile.</p> <p>§ 4763. Homicide—When allowable to prevent intrusion on defendant's premises.</p> <p>§ 4764. Guest in house may protect it from invasion.</p> <p>§ 4765. Defense of property—Shooting trespasser.</p> <p>§ 4766. Killing in defense of property—Defendant not limited to force "actually" necessary.</p> |
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§ 4691. **Self-Defense—Elements of.** (a) The court charges the jury that, before the jury can acquit the defendant on the grounds of self-defense, three essential elements must occur: First, the defendant must be without fault in bringing on the difficulty, and must be disregarding of the consequences in this respect of any wrongful acts or words; second, there must have existed at the time, either really or apparently, as to lead a reasonable mind to the belief that it actually existed, a present, imperious, impending necessity to shoot in order to save himself from great bodily harm; third, and there

must have been no other reasonable mode of escape, by retreat or by avoiding the combat, with safety.<sup>1</sup>

(b) The court charges the jury that if they have a reasonable doubt, after considering all the evidence, as to whether the killing was done in self-defense, then the jury must find the defendant not guilty.<sup>2</sup>

(c) The court charges the jury that if they believe that M. came back from down the church aisle in anger at defendant and went to defendant in an attacking manner and was not provoked by defendant, and the defendant struck at him with a pistol and the pistol went off and killed M. accidentally, then the jury should acquit the defendant.<sup>3</sup>

(d) The defendant was justified in taking the life of the deceased if the deceased was coming onto him with a deadly or dangerous weapon in such a manner as to produce in the mind of a reasonable man a sense of danger to life or limb, and the defendant had no means of retreating without exposing the defendant to greater peril; and this danger may not be real; it is sufficient if it so appears to a reasonable mind. To establish the plea of self-defense he is only required to show that at the time he was either, to ordinary appearances in imminent peril of life or limb, or great bodily danger. One is justified in taking the life of another if at the time there reasonably appeared to be a present, impending, imperious necessity to do so.<sup>4</sup>

**§ 4692. Self-Defense—Instruction Requiring Acquittal Must Include All Essential Elements.** The court charges the jury that if they believe from the evidence that there was an actual or impending danger to the defendant at the time of the shooting, or such a state of facts as were justly calculated to impress upon his mind a rea-

1—Harkness v. State, 129 Ala. 71, 30 So. 73 (74).

"It is not clear what is meant by that part of charge which, after stating freedom from fault as a condition necessary to establishing self-defense, asserts as a further condition that the defendant 'must be disregarding of the consequences in this respect of any wrongful acts or words.' The subsequent parts of that charge were approved in Wilkins v. State, 98 Ala. 1, 13 So. 312.

The first part, including the clause quoted, is as easily susceptible of a construction favoring the defendant as the prosecution. Its defect is only a tendency to mislead, and that vice, being one which might have been cured by an explanatory charge had it been requested, is not available to reverse the judgment."

2—Mitchell v. State, 129 Ala. 23, 30 So. 348 (352).

Held "bad, in predicating a right to acquittal on self-defense, without hypothesizing the existence of conditions which must have existed in order to give the right to act in self-defense, viz., defendant's freedom from fault in bringing on the

difficulty, his inability to retreat without increasing his own danger, and a real or apparent necessity to kill in order to save himself from great bodily harm. Roden v. State, 97 Ala. 54, 12 So. 419; Miller v. State, 107 Ala. 40, 19 So. 37; McLeroy v. State, 120 Ala. 274, 25 So. 247; Golson v. State, 124 Ala. 8, 26 So. 515; Howell v. State, 79 Ala. 284."

3—Stewart v. State, 137 Ala. 33, 34 So. 818 (820).

"As an instruction on self-defense it ignored the question of apparent danger, necessity to strike and the duty to retreat. Moreover, if defendant was at fault in striking deceased intentionally, with a pistol, and it accidentally went off and killed deceased, the defendant might have been found guilty of manslaughter. Fitzgerald v. State, 112 Ala. 34, 20 So. 966."

4—Plant v. State, 140 Ala. 52, 37 So. 159.

"The above charges were each properly refused. They fail to hypothesize one or more of the elements of self-defense, or refer the question of self-defense to the jury without setting out its elements."



sonable belief of the necessity of taking life, and he acted thereon, they may acquit the defendant.<sup>5</sup>

**§ 4693. Self-Defense Must Be Defined or Explained to the Jury.**

(a) If the defendant acted in self-defense, or if the jury find from all the evidence that the probability is he did act in self-defense, the jury must find the defendant not guilty.<sup>6</sup>

(b) Whether the defendant sets up self-defense, or not, yet if the jury have a reasonable doubt, growing out of the evidence, as to whether or not the defendant fired the fatal shot in self-defense, then they cannot convict the defendant.<sup>7</sup>

(c) The court charges the jury, if the jury believe from the evidence that defendant was acting in self-defense, and, while so acting, killed G. accidentally, the jury cannot find the defendant guilty.<sup>8</sup>

**§ 4694. Self-Defense—Assuming that Danger Existed.** If the jury believe that at the time E., the defendant, shot and killed B., if he did shoot and kill him, he then and there was in danger of death or of suffering great bodily harm, and there appeared to him, in the exercise of a reasonable judgment, no other safe way to avert the then real danger, if any, then pending, but to shoot and kill B., then he had the right to shoot him, and the jury ought to acquit the defendant on the ground of self-defense.<sup>9</sup>

**§ 4695. Defendant Must Believe Himself in Peril.** (a) The court charges the jury that if they believe from the evidence that deceased brought on the difficulty at the time it occurred, and that the defendant was not at that time at fault, and if they further believe from the evidence that the circumstances were such as to create in the mind of a reasonable man a belief that he was in imminent danger of his life or of his great bodily harm and that he could not flee without adding to his danger, they must acquit the defendant.

(b) The court charges the jury that in order to justify the de-

5—McClellan v. State, 129 Ala. 80, 30 So. 582.

Held "bad for omitting to hypothesize defendant's freedom from fault in bringing on the difficulty. Henson v. State, 120 Ala. 316, 25 So. 23."

6—"Bad in that it omits to set out the constituent elements of self-defense." Gilmore v. State, 126 Ala. 20, 28 So. 595 (602). Following Miller v. State, 107 Ala. 40, 19 So. 37. See also Harbour v. State, 140 Ala. 103, 37 So. 330 (331).

7—Held "bad in the omission to hypothesize the constituent elements of self-defense, and in leaving it to the jury to say what would constitute self-defense." Tarver v. State, 137 Ala. 29, 34 So. 627 (628).

8—"Refers a question of law to the jury." Hall v. State, 130 Ala. 45, 30 So. 422 (424). Citing Miller v. State, 107 Ala. 40, 19 So. 37.

9—Ellis v. Commonwealth, 30 Ky. L. 349, 98 S. W. 278.

"The instruction tended to mislead or confuse the jury. Under it, they were required to believe that appellant was then and there in actual danger of death or of suffering great bodily harm, and also that there appeared to him, in the exer-

cise of a reasonable judgment, no other safe means of averting the then real, or to him apparent danger, before he could be acquitted on the ground of self-defense. The instruction should have submitted to the jury the question as to what the appellant believed, and had reasonable grounds to believe, from the circumstances as they appeared to him at the time. The jury could, and possibly did, conclude from the evidence that the appellant was not in danger of losing his life, or of suffering great bodily harm at the hands of B.; but the real question was, how did the situation appear to the appellant? Did he believe, and have reasonable grounds to believe, that he was in danger? If so, and there was no other apparently safe way to avert the real, or to him apparent, danger, except by shooting B., then he was justified in taking such steps to protect himself.

"The question we have here was fully considered by this court in the case of Austin v. Commonwealth, 28 Ky. L. 1087, 91 S. W. 267, and the opinion rendered therein sustains the principle above enunciated."

fendant on the ground of self-defense it is not necessary that the danger from the deceased to the defendant should have been an actual or real danger, but such as would induce a reasonable person in the defendant's position to believe that he was in imminent danger of great bodily harm or injury from deceased. Under such appearance the defendant would have the right to act and would not be held accountable, though it should afterwards appear that the indications upon which he acted were wholly fallacious and that he was in no actual peril. The rule of law in such case is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, knowing what he knew and seeing what he saw, suppose from the situation and the surroundings? If such reasonable person, so placed would have been justified in believing himself in imminent danger of great bodily harm, then the defendant would be justified in acting upon such appearances, and would be entitled to an acquittal at the hands of the jury, if he was without fault in bringing on the difficulty.<sup>10</sup>

§ 4696. "Honest" Belief in Danger Not Enough. The court charges the jury that if they find from the evidence that immediately before the defendant fired the shot that caused the death of W., W. acted in such a manner as to create in the mind of A. an honest belief that the defendant was in danger of his life or great bodily harm at the hands of W., and further find from the evidence that A. was free from fault in bringing on the difficulty which resulted in the death of W., and there was no reasonable way of escape on the part of A., they must find the defendant not guilty, notwithstanding that W. was in fact unarmed at the time he was shot.<sup>11</sup>

§ 4697. Defendant Must Have Reasonable Grounds for His Fear.

(a) If you have a reasonable doubt as to whether or not the defendant, acting under fear of receiving death or great bodily harm from the man in the room, . . . fired the fatal shot upon the sudden impulse, acting under such fear and under such circumstances, and you have a reasonable doubt as to whether or not he intended to shoot or wound the deceased, you will find the defendant not guilty.<sup>12</sup>

(b) If one is pursued or assaulted in such a way as to induce in him a reasonable and well-founded belief that he is in actual danger of losing his life or receiving great bodily harm, under the influence of such apprehension, he will be justified in defending himself, whether the danger be real or only apparent. . . . So, in such

10—Jimmerson v. State, 133 Ala. 18, 22 So. 141 (142).

"The first charge, to say no more of it, fails to hypothesize the reasonable belief of defendant that he was in imminent peril. The second is subject to the same vice as the first. It is besides argumentative and tends to mislead, and ignores the doctrine of retreat."

11—Wilson v. State, 140 Ala. 43, 47 So. 93 (94).

Held bad because "it was necessary to justify defendant on the theory of self-defense, not only that he should have honestly believed he was in imminent peril, as the charge hypothesizes, but also that the circumstances were such as to reason-

ably impress him with that belief, which the charge does not hypothesize. Moreover, this charge was abstract in one or more of its postulates."

12—State v. Smith, 43 Ore. 109, 71 Pac. 973 (975). Citing and quoting from State v. Morey, 25 Ore. 241, 35 Pac. 655, 36 Pac. 573, and State v. Johnson, 7 Ore. 210.

"Unless his fears were such as a reasonably prudent man would have entertained under all the circumstances he would have been guilty of manslaughter at least; and hence an instruction to the jury to find him not guilty would be erroneous and no error was committed in refusing to give it."

cases as this, where the defendant relies upon the supposed necessity of killing as a justification or excuse, the rule to be applied is that the accused must have believed that he was in immediate and actual danger of his life from the deceased, and his belief must rest upon reasonable grounds, and the party from whom the danger is apprehended must be making some attempt to execute his design, or at least be in an apparent situation to do so, and thereby induce a reasonable belief that he intended to do so immediately.<sup>13</sup>

§ 4698. **Whether Defendant May Act Upon Mere Threats and Appearances.** The court charges the jury that in order to justify the defendant on the ground of self-defense, it is not essential that there should have been any actual or real danger, if there was an apprehension of imminent danger caused by acts or demonstrations of the deceased, or by his threats or word coupled with his acts or demonstrations; and if the jury find from the evidence that the acts or demonstrations or the threats made by deceased against defendant, if such threats and acts were made, coupled with the acts or demonstrations, produced in the mind of the defendant a reasonable apprehension or expectation of some serious bodily harm to himself from the deceased, the defendant would be justified if he acted on such appearance of danger and under reasonable apprehension even though it subsequently turned out that there was in reality no danger, and deceased was free of fault in bringing on the difficulty.<sup>14</sup>

§ 4699. **The Danger Need Not be Real.** (a) The court instructs the jury that, to justify a killing on the ground of self-defense, it must appear that the party killing was apprehensive, in consequence of the acts and conduct of the party killed, that some great bodily injury to himself was impending, and about to fall on him, and that such killing was necessary to prevent such injury, either apparent or actual. Therefore, if you believe from the evidence that, in consequence of the acts and conduct of S., either alone or acting with another at the time the fatal shot was fired, the defendant had reasonable cause to believe, and did believe, that S. was about to kill him or do him some great bodily harm, and that defendant shot to prevent such design being consummated, then your verdict should be for defendant. But you must say from the evidence, under all the facts and circumstances before you, whether the defendant did have reasonable cause for such apprehension. If he did not have reasonable cause

13—State v. Singleton, 670 Kas. 803, 74 Pac. 243 (244).

"Under the circumstances stated it was not necessary to a complete defense that the defendant should have believed his life to be in danger. He is equally protected if he acted upon a reasonable belief that he was in danger of receiving great bodily harm. State v. Petteys, 65 Kas. 625, 70 Pac. 588. It is therefore obvious that the second paragraph of the instruction quoted does not contain a complete and sufficient statement of the law, and, if considered alone, would necessarily be held erroneous. In other instructions language was used classing the fear of receiving great bodily harm with the fear of loss of life

as a ground of self-defense. But it is well settled that in a criminal case an erroneous instruction upon a material matter cannot be rendered harmless by a correct statement of the law in another part of the charge. Horne v. State, 1 Kas. 42, 81 Am. Dec. 409."

14—Jimmerson v. State, 133 Ala. 18, 32 So. 141 (142).

"Mere 'apprehension of imminent danger caused by acts or demonstrations of the deceased, or by threats or words coupled with his acts or declarations,' as stated in the charge, were not sufficient to justify a deadly assault upon deceased, as the charge implies. Moreover, the charge ignores the doctrine of escape."



for such apprehension even though he believed he had, you cannot acquit him on the ground of self-defense.<sup>15</sup>

(b) Even though the jury may believe from the evidence that there was a struggle between the defendant, S., and the deceased, K., and in such struggle the said defendant, S., inflicted a mortal wound upon said K. in manner and form as charged in the indictment, from which he died, but that said wound or wounds causing the death of said K. were not inflicted by the said S. to save his own life or save himself from great bodily harm, and were not inflicted by the said S. upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible, then the said defendant, S., is guilty of murder, and the jury should so find.<sup>16</sup>

(c) If you believe from the evidence that defendant was assaulted by the deceased in such a way as to induce in the defendant a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm, and there was no way of escape except to shoot B., then he was justified in defending himself, whether the danger was real or apparent. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances, and determine therefrom as to the actual state of things surrounding them; and in such cases, if persons act from honest convictions, induced by reasonable evidence, they will not be held responsible criminally for a mistake as to the extent of the danger.<sup>17</sup>

(d) The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defense unless the necessity for taking human life, or assaulting with a weapon in a manner likely to produce death or great bodily injury, is actual, present, urgent,—unless, in a word, the taking of his adversary's life, or making such assault upon him, is the only reasonable resort of the assailed to save his own life, or his person from dreadful harm or severe calamity felonious in its character. You should ascertain whether all the circumstances in evi-

15—State v. Hollingsworth, 156 Mo. 178, 56 S. W. 1087 (1089).

"The defendant prayed an instruction substantially like the above, with this modification: 'It is not, however, necessary that the danger should have been actual or real, or that the danger should have been about to fall upon him. All that is necessary is that the defendant should have had reasonable cause to believe that state of facts, and did so believe, and shot and killed S. to prevent the consummation of such design on the part of S.' The court refused this and defendant duly excepted. The court erred in refusing this qualification of its instruction on self-defense. This has been approved by this court since the case of State v. Starr, 38 Mo. 270. The judgment in State v. Eaton, 75 Mo. 586, was reversed on the identical ground."

16—Steiner v. People, 187 Ill. 244 (245), 58 N. E. 383.

"Unquestionably erroneous. It limits the right of self-defense to actual danger, and leaves the jury

to reasonably infer, that there could be no justification for the act of killing, unless the necessity to destroy life in self-defense was actual."

17—People v. Bennett, 121 Mich. 241, 80 N. W. 9 (10).

The court said that "the jury might get an impression from the statement of the law that the respondent could not act upon his own belief of danger, and that he could not escape it in any other way than to do as he did do, if the jury believed, in the light of all the testimony, he was mistaken, and could in fact have escaped. It is true that in another portion of the charge the jury were told the respondent might judge of the circumstances as they appeared to him, but the jury were evidently confused by the charge, for, after being out for a time they announced they were not able to agree, and asked for further instruction in relation to the degrees of the crime, and as to what would be a justification of the shooting."

dence denote or show that A. intended to take the life of the defendant, or do him some enormous or dreadful bodily harm; or whether from all the circumstances at the time surrounding the parties, and attending the transaction, this was, to the defendant's reasonable apprehension, A.'s intention. And if you so find that it was A.'s intention, or whether it was in fact so or not, if to defendant's reasonable apprehension it was so, then defendant, in self-defense, might lawfully take the life of the assailant, or assault him with a weapon and in a manner likely to cause death.<sup>18</sup>

(e) The court instructs the jury as a matter of law that, before a person assailed is justified in taking life, the circumstances must be such that the taking of the assailant's life was necessary to preserve his own life, or to prevent his receiving great bodily harm.

(f) The jury are instructed as a matter of law that, if a person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before any mortal blow was given.<sup>19</sup>

§ 4700. **Danger Must be Shown by Overt Acts of Deceased and Must be "Imminent."** If you believe from the evidence in this case that \* \* \* K. had made threats against the defendant to inflict death or great bodily harm upon him; \* \* \* and the defendant had reasonable ground to believe that the said threats would be carried out by K. \* \* \* and there were such circumstances and surroundings as would lead an ordinary man to believe that he was in danger \* \* \* [and] fired the fatal shot, intending then and there to protect or defend himself against an anticipated assault, and that inadvertently and without his fault the deceased came in range of his pistol and received the bullet therefrom which caused

18—State v. Keasling, 74 Ia. 528, 38 N. W. 397 (399).

Under this "the right to take life, or to resort to the use of a deadly weapon in resistance of an assault, is made to depend on whether the assault is in fact felonious, and the danger actual and urgent. It can make no difference as to the effect of the instruction that the true rule is subsequently laid down; for with two conflicting and inconsistent rules given them for their guidance, it can never be determined which the jury obeyed, or under which the verdict was found. In State v. Shelton, 64 Ia. 333, 20 N. W. 459, we reversed the judgment for the reason that the trial court had given two inconsistent instructions to substantially the same effect."

Substantially the same instruction was condemned for like reasons in State v. Miller, 43 Ore. 325, 74 Pac. 658 (660). Citing Goodall v. State, 1 Ore. 334 (338), 80 Am. Dec. 396; State v. Morey, 25 Ore. 241, 35 Pac. 655; State v. Porter, 32 Ore. 135, 49 Pac. 964; State v. Gibson, 43 Ore. 184, 73 Pac. 333.

19—Enright v. People, 155 Ill. 32 (35), 39 N. E. 561.

"Both these instructions limit the right of self-defense to actual danger, no matter how threatening may be the appearances. A case cannot be readily suggested in which one relying upon the law of self-defense could prove that the killing was 'absolutely necessary' to save his own life or avoid great bodily harm. We are not able now to conceive of a case in which a defendant could do more than prove that the killing was apparently necessary. At all events, this court has unqualifiedly condemned the rule announced in these instructions in the following cases: Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Hopkinson v. People, 18 Ill. 264; Schnier v. People, 23 Ill. 11; Maher v. People, 24 Ill. 241; Roach v. People, 77 Ill. 25; Steinmeyer v. People, 95 Ill. 383; Pantan v. People, 114 Ill. 505, 2 N. E. 411, 5 Am. Cr. Rep. 425. In these and perhaps other cases, judgments of conviction by trial courts have been reversed because of the error in giving such instructions."

her death, the defendant would not be guilty of murder in the first degree, and you must find him not guilty thereof.<sup>20</sup>

§ 4701. **Danger Need Not be "Manifest."** On the law of self-defense I charge you that justifiable homicide is the killing of a human being in the defense of one's person against one who manifestly intends or endeavors by violence or surprise to commit a felony against another. A bare fear of any of these appearances is not sufficient to justify the killing.<sup>21</sup>

§ 4702. **Not Necessary that there Should be an Actual "Assault."** It is not the law of this state that any violent assault, importing peril or injury to the person, may be resisted or repulsed to the extremity of taking the life of the assailant. There is no foundation for such a proposition. Human life can be taken lawfully only in resistance of an assault, threatening, imperiling life or grievous bodily harm.<sup>22</sup>

§ 4703. **Imminence of the Peril Must be Submitted to the Jury.** If the jury believe from the evidence that defendant did not bring on, provoke or encourage the difficulty, and that the deceased had previously made threats which had been communicated to the defendant in a threatening manner and started for the defendant and at the time there was to all appearance no reasonable mode of escape with-

20—State v. Smith, 43 Ore. 109, 71 Pac. 973 (1975).

"Such is not the law. The right of self-defense rests upon the broad foundation of necessity. (State v. Morey, 25 Ore. 241, 35 Pac. 655, 36 Pac. 573; Stanley v. Commonwealth, 86 Ky. 440, 6 S. W. 155, 9 Am. St. 305); which is evidenced by a real or an apparent exhibition of force to repel which, and to allay a reasonable apprehension of imminent danger, superinduced by some overt act, force may also be used. (U. S. v. Outerbridge, Fed. Cas. No. 15,978), but without such necessity the right to resort thereto does not exist. It is further stated in said first instruction that 'if there were such circumstances and surroundings that would lead an ordinary man to believe that he was in danger of being assaulted or of receiving great bodily harm from the person so in the room of the deceased, then I charge you,' etc. It will be observed that the word 'danger' is not qualified by the word 'imminent.' In United States v. Outerbridge, supra, Mr. Justice Field in defining such limiting word says: 'By 'imminent danger' is meant immediate danger—one that must be instantly met; one that cannot be guarded against by calling on the assistance of others or the protection of the law.' If the defendant did not as a reasonably prudent man apprehend the existence of immediate danger from the apparently probable execution of said threats, the necessity adverted to did not exist, and therefore he was not justified in resorting to the use of force. These elements having been omitted no error was committed in refusing to give the first instruction."

21—State v. Crawford, 31 Wash. 260, 71 Pac. 1030 (1931).

"The objection is to the word 'manifestly' in the first part of the instruction. Were the instruction limited to its first and second sentences, it would clearly be erroneous. But the concluding part makes the whole clear. It is there stated that a person may act when he in good faith and as a reasonable man has cause to believe that his life is in danger, whether the belief be founded on conditions which are real or only apparent. This is a correct statement of law."

22—Thomas v. State, 106 Ala. 19, 17 So. 460 (1911).

"We do not think this charge asserts the true doctrine. The law does not require that peril must actually exist before a party can strike in self-defense. If the circumstances are such as to create a reasonable belief, and if, from the circumstances, the party does believe that he was in imminent peril of life or limb, and he was not at fault in bringing on the difficulty, and there is no reasonably safe way of escape, the law excuses him for acting on such appearances, under such circumstances, even to the taking of life. The charge asserted more than the rule as we have stated it. The language is 'an assault threatening, imperiling life,' not threatening or imperiling life. We do not think the language admits of any other legitimate construction than that placed upon it by us. Certainly it admits of this construction, and it is the one a jury would probably give it. The court erred in giving the charge under consideration."



out increasing defendant's peril, then defendant was authorized to anticipate the deceased and shoot first, having the right to act upon the reasonable appearance of things.<sup>23</sup>

§ 4704. **Motives of Defendant Not Determined from Motives of Deceased.** If, under this charge, and the evidence in this case, you find that the deceased, P., had the legal right to put up that part of the B. pasture fence (if any) which formed a part of the inclosure around the W. place, at the time of the killing of deceased, then deceased had the legal right to go armed to the place where he put up said fence, and to use such force as might appear to him, from all the facts and circumstances, to be necessary to repel and overcome any unlawful resistance or interference that he might meet with in putting up said fence; and if, from all the facts and circumstances in evidence before you in this case, viewed from deceased's (P.'s) standpoint, that at the time of the killing deceased had reason to believe, and did believe, from words spoken or acts done by J. and L., or either of them, that they, or either of them, intended to immediately take his life or do him serious bodily injury, then deceased had the right to defend himself and fire the first shot, although you may believe that he was in fact in no actual danger.<sup>24</sup>

§ 4705. **Does Not Depend on Correctness of Defendant's Apprehension of Danger.** (a) There can be no unlawful homicide without unlawful intent. And in every case, in determining whether the attack or assault or supposed assault is such as to justify or excuse the homicide or not, the circumstances must be viewed from the standpoint of the slayer; and, if the act or acts and words of the person making the attack or supposed attack were such as raised in the mind of the slayer a reasonable expectation or fear of death or serious bodily injury, as viewed from the slayer's standpoint, then in such case the killing would be justified or excused, according as the apprehension was correct or not.<sup>25</sup>

(b) If you believe from the evidence that the defendant was on his own side of the premises, and that S. came on defendant's side

23—*Watkins v. State*, 133 Ala. 88, 32 So. 627 (628). Citing *Gilmore v. State*, 126 Ala. 22, 28 So. 595.

"Erroneous in not submitting to, but withholding from, the jury the right to determine whether the facts hypothesized were sufficient to show imminent peril to life or limb."

24—*Casner v. State*, 42 Tex. Cr. App. 118, 57 S. W. 821 (823).

"The charge of the court erroneously restricts the rights of appellant to the intent of deceased. This cannot be done. Appellant's intent must be judged by his own purpose, and not by the intent of deceased. Certainly deceased would have the right to shoot in self-defense, viewed from his standpoint. This would be the law if deceased were living and on trial, but he is dead. Then what are the rights of appellant? If appellant did not go where deceased was putting up the fence with the intent to kill deceased, or if appellant and son, while acting together, each knowing the unlawful intent of the other,

did not go to where deceased was with the intent to kill him, and deceased fired upon them, without any overt act on their part, then appellant's right of self-defense would be perfect."

25—*Lankster v. State*, 42 Tex. Cr. App. 360, 59 S. W. 888 (889).

"We desire to emphasize the last expression, 'according as the apprehension was correct or not,' as error. Self-defense does not depend upon the slayer's correct apprehension of apparent danger. A deceased party may, under such circumstances, draw an unloaded pistol. The accused, believing his life in danger, shoots and kills. Yet, as a matter of fact, he may have been in no danger, for the pistol was unloaded. If defendant believed, under such circumstances, that his life was in danger, or the appearances were such to him, he would have the right to shoot whether his apprehension was correct or not, and be justified under the law of self-defense."

threatening to kill or do him great bodily harm, or to eject him from the same, the defendant had the right to repel force with force, and to use such means and such force as was reasonably necessary to save himself from harm.<sup>26</sup>

**§ 4706. Defendant Need Not Act as a "Brave" Man.** (a) Where a man threatens the life of another, or threatens to do him great personal injury, and acts in such a manner as to induce in the mind of his opponent, as a reasonable, prudent, cautious and brave man, that he is about to put his threats into execution, he may defend himself even to the extent of taking life.<sup>27</sup>

(b) When one believes himself, from the attending circumstances, to be in imminent danger of great bodily harm from the attack or anticipated attack of an opponent, he is justified if he takes the life of the opponent, if that be, in his judgment, the only means of safety to himself. And where the difficulty arises on his premises or those in his custody, he may use such force without retreat.

(c) The necessity of taking the life of the opponent must be judged from the standpoint of the party killing. The fact that it subsequently developed that there was no such peril is not to be charged against him, if, from the attending circumstances, he verily believed the danger at the time existed.<sup>28</sup>

**§ 4707. If Danger Is Actual, Appearance and Strength of Deceased Are Immaterial.** If from the evidence you believe defendant killed said D., but further believe that at the time of so doing deceased had made an attack on him, which from the manner and character of it, and the relative strength of the parties, and defendant's

26—State v. Hollingsworth, 156 Mo. 178, 56 S. W. 1087 (1089).

"Unquestionably this was correct, so far as it went; but it is urged that it fell short of defining the full right of defendant, in this; that defendant was entitled to have the jury consider, not merely what they would think would have been reasonable force to resist the assault of S. in the light of all the evidence developed in the case, but it was defendant's right to have them apply the law to the facts as they appeared to defendant at the time he shot under the then surrounding circumstances, and, if he acts in a moment of apparently impending peril, he is not bound to gauge the amount of his resistance to a nicety, and the jury should consider how it appeared to him at the time, and how it appears to them when considering their verdict. While the instruction evidently intended to give the defendant the benefit of this principle, we think it fell short of stating the full right of defendant. State v. Palmer, 88 Mo. 568; State v. Harper, 149 Mo. 514, 51 S. W. 89; State v. Rose, 142 Mo. 428, 44 S. W. 329."

27—Surrency v. State, 48 Fla. 59, 37 So. 575 (576).

"We think that perhaps the court was wrong in using the word 'brave'

in this charge, but we feel satisfied that no injury resulted therefrom, since the record shows that subsequently, at the special request of the defendant, the court gave to the jury several other correct charges upon the same point that were entirely proper, and that corrected the mistake made in the above charge. State v. Shreves, 81 Ia. 615, 47 N. W. 899."

28—State v. Halliday, 112 La. 846, 36 So. 753.

"The first above quoted charge does not contain a correct statement of the law of self-defense. In the leading case of State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599, the court said: 'If there be an actual physical attack of such a nature as to afford reasonable ground to believe that the design is to destroy life, or to commit a felony upon the person assaulted, the killing of the assailant in such a case will be justifiable homicide in self-defense.' The charge makes the right of self-defense depend on the mere belief of the accused arising from an anticipated attack, instead of reasonable ground to believe, founded on an actual physical attack or hostile demonstration. The last quoted charge contains the same error of assuming that the right of self-defense depends on the belief of the accused."

knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation and fear of death or serious bodily injury, then acting under such reasonable expectation or fear, defendant killed deceased, etc., you will acquit him.<sup>29</sup>

§ 4708. **Instruction Supposing Certain Circumstances Must Leave Inference of Danger Therefrom to the Jury.** If you believe that deceased, without defendant being then in fault, called defendant a liar, and put his hand to his pocket and drew therefrom a knife, and advanced towards defendant, being then about four feet from defendant, and that defendant could not have retreated without probably increasing his danger, then he had the right to fire and take the life of deceased, and must be acquitted.<sup>30</sup>

§ 4709. **Self-Defense Not Depending on Whether Deceased Had Deadly Weapons—Defendant May Use More Force than Actually Necessary.** (a) If you find that deceased did assault the defendant with a knife, and if you further find that the defendant, under all the circumstances of the case as they appeared to him at the time, honestly believed that he was in danger of his life or of great bodily harm, and honestly believing that it was necessary for him to do what the evidence shows he did do in order to save himself from such apparent or threatened danger then you should find him not guilty. However, if deceased did not assault the respondent with a knife, then the defense here made of self-defense fails.<sup>31</sup>

(b) If you shall find and believe from the evidence that, at the county of D. and state of Missouri, any time within three years prior to the day on which the indictment was filed in this cause, the defendant shot and wounded the deceased, O., and that the said O. died on the same day from the effects of such shooting and wounding, at the said county and state, and shall further find and believe from the testimony that such shooting was done by the defendant while said deceased was attempting to commit a felony upon and against the father of the said defendant, you will find the defendant guilty of manslaughter in the second degree, unless you further find and believe from the testimony that such shooting and wounding by the defendant was necessarily done; that is, unless you find from the testimony that it was necessary in order to prevent the deceased from committing such felony upon the person of the father of the said defendant, and was also done under such circumstances as would have

29—Hickey v. State, 45 Tex. Cr. Rep. 297, 76 S. W. 920 (921).

"If he (defendant) was fired upon twice by deceased with a six-shooter, as stated, it would make no difference what was the character or disposition of the deceased, or appellant's knowledge of these facts. His right of self-defense was complete if it was in defense of himself against such an attack. The charge burdened appellant's self-defense with circumstances and facts not admitted. This was error. Brady v. State, — Tex. Cr. App. —, 65 S. W. 521; Warthan v. State, 41 Tex. Cr. App. 385, 55 S. W. 55; Bracken v. State, 29 Tex. Cr. App. 362, 16 S. W. 192; Steagald v. State, 22 Tex. Cr. App. 491, 3 S. W. 771; Hackett v. State, 13 Tex. App. 406."

30—Gilmore v. State, 126 Ala. 20, 28 So. 595 (601).

"Faulty in assuming as a matter of law that the facts postulated created imminent peril to life or limb, and in taking from the jury the right and duty of determining whether the facts hypothesized were sufficient to create imminent peril actual or reasonably apparent."

31—People v. Wright, — Mich. —, 108 N. W. 92. "The charge was erroneous in making the question of self-defense turn wholly upon the question of whether deceased had a knife. The rule that the defendant had the right to act upon the circumstances as they reasonably appeared to him was recognized in one portion of the charge, but this portion of the charge ignores this rule. See Hurd v. People, 25 Mich. 405; People v. Lilly, 38 Mich. 270."



justified the father of deceased in himself having delivered the fatal shot.<sup>32</sup>

§ 4710. **Aggressor Cannot Plead Self-Defense.** (a) If the jury believe from the evidence that the defendant entered into the fight willingly, or provoked or encouraged the difficulty, you cannot acquit him. Even though the jury should believe from the evidence, that J. was in imminent peril, real or presently apparent, of loss of life or limb, and that it was necessary for him to shoot to keep H. from shooting him, still you cannot acquit defendant if you believe he provoked or encouraged or brought on the difficulty.<sup>33</sup>

(b) A party may have a perfect right of self-defense, though he may not be entirely free from blame or wrong in the transaction. If the blamable or wrongful act was not intended to produce the occasion,—not an act which was, under the circumstances, reasonably calculated to produce the occasion, or provoke the difficulty,—then the right of self-defense would be complete, though the act be not blameless. But you are instructed that a party cannot avail himself of a necessity which he has knowingly and willingly brought upon himself. Whenever a party, by his own wrongful act, produces a condition of things wherein it becomes necessary for his safety that he should take life or do serious bodily harm, then the law imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of his offense (if any), which, but for such acts, would never have been occasioned. How far and to what extent he will be excused or excusable in law depends upon the nature and character of the act he was committing (if any) which produced the necessity that he should defend himself.<sup>34</sup>

(c) The court further instructs the jury for the defendant, that if the evidence raises in their mind a reasonable doubt as to whether P. had a right to believe and did believe, that H. was at the time seek-

32—State v. Harper, 149 Mo. 514, 51 S. W. 89 (91). Citing State v. Palmer, 88 Mo. 568; Nichols v. Winfrey, 79 Mo. 544; Morgan v. Durfee, 69 Mo. 469.

"It is well settled that, in resisting an attempt to commit a felony, the person so resisting is not required to determine with absolute certainty what force is necessary for that purpose, but it does exact of him that he shall not use any more force than shall seem to him to be reasonably necessary for that purpose. . . . While, in the case in hand, the homicide was not committed in the defense of defendant's person, if it was committed in defense of his father the same rule obtains with respect to the quantum of force necessary to repel the assault of the deceased as if the assault had been committed on him personally."

33—These instructions were held "bad, in that they authorize the jury to reach a conclusion of guilt upon their belief of certain facts, though they may not have believed them beyond a reasonable doubt." Jackson v. State, 106 Ala. 12, 17 So.

333 (335). Citing Carr v. State, 104 Ala. 4, 16 So. 150, 10 Am. Cr. Rep. 75; Rhea v. State, 100 Ala. 119, 14 So. 553; Pierson v. State, 99 Ala. 148, 13 So. 550."

34—Thornton v. State, — Tex. Cr. App. —, 65 S. W. 1105 (1107).

"The court tells the jury that if the act committed by defendant was reasonably calculated to produce the occasion or provoke the difficulty, he would forfeit his right of self-defense; that, the law being that, although the act was calculated to provoke a difficulty, defendant's right would not be forfeited unless he intended that said act or acts should provoke a difficulty. We think these objections to the charge are well taken. The law of provoking the difficulty is predicated upon the intent with which defendant commits the act, and upon the reasonableness or unreasonableness of the provocation. For a discussion of this matter, see Matthews v. State, 42 Tex. Cr. App. 31, 58 S. W. 86; Chapman v. State, 43 Tex. Cr. App. 328, 65 S. W. 1098, 96 Am. St. 874; Faulkner v. State, 43 Tex. Cr. App. 311, 65 S. W. 1093."

ing to do him some great bodily harm, and that the only way to avoid this was to take the life of H., then they should give P. the benefit of such doubt and acquit him.<sup>35</sup>

(d) The court charges the jury that, if the defendant was the aggressor and the sole cause of the difficulty in which the deceased was killed, yet if you believe from the evidence that he retreated, or attempted to retreat, and was thereby apparently placed in such position that he was in danger of losing his life or of receiving grievous bodily harm, he had the right to use such force to repel this danger, even though he had to kill the deceased to do so.<sup>36</sup>

(e) If the jury believe from the evidence that the deceased made the first hostile demonstration, by presenting a deadly weapon at the defendant, and if the accused was in such proximity as that he would be put at a disadvantage by undertaking to escape, then the law would not require him to do so, but the defendant would have a right to stand his ground and resist the attack, even to the extent of taking the life of his assailant.

(f) If the jury believe from the evidence that the deceased made the first hostile demonstration, by presenting a pistol, at the defendant, and if the accused was in such proximity to the deceased as to render it hazardous to attempt flight, or if the assault was made with a deadly weapon, and was open and direct, and in perilous proximity, then the law would not require the accused to endanger his safety by attempting flight.<sup>37</sup>

(g) If you believe from the evidence that the defendant was attacked by the deceased, and such attack was in a manner to cause a reasonably cautious man to apprehend danger to his life or great bodily harm to his person, and such danger was imminent from the then surrounding circumstances, he was not bound to retreat in order to avoid the necessity of killing the deceased, and you will acquit him.<sup>38</sup>

§ 4711. **What Acts of Defendant Make Him the Aggressor—Felonious Intent Not Necessary.** (a) Before you can, however, refuse the defendant, B. the benefit of his plea of self-defense on the ground that he voluntarily entered into the difficulty, you must find that he, at the time of entering into the same, had a felonious intent to maim, wound or kill the deceased.

(b) If you should believe that the defendants brought on the difficulty with the deceased, or were the aggressors therein, but should further believe that in becoming such aggressors or in bringing on such difficulty, defendants had no design to feloniously maim, wound or kill the deceased, then in such event the defendants would not be deprived of the benefit of the right to self-defense.<sup>39</sup>

35—Peoples v. State, — Miss. —, 33 So. 289 (291).

36—"Misleading, as it requires acquittal regardless of the question of who was the aggressor."

37—Wilson v. State, 128 Ala. 17, 29 So. 569 (571).

38—"To be in position to establish self-defense in homicide, the slayer must be free from fault in bringing on and engaging in the immediate difficulty which results in the killing. Gilmore v. State, 126 Ala. 20, 28 So. 596."

39—Ford v. State, 129 Ala. 16, 30 So. 27 (29).

Held that these instructions "premit all reference to freedom of fault in provoking or bringing on the difficulty, and were misleading."

38—Padgett v. State, 40 Fla. 451, 24 So. 145 (146).

"Properly refused, under the facts in proof because of omission to state the rule of law on the right of self-defense when the party is himself at fault, and has been the aggressor or originator of the quarrel."

39—Bassett v. State, 44 Fla. 2, 33 So. 262 (264).

Held properly refused. The court said: "This court has approved the

(c) If you believe from the evidence beyond a reasonable doubt, that F. had threatened to kill M., and being armed with a deadly weapon which he had provided and intended to use in a difficulty with M., by shooting him with it, and that he began the difficulty in which he shot and killed M., then he is guilty of murder, even though you should believe that M. cursed him, and called him a "damned liar," and threw his hand behind him just immediately before the shooting, and it will be your sworn duty to so find; for a killing, under such circumstances, is not justifiable or excusable on any ground whatever.<sup>40</sup>

§ 4712. **What Constitutes Provoking the Difficulty.** (a) You are further instructed, as a part of the law of this case, and as a qualification of the foregoing charge on self-defense, that if you believe beyond a reasonable doubt that defendant, by his own wrongful act, brought about the necessity of killing deceased, and provoked a difficulty with the apparent intention of taking the life of deceased intentionally and with a view thereto, and under such circumstances he shot and killed deceased, then defendant's plea of self-defense will not avail him, and the homicide would be murder in the first or second degree, according as the facts and circumstances may justify the jury in finding. But if you believe from the evidence that defendant provoked a difficulty without any intention to kill or inflict serious bodily injury, and suddenly and without deliberation did the act of killing, under the immediate impulse of sudden passion, arising from adequate cause, as hereinbefore explained in this charge, while the homicide would not be justifiable, it would be manslaughter, as that term is hereinbefore explained. If, however, the blamable or wrongful acts of defendant, if any, were not intended to produce the occasion, nor acts which were, under the circumstances, reasonably calculated to produce the occasion or provoke the difficulty, then the

following statement as a correct proposition of law, viz., a necessity brought about by the party who acts under its compulsion cannot be relied upon to justify his conduct. The aggressor in a personal difficulty, one not reasonably free from fault, can never be heard to acquit himself of liability for its consequences on the ground of self-defense. *Lovett v. State*, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; *Ballard v. State*, 31 Fla. 266, 12 So. 865; *Padgett v. State*, 40 Fla. 451, 24 So. 145; *Mercer v. State*, 41 Fla. 279, 26 So. 317. Under our statement of the rule the accused must not be reasonably free from fault and the aggressor in a personal difficulty; that is, his wrongdoing to preclude him from relying upon a self-defense, must relate to the assault in resistance of which the assailant was killed. The principle is applicable only to personal difficulties. *State v. Perigo*, 70 Ia. 657, 28 N. W. 452. . . . The question involved in the refused requests has given rise to much discussion in other states, and the decisions are not entirely harmonious on the subject. They are extensively reviewed in the annotated case of *Foutch v.*

*State*, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687. In following our previous decisions we think the principle should be applied in accordance with the views here expressed. The principle we have approved, it will be observed, goes only to the extent that the party, under the conditions stated, cannot justify his conduct or acquit himself on the ground of self-defense; that is, he cannot escape all punishment, unless he retires from the contest in good faith, when his right of self-defense is restored."

40—*Fore v. State*, 75 Miss. 727, 23 So. 710 (711).

"Erroneous in assuming that the appellant was 'armed with a deadly weapon, which he had provided and intended to use in a difficulty with M. by shooting him with it.' The rule of law on this subject is plain and well known. In the case of *Prine v. State*, 73 Miss. 838, 19 So. 711, it was said: 'He (the slayer) must have been the originator of the difficulty. He must have entered it armed, and he must have so brought it on and entered into it intending to use his pistol, and overcome his adversary, in the course of the encounter.'"



right of self-defense would be complete, though the act be not blameless. On the other hand, if defendant did not provoke a difficulty with W., in which W. was killed (if he was killed), and if defendant killed him, then the killing would be murder, manslaughter or justifiable homicide, according to the facts in the case as applied to the law as contained in this charge.<sup>41</sup>

41—McCandless v. State, 42 Tex. Cr. App. 58, 57 S. W. 672 (673).

"In *Abram v. State*, 36 Tex. Cr. App. 46, 35 S. W. 389, the doctrine of provoking the difficulty was characterized as in the nature of an estoppel; that is, the effect of the evidence suggesting provocation was to cut off the right of self-defense by estopping a defendant to claim the same because of his acts in bringing on the conflict. Before a defendant can be deprived of his perfect right of self-defense, when the evidence raises that issue, there must then be testimony showing that he did some act to produce the occasion, and bring on the conflict. As was said in *Cartwright's Case*, 14 Tex. App. 502. It would follow, therefore, that the conduct of the party must show that he knowingly and willfully used language or did acts which might reasonably lead to an affray or deadly conflict, and that something besides merely going to the place where the person is slain with a deadly weapon for the purpose of provoking a difficulty, or with an intent of having an affray, is required, in order to constitute such wrongful act.' Of course, the act of provocation will depend on the peculiar circumstances of each case; but we cull from the authorities that the act must be a hostile act, reasonably calculated to produce the occasion or bring on a difficulty, and it must have been so intended by appellant. To illustrate: A. has a grudge against B. He arms himself, and goes to a place where he knows he will meet B. He knows, or has reason to believe, that B. will resent an insult. He curses and abuses B. B. resents the insult, and makes an assault upon A., whereupon A. shoots and kills B. Now, if A. sets up self-defense, it would be the duty of the court, in giving a charge on that subject, to also give a charge on provocation, limiting A.'s right of self-defense. What a proper charge on this subject should be has been frequently discussed, but the cases in this state are not altogether harmonious; some of them going to the extent of holding the court should group the facts, and predicate his charge thereon. *Carter v. State*, 37 Tex. Cr. App. 403, 35 S. W. 378; *Mozee v. State* (Tex. Cr. App.), 51 S. W. 250. We believe these cases go too far; indeed it would frequently be found impracticable to indicate the facts, or to charge upon them, without danger of charging on the weight of testimony. Of course, there are

cases in which such a charge can be predicated upon the facts. While it is sound doctrine that in every case where the facts authorize a charge on provoking the difficulty, the judge should be able to indicate from the evidence the act of provocation (*Morgan v. State*, 34 Tex. Cr. App. 222, 29 S. W. 1092), yet it is not necessary to submit the words or the particular acts of the defendant (*Alexander v. State*, 40 Tex. Cr. App. 395, 49 S. W. 230, 50 S. W. 716). When a judge, after hearing the testimony, is enabled to say therefrom that there is evidence tending to show that a defendant provoked a difficulty for the purpose of slaying his adversary or doing him some serious bodily injury, and self-defense is set up, then he is authorized to give a charge on provocation, limiting the right of self-defense. A charge on this subject should be couched in general terms (*Gonzalez v. State*, 30 Tex. App. 265, 16 S. W. 978); that is, we mean that the court should instruct the jury in effect that, if defendant sought the occasion for the purpose of slaying his adversary (if he did so), and, having found him, did some act, or used some language, or did both, as the case may be, with intent to produce the occasion and bring on the difficulty, and that the same, under the circumstances, was reasonably calculated to provoke a difficulty, and on such account his adversary attacked him, and he then killed his adversary in pursuance of his original design, then such killing would be murder of either the first or second degree. We would not be understood in the above as formulating a proper charge, but merely as suggesting the essential elements which it should contain. The charge in question does not, in terms, embrace all these elements. For instance, it does not submit to the jury that the circumstances must be such as were reasonably calculated to bring on the difficulty. While in fact the circumstances must be reasonably calculated to bring on the difficulty, and a judge as a matter of law must be able to say so, yet the charge need not embody this. And again, the charge as given requires that the 'difficulty was provoked with the apparent intention of taking the life of deceased.' And this particular portion of the charge is objected to on account of the word 'apparent,' appellant interpreting it to signify less than an actual intent or purpose. We take it that this

(b) If you believe from the evidence that the defendant did not return to the scene of the difficulty for the purpose of provoking or bringing on a difficulty with deceased, but that defendant returned to said scene for the purpose of rejoining the crowd there assembled, then the defendant had a right to return to said place for such purpose, and his right of self-defense would not be forfeited.<sup>42</sup>

§ 4713. **Bringing on a Difficulty for the Purpose of Killing.** If the jury believe and find from the evidence that the defendant had an altercation with D., which resulted in the death of said D., and that the defendant commenced such difficulty or voluntarily entered into the same with the felonious intent to take advantage of the quarrel thus begun and to kill said D. or to do him some great bodily harm, then there is no self-defense in this case, and the jury will not acquit the defendant on that ground. And this is true, no matter how violent defendant's passion became, or how hard he was pressed, or how imminent his peril may have become during said difficulty. You are further instructed, however, that although you may believe from the evidence and beyond a reasonable doubt that defendant had an altercation with D. which resulted in the death of said D., and that said defendant brought on or voluntarily entered into said difficulty, during the progress of which difficulty defendant intentionally stabbed and killed said D., yet if you further find from the evidence that he did not bring on or enter into said difficulty with the view to take advantage of the quarrel thus begun and to slay said D. or to do him some great bodily harm, then the defendant cannot be justified on the grounds of self-defense, and the killing was manslaughter in the fourth degree, and the jury will so find, no matter how hard pressed defendant was or imminent his peril may have become during said difficulty.<sup>43</sup>

language is taken from our Code (article 708, Pen. Code), and has as strong a meaning as 'actual;' it means 'evident,' 'obvious,' 'clear.' The charge as given, taken altogether, may be sufficient, though we would not commend it as a proper charge on this subject."

42—*Brownlee v. State* (Tex. Cr. App.), 87 S. W. 1153 (1155).

"The court should have given a proper charge on provoking the difficulty. However, this is not a proper presentation of the law of provoking the difficulty. The charge should have stated that, if the defendant returned to the scene of the difficulty for the purpose of provoking a difficulty, and did provoke one by the use of words or acts, and that he did so with the specific intent to kill, he would be guilty of murder. If he did not provoke the same by words or acts with such specific intent, then he would be guilty of manslaughter. We are not here attempting to lay down a form of charge, as our decisions are replete with forms of such charges. The court should have also charged that, if the defendant returned to the place of the first difficulty for the purpose of inquiring of deceased why he struck him, and deceased renewed the difficulty,

and defendant's life was in danger or his body was in danger of serious injury, then, in that event, defendant would have the right to act upon the appearances of danger and slay deceased."

43—*State v. Gordon*, 191 Mo. 114, 89 S. W. 1025.

"No criticism is made on the first clause of this instruction, which told the jury that if the defendant brought on the difficulty with a felonious intent to kill the deceased, or to do him some great bodily harm, then the defendant could not be justified on the ground of self-defense, as a legal proposition, where the evidence warrants such an instruction; but it is earnestly insisted that the latter portion of the instruction in effect advised the jury that, although the defendant voluntarily entered into the difficulty without any felonious intent and without any purpose to do great bodily harm and after the same had been brought on by the deceased, the jury were bound to ignore any evidence tending to show self-defense, and must at all events convict defendant of manslaughter. On the part of the state it is insisted that this is a misconstruction of the instruction; that this portion of the instruction was not attempting to

§ 4714. **Provoking Quarrel Without Felonious Intent.** (a) The court further instructs the jury that, if you believe from the evidence that the defendant, sought or voluntarily entered into a difficulty with the deceased, which resulted in the shooting and killing the said deceased, you cannot acquit the defendant on the ground of self-defense, unless you shall further find from the evidence that the defendant withdrew or attempted to withdraw, from the difficulty, before he fired the fatal shot.<sup>44</sup>

deal with the question of self-defense, but its purpose was to declare the law as announced in *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31, in which the distinction was drawn between the perfect and imperfect right of self-defense. In that case the court accepted the doctrine announced in *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795.

Thus it will be observed that in *Partlow's* case this court held that the right of perfect or imperfect self-defense depended upon the intent with which the assailant brought on the quarrel. If he provoked the combat, or produced the occasion in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder in the first degree, no matter to what extremity he may have been reduced in the combat; if, on the other hand, he had no felonious intent, intending merely an ordinary battery, and during the progress of the fight is compelled to take the life of his adversary in order to save his own, he is guilty of manslaughter; or if, having entered into a fight without felonious intent, he seeks in good faith to abandon it and withdraws as far as he can, and his adversary still pursues him, then if necessary to save his own life he slay his opponent, he will be justified. At common law words of reproach, how grievous soever, were not provocation sufficient to free the party killing from the guilt of murder; nor were contemptuous or insulting actions or gestures, without an assault upon the person; nor was any trespassing against lands or goods to have the effect. To reduce the guilt of killing to a grade of manslaughter, the provocation must consist of personal violence. 1 *East's Pleas of the Crown*, 233; 4 *Blackstone*, Com. 201; *State v. Weiners*, 66 Mo. 13. And the common law rule in this respect is firmly established in this state by a long line of decisions. *State v. Starr*, 38 Mo. 271; *State v. Branstetter*, 65 Mo. 149; *State v. Hill*, 69 Mo. 451; *State v. Elliott*, 98 Mo. 150, 11 S. W. 566; *State v. Gartrell*, 171 Mo. 516-519, 71 S. W. 1045.

Our conclusion is that in the light of the more recent decisions of this court since the *Partlow* Case, notwithstanding there are cases which seemingly conflict with the view, it is error to instruct that a defendant

in a personal altercation forfeits the right of self-defense merely because he voluntarily engages in a difficulty. The occasions on which this right is forfeited have been pointed out in the foregoing excerpts from the decision in *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31, and in cases cited. The instruction, as applied to the facts in this record, was in our opinion misleading and erroneous. It was not made applicable to the state of the testimony, and should not have been given, even when modified by omitting the clause as to 'voluntarily entering into the difficulty,' without fully advising the jury as to what constitutes provocation that will justify an assault and as to what is meant by 'provoking a difficulty' or 'being free from fault.' Mere words of reproach or opprobrious epithets do not constitute such provocation as would put the defendant in any degree in the wrong, if it became necessary to kill D. in his own defense."

44—*State v. Patterson*, 159 Mo. 560, 60 S. W. 1047 (1048).

"This instruction is given in plain disregard of numerous decisions of this court. A man does not lose his right of self-defense by beginning the quarrel, unless he does so for the purpose of doing his adversary great bodily harm, or else effecting his death. If he provoke the quarrel without such felonious intent, intending merely an ordinary battery, the final killing in self-defense would only be manslaughter in the fourth degree. In such cases the right of self-defense would be of an imperfect nature, and not absolute in its character. But even if a man begin a quarrel with felonious intent, and with a lethal weapon, still if he honestly withdraws from and abandons the fight, and his adversary still pursues him, the beginner of the fight, having reached what is known in legal contemplation as the 'wall,' may turn, and attack his pursuer, and if, being closely pressed by him, he kills him to avoid his own destruction, the homicide is excusable self-defense. *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31, and cases cited; *State v. Cable*, 117 Mo. 380, 22 S. W. 953. And we have said in the more recent case of *State v. Rapp*, 142 Mo. 443, 44 S. W. 270, that 'the voluntary entering into a difficulty' is not an ingredient in any homicidal crime;



(b) If you find that the defendant voluntarily brought on the difficulty with H., then in law he was the aggressor, and he cannot be acquitted on the ground of self-defense, no matter how great or how imminent his peril may have become during the progress of such difficulty.

(c) The court instructs the jury that although they may believe from the evidence that the defendant at the time of the difficulty between himself and the prosecuting witness, H., used violent and abusive language towards said H., yet no words, however grievous, would justify said H. in assaulting and beating the defendant, or in doing him great personal injury, and if the jury believe that said H., upon the provocation of words, alone, assaulted the defendant, and was about to do the defendant great personal injury or bodily harm, then the said H. was the aggressor (unless the defendant voluntarily brought on a difficulty with said H., as defined in above instruction) and the defendant had the right to repel force by force, and use whatever force was necessary to prevent said H. from doing him great personal injury, although the weapon used was a pocket knife, and if the jury so believe they should acquit the defendant.

(d) The jury are instructed that if they shall believe from the evidence that the prosecuting witness, H., in the absence of an attempt on the part of the defendant to first assault him, made an assault upon the defendant, and was about to do the defendant great bodily harm, then the defendant (unless he voluntarily brought on the difficulty, as defined in the first above instruction) had the right to defend himself against said assault, using only such force and means as might seem to a man of ordinary judgment to be necessary for the purpose under the circumstances, and in such case it would make no difference that said H. believed that the defendant was about to assault him unless under the evidence it shall appear that such was in fact the intention of the defendant, and that such intention was about to be carried into immediate execution.<sup>45</sup>

§ 4715. **Mere Intent by Defendant to Provoke Difficulty Does Not Bar Plea of.** If you believe from the evidence, beyond a reasonable doubt, that defendant armed himself, with the intent and purpose to provoke a difficulty with the deceased, as a pretext for killing him; and if you further believe from the evidence beyond a reasonable doubt that defendant, with malice express, as before defined, did shoot and kill T., though his own life or serious bodily injury was threatened in such difficulty, then defendant would not be entitled to the plea of self-defense, but such killing would be murder in the first degree.<sup>46</sup>

and, if the right of self-defense exists, its exercise is necessarily a voluntary and affirmative act."

<sup>45</sup>—*State v. Higginson*, 157 Mo. 395, 57 S. W. 1014 (1015).

"The second and third instructions above quoted, otherwise correct statements of the law, were rendered erroneous by the insertion into each of the clause, 'unless defendant voluntarily brought on a difficulty with said H., as defined in above instruction.' Upon the facts assumed, H. had no lawful provocation to assault defendant, and, if he did under those circumstances, then defendant had a right to defend

himself, and use such force as was reasonably necessary to prevent said H. from doing him great bodily harm, and the interpolated clause denied this right. Unless defendant sought and brought on the difficulty with a design to wreak his malice, he did not forfeit his right of self-defense. Whether these conditions existed, the jury were to find from the evidence." *State v. Rapp*, 142 Mo. 443, 44 S. W. 270. For the same reason, the instruction first above quoted is erroneous."

<sup>46</sup>—*Tardy v. State*, 46 Tex. Cr. App. 214, 78 S. W. 1076 (1078).

"This, charge is erroneous, and

**§ 4716. No Intention to Kill but Killing Accidentally in Resisting Assault.** If the jury believe from the evidence that defendant did not intend to kill the deceased, but merely employed that force necessary to resist an assault which the deceased was at the time making on him, and death accidentally resulted, and that the defendant did not use a weapon the use of which would reasonably, naturally and ordinarily produce death, then they must find the defendant not guilty.<sup>47</sup>

**§ 4717. Accidentally Killing Another While Preparing For.** If a man prepares to defend himself, and in that preparation accidentally discharges his gun, and thereby kills another, in that case, if the act of preparation was not such as apparently endangered the life of the other or others, then the accidental death of another arising therefrom is excused, whether the deceased be the one against whom the person killing was preparing to defend himself, or whether the person killed be an innocent third party.<sup>48</sup>

**§ 4718. Gives No Right to Kill Former Assailant on Sight.** If the jury shall believe from all the evidence that, previous to the time of the killing, the deceased, H., lay in wait for the defendant, and menaced and threatened to kill him, and attempted violence upon his person with a deadly weapon or did any or either of them, then he had the right to consider the same in determining whether he was in danger of losing his life or of suffering great bodily harm at the hands of H. whenever with or near him. These alone will not excuse the killing; but the defendant had the right to bear arms openly, and when he met the deceased, if from such lying in wait, threats, menaces, and attempted violence, if any, and from the circumstances attending the meeting, or if from the circumstances attending the meeting alone, he in good faith believed, and had reasonable grounds to believe, that he was then and there in danger of losing his life or of suffering great bodily harm at the hands of the deceased, then he was not obliged to wait until he was actually assaulted, but he had the right to use such means as were at hand, and as were necessary, or apparently necessary, to protect himself from such immediate danger; and if in doing so, he shot and killed de-

under all the authorities, it is laid down that bare intent and purpose to provoke a difficulty does not deprive defendant of the perfect right of self-defense. He must do some act, or something at the time of the difficulty that does provoke the same. For a discussion of this question, see *Matthews v. State*, 42 Tex. Cr. App. 31, 58 S. W. 87.

47—*Williams v. State*, 140 Ala. 10, 37 So. 228 (229).

Held properly refused because it "states that defendant upon the facts hypothesized, should be acquitted, although under these facts the defendant might have been convicted of manslaughter in the second degree, or of an assault and battery, if he went into the fight willingly, or was at fault in bringing on the difficulty, though he may not have intended to kill deceased, and though the weapon he used was such as would not ordinarily produce

death. Charges similar to these were approved in *Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. 844; but those charges as to the same point upon which we condemn the ones mentioned in this case were erroneous, and must to that extent be overruled."

48—*Lankster v. State*, 41 Tex. Cr. App. 603, 56 S. W. 65 (66).

"This charge is hinged upon a misstatement of the law. Where a party prepares to defend himself against the attack of another, it makes no difference if the act of preparation either apparently or actually endanger the life of another or others. He has the right to so prepare himself, and to act in his own self-defense, whether it endangers other people or not. This charge was clearly wrong, and hinges defendant's theory of accidental shooting upon a misstatement of the law."

ceased, he is excusable on the ground of self-defense, and should be acquitted, unless the jury shall believe from all the evidence, beyond a reasonable doubt, that at the time of killing, the defendant sought the deceased with the intention and for the purpose of killing him, in which case he is not entitled to an acquittal on the ground of self-defense.<sup>49</sup>

§ 4719. **Defendant's Previously Arming Himself, Whether Evidence of Malice.** If you find that defendant X., after his difficulty with Y. in the livery barn, honestly and in good faith feared a sudden deadly or dangerous assault from the deceased while in the pursuit of his own affairs, and under such circumstances that he could not avoid it without danger to his life or danger of great bodily harm, then he would be justified in arming himself for self-protection and defense; and under such circumstances being armed should not be treated as evidence of malice, or intent to kill X. But in considering this matter you have the right to and should take into consideration the apparent necessity for such action on the part of the defendant, and if you find from the evidence that he armed himself for the purpose and with the intent of engaging in future conflict with Y., and for the purpose of using it in mutual conflict with Y., and not for the honest purpose of self-defense, he was not justified in so arming himself, and such act will, under such circumstances, be competent evidence of malice and intent.<sup>50</sup>

49—*Reynolds v. Commonwealth*, 24 Ky. L. 1742, 72 S. W. 277 (278).

The court said that such a grouping of facts by the trial judge "is accepted by the average jury as meaning that if one has been threatened, or been assaulted in the past, when he meets his foe afterwards, he may, without more ado, assassinate him. The principle enunciated is unsound by every canon of the criminal law and is unwarranted by any authority with which we are acquainted."

50—*State v. Bone*, 114 Ia. 537, 87 N. W. 507 (510).

"The last sentence of this instruction is undoubtedly correct. *State v. Neeley*, 20 Ia. 115; *Stewart v. State*, 1 Ohio St. 66; *State v. Hawkins*, 18 Ore. 481, 23 Pac. 475; *Allen v. State*, 24 Tex. App. 224, 6 S. W. 187. Defendant contended that he armed himself simply for self-protection, and that when Y. attacked him in a violent manner he had the right to act on appearances and to use the weapon for his defense; and that, even if he went further than the law justified, the possession of the weapon under the circumstances should not be considered against him. His counsel argue that he had a right to arm himself, even though he did not fear 'a sudden dangerous or deadly assault under such circumstances that he could not avoid it without danger to his life or danger of great bodily harm.' This argument appears to us to be sound. The instruction as will be noticed, deals with the question of malice or intent to kill, and not with the abstract right of

self-defense. And we think the first sentence is erroneous. Defendant could not possibly know in advance whether the threats he claimed Y. made against him would be carried out at such a time and place and in such a manner as that he could avoid the assault without danger to his life or of great harm to his person. If from previous threats made by Y. defendant had reasonable ground to believe, and in fact did believe, that deceased intended to take his life, or to inflict upon him some great bodily injury, and, so believing, armed himself solely for necessary self-defense in the event of being attacked, then defendant's arming himself after the difficulty at the livery barn would not supply the intent necessary to make out the crime of murder. In other words, if defendant was justified in arming himself for self-protection, and, on meeting his adversary, killed him, the degree of his crime is to be determined from the circumstances surrounding the killing, and not from his previously having armed himself solely for self-defense. The exact fault with the charge lies in the statement that he would have no right to arm himself for self-defense unless he anticipated that the assault would be under such circumstances that he could not avoid it without danger to his life or great bodily harm. As we have already said, he could not anticipate just how and when and in what manner the assault would be made, and he could not possibly know whether it would be under such circumstances that he could not avoid it by re-



§ 4720. **Aggressor, Previously Arming Himself Not Necessarily Barred from Pleading.** (a) If the jury shall believe from the evidence, beyond all reasonable doubt, that, in the difficulty in which B. lost his life, the defendant was the aggressor and provoker of the difficulty, and that he prepared himself for it by arming himself with a deadly weapon, to wit: a pistol, and sought the deceased and provoked the difficulty, intending to use his pistol and overcome his adversary, if necessary, and that he then shot and killed B., he is guilty of murder, and the jury should so find.<sup>51</sup>

(b) You are charged that defendant had the right to arm himself with a deadly weapon, and go to the place where the homicide occurred, and at the time he did, and by such acts his right of self-defense will neither be abrogated nor abridged.<sup>52</sup>

(c) I further instruct you that a man has a right to arm himself for the purpose of defending himself against a felonious attack liable to cause his death or do him great bodily harm, where from the character of the assailant, and his former attitude towards the defendant, his previous threats, communicated and made to the defendant, lead the defendant, as a reasonable man, to believe, and he does honestly believe that his assailant is liable to attack him and kill or do him great bodily harm if the opportunity occurs.<sup>53</sup>

§ 4721. **Procurement of Arms as Affecting Motive.** You are instructed that the testimony admitted before you regarding the procurement of arms by defendant and other parties, the occurrence at the S. Hotel before the procurement of arms, and the occurrence at said hotel after said procurement of arms, is admitted before you, to be considered by you together with the other testimony in this case, and to be given such weight, as upon a consideration of the entire testimony you may deem the same entitled to, as a circumstance in determining whether or not defendant had a motive at said time and place in killing J. G., deceased, and for no other purpose whatever, and under no circumstances will said testimony be considered by you as affecting the defendant's right of self-defense, if you shall believe that the defendant was acting in self defense in the killing of said G. at the time and place of said killing.<sup>54</sup>

treating. The attorney general contends that under the facts the instruction was not erroneous, or, if erroneous, was not prejudicial. Some of the facts were in dispute, and defendant had the right, in any event, to have his theory of the case fully presented to the jury. As supporting our views, see *Allen v. U. S.*, 157 U. S. 675, 15 S. Ct. 720, 39 L. Ed. 854; *Thompson v. U. S.*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146, 9 Am. Cr. Rep. 209; *Gourko v. U. S.*, 153 U. S. 183, 14 S. Ct. 806, 38 L. Ed. 680."

51—*Rogers v. State*, 82 Miss. 479, 34 So. 320 (321).

"Erroneous, in that it denies the defendant the right of self-defense. All the facts assumed or alleged in the instruction may be true, and yet the killing may not have been in pursuance of such former design, or it may have been done in necessary self-defense."

52—*Bush v. State*, 40 Tex. Cr. App. 539, 51 S. W. 238 (239).

"The fault in this charge is that it is too broad, and does not state the circumstances, or any circumstance, which would authorize defendant to arm himself and seek his adversary."

53—*State v. Bartmess*, 33 Ore. 110, 54 Pac. 167 (173).

Held properly refused as seeming "to carry the right of repelling force beyond the limits of defendant's curtilage, and to imply that he might resort to the use of arms to settle a controversy in relation to the right of possession and to rid his premises of an intruder."

54—*Terry v. State*, 45 Tex. 264, 76 S. W. 928 (930).

"This and similar charges complained of by appellant were clearly upon the weight of evidence, and the court erred in giving such charges. *Walker v. State*, 7 Tex.

§ 4722. **Assumption that Deceased Was the Aggressor Must Rest upon Evidence.** (a) If from the evidence you believe that defendant killed A., but further believe that at the time of so doing deceased had made an attack on him, which from the manner and character of it, and the relative strength of the parties, and defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, defendant killed deceased, then you should acquit. And if deceased was armed at the time he was killed, and was making such attack on defendant, and if the weapon used by him, and the manner of its use, was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon defendant.<sup>55</sup>

(b) If the jury believe from the evidence that C., deceased, seriously made threats against the life of defendant, S., to the effect that he would kill defendant S., when they met, if they should meet, and intended to carry such threats into execution, if they should meet; and if you further believe defendant, S., was informed of such threats, and believed that they were seriously made, and that said C. (the deceased) intended to and would carry said threats into execution, if they should meet, and when they should meet; and if the jury further believe that on the day C. was killed (if he was killed) and just prior to his being killed, defendant, S., saw deceased, C., at a distance of 150 yards, or some such distance, riding towards defendant, and defendant then and there concluded to meet said C., and fight him with deadly weapons, if the said C. made any demonstrations to fight or to carry his threats into execution, and did ride forward, and did meet said C., and that they then and there fought with deadly weapons,—such fighting would be a fighting by mutual combat, and, if defendant in such fight killed said C., such killing would be murder in the second degree, and you will so find by your verdict, and affix punishment as for murder of the second degree.<sup>56</sup>

Ct. Rep. 395, 72 S. W. 997; Hudson v. State, 28 Tex. App. 324, 13 S. W. 388; Attaway v. State, 41 Tex. Cr. App. 395, 55 S. W. 45.

These authorities hold that it is not necessary to charge on motive. However it does become the duty of the court whenever extraneous crimes are introduced on a controverted question of intent, to limit the same to that purpose. For collation of authorities see White's Ann. Code Cr. Proc. 1895, p. 529. But where another crime forms part and parcel of the motive and res gestae of the motive, it is not proper to charge on the same.

55—Seeley v. State, 43 Tex. Cr. App. 66, 63 S. W. 309 (310).

"The charge referred to submits the case upon the theory that deceased had made an attack on defendant. This assumption is unwarranted, and turned the issue of self-defense, not upon apparent danger, but upon the fact that deceased had then made an attack. This charge

has been condemned as erroneous. Phipps v. State, 34 Tex. Cr. App. 560, 31 S. W. 400; *Ib.*, 34 Tex. Cr. App. 608, 31 S. W. 657; Stewart v. State, 40 Tex. Cr. App. 649, 51 S. W. 907."

56—Schauer v. State, — Tex. Cr. App. —, 60 S. W. 249 (251).

The evidence was that defendant turned aside and gave deceased the road and that deceased fired before defendant did anything. There was no evidence of mutual combat. It was "only a question of who made the first assault."

The court said:

"A charge on mutual combat, like a charge on provoking the difficulty, is a limitation of the right of self-defense, and such a charge should never be given unless the judge, looking to the testimony, is able to lay his hand on the evidence which authorizes it. Rosborough v. State, 21 Tex. App. 672, 1 S. W. 459; Morgan v. State, 34 Tex. Cr. App. 222, 29 S. W. 1092; Red v State, 39 Tex.

(c) The right to use a deadly weapon in self-defense is denied to an accused person who was the originator of the difficulty, entered it armed, and brought it on intending, if necessary, to use his weapon to overcome his adversary.<sup>57</sup>

§ 4723. Not Enough that Defendant "Reasonably" Free From Fault. (a) If C. made an attack upon D. with a knife, under such circumstances as to make D. reasonably believe that he was in danger of his life, or of serious bodily harm, and that he (D.) was reasonably free from fault in bringing on the difficulty or danger, and in that situation he fired the fatal shot, then the jury should acquit the defendant.<sup>58</sup>

(b) No matter what may have been the purpose of defendant in going to the P. home, if he was reasonably free from fault in bringing on the difficulty, then he can successfully invoke the doctrine of self-defense; and if he fired the fatal shot when there was a reasonable apprehension of losing his own life, or of suffering great bodily harm, then the jury must find the defendant not guilty.

(c) If defendant fired the fatal shot solely as the result of sudden and imminent peril to himself, from which there was no other reasonable mode of escape, then he did not shoot with malice, and he cannot be convicted of murder; and if he was reasonably free from fault in bringing on the difficulty, and fired the fatal shot under the reasonable belief that it was necessary to shoot in order to save his own life, or to save himself from being shot with a gun in the hands of deceased, when there was no other reasonable mode of escape in time to avoid being shot, then the jury must find the defendant not guilty.<sup>59</sup>

(d) The court charges the jury that if the defendant was reasonably without fault in bringing on the difficulty and at the time of the homicide there appeared so apparently as to lead a reasonable mind to the belief that it actually existed, a present, imperious and im-

Cr. App. 414, 46 S. W. 408, 73 Am. St. 965."

57—Saffold v. State, 76 Miss. 258, 24 So. 314 (315), 11 Am. Cr. Rep. 334.

"This charge for the state, while announcing a correct abstract proposition of law, is fatally erroneous as applied to the case made by the proof. There is an entire failure to show, in a proper sense, that S. began the difficulty."

58—Dennis v. State, 118 Ala. 72, 23 So. 1002 (1003).

Held erroneous because it "demanded an acquittal if the defendant was reasonably free from fault in bringing on the difficulty. Similar charges have been condemned. Holmes v. State, 100 Ala. 84, 14 So. 864; Crawford v. State, 112 Ala. 1, (28) 21 So. 214 and authorities cited."

59—Crawford v. State, 112 Ala. 1, 21 So. 214 (223).

"This court has strenuously insisted upon and vigorously enforced, the doctrine that the plea of self-defense is not available to a defendant who is not free from fault

in the creation of a necessity to take the life, or to do grievous bodily harm to another. Holmes v. State, 100 Ala. 80, 14 So. 864. In Johnson v. State, 102 Ala. 19, 16 So. 105, it is said: 'This doctrine is too important, too conservative of human life and of good order to allow it to be frittered away.' And this was said in commenting on an instruction predicated the right to self-defense on a reasonable freedom from fault in provoking or encouraging the difficulty. This expression 'reasonably free from fault' had been employed in some of our previous decisions; it may be inadvertently rather than intentionally. Whatever may be true in this respect, the more recent decisions have corrected this expression, and have settled, as is said in McQueen v. State, 103 Ala. 17, 15 So. 826 that 'the law admits of no qualification of this requirement. The defendant must have been free from all fault or wrong doing on his part which had the effect to provoke or bring on the difficulty.' There was no error in the refusal of these instructions."



pending necessity in order to save himself from great bodily harm to kill the deceased, then he had the right to shoot the deceased, and the jury must acquit him on the ground of self-defense.<sup>60</sup>

**§ 4724. Self-Defense—When Defendant, in Fault, Abandoning the Conflict, May Plead.** (a) If the jury find from the evidence that after defendant, C. and B. went into the house of P. a difficulty there arose between them or either of them and old man P., and if they further find that defendant and C. in good faith abandoned the conflict and were withdrawing from the house and that old man P. pursued them and presented his gun at C. in such close proximity as to render retreat hazardous, then C. had the right to use such force as was necessary to free himself from the danger even to the taking of old man P.'s life, and if you find the killing occurred under such circumstances as these, you should find the defendant not guilty.<sup>61</sup>

(b) The jury are instructed that if the minds and consciences of the jury are fully satisfied by all the evidence in the case that the defendant provoked the difficulty with the deceased, armed at the time with a deadly weapon, provided for the purpose of killing or doing deceased some great bodily harm, and that he shot and killed the deceased in the difficulty so provoked, then the court instructs the jury that the defendant is guilty, even though the jury may believe that the defendant, at the time he killed the deceased, killed him in self-defense.<sup>62</sup>

(c) If defendant armed himself with a deadly weapon, and went to the house of the deceased, at night, to do some unlawful act, and in pursuance of such unlawful design provoked a difficulty, and in such difficulty killed deceased, then it was murder, although the jury may have further believed that deceased, at the time of the shooting

60—*Watkins v. State*, 133 Ala. 88, 32 So. 627 (628).

Held that this "does not hypothesize freedom from fault in bringing on the difficulty. The expression 'reasonably without fault,' in doing so, is not sufficient."

See also *Welch v. State*, 124 Ala. 41, 27 So. 307 (308).

61—*Evans v. State*, 109 Ala. 11, 19 So. 535 (536, 538).

Held properly refused. "It fails to hypothesize that the defendants were 'at the time so menaced, or appeared to be so menaced, as to create a reasonable apprehension of the loss of life, or that they would suffer great bodily harm, and that there was no other reasonable mode of escape from such present impending peril' without increasing their apparent danger."

62—*Jones v. State*, 84 Miss. 194, 36 So. 243.

"Full satisfaction' of the minds and consciences of the jury of the guilt of a defendant is no compliance with the rule which requires the jury to be convinced of guilt 'beyond all reasonable doubt,' *Williams v. State*, 73 Miss. 823, 19 So. 826; *Powers v. State*, 74 Miss. 777, 21 So. 657; *Lipscomb v. State*, 75 Miss. 576, 23 So. 210, 230. The in-

struction is further inaccurate in that it deprives the defendant of the right of self-defense, even though, after provoking the difficulty, he may have, in good faith, withdrawn therefrom. It is well settled that one may wrongfully provoke a difficulty and yet if afterward, at any moment during its progress, he in good faith abandons the conflict, and is subsequently murderously assaulted by the deceased, and is forced to slay in self-defense, he is not estopped from pleading such self-defense in justification of his acts. *Smith v. State*, 75 Miss. 553, 23 So. 260; *Patterson v. State*, 75 Miss. 675, 23 So. 647. We approve the language employed in *Lofton v. State*, 79 Miss. 734, 31 So. 425, where, speaking of an instruction similar to the one here under review, the court said: "This form of charge, declaring a defendant estopped to plead self-defense, is an exceedingly unwise one to be given. We have repeatedly condemned it. . . . It can never be proper, save in a few very rare cases where the case is such, on its facts, that a charge can be given embracing all the elements,—not part of them, nor nearly all of them,—essential to be estopped. The old paths are the safe paths."

which produced death, was striking defendant with a hoe or other deadly weapon.<sup>63</sup>

(d) The court instructs the jury that if they believe from the evidence in the case, beyond a reasonable doubt, that P. was hunting A. to kill him, armed with a deadly weapon provided for that purpose, and that, when he found A., he provoked a difficulty with A., or was the aggressor in the difficulty in which he killed A., then he is guilty of murder, even though he killed A. in self-defense, and the jury should so find.<sup>64</sup>

§ 4725. **Aggressor Must Give Deceased to Understand He Has Abandoned the Contest.** Even if the jury believe the evidence that defendant was at fault in bringing on the difficulty, yet if they further believe from the evidence that he had in good faith abandoned the difficulty, and was leaving the house and that deceased followed him with his gun, and presented the gun at defendant in such close proximity to defendant as to have rendered retreat perilous, then defendant had the right to strike in defense of himself, even to taking the life of his assailant, if apparently necessary to free himself from danger.<sup>65</sup>

63—Hunt v. State, 72 Miss. 413, 16 So. 753 (755).

The court said:

"It is not the law that he would have been guilty of murder, in the case stated, if his purpose was to do some (that is 'any') unlawful act, and in pursuance of 'such' (that is, any) unlawful design, provoked a difficulty, and killed the deceased. The instruction tells the jury that the malice aforethought, essential to constitute murder, may consist, in the case of one arming himself with a deadly weapon, and going to another's house at night, in the intent to do any unlawful act. Again, it omits all reference to the qualification as to the defendant's having, in good faith, abandoned the contest. In Cannon's Case, 57 Miss. 154, Chief Justice Campbell says with great clearness: 'A mere grudge or malice, in its general sense, is not sufficient to bring a case within the principle that where one, having expressed malice towards another kills that other, the killing is referable to the previous malice, and not to a provocation at the time of killing. To do this there must be a particular and definite intent to kill, so that the provocation is a mere collateral circumstance; the intent to kill existing before, and independently of it. It is for the jury to say whether the act of killing proceeded from a deliberate purpose, previously formed, to kill, then and there carried into effect in pursuance of the previously concerted design, or whether the act was done because of the present circumstances, without regard to the previous design.' Says Lord Hale (1 Hale, P. C. 479, 480): 'But Mr. Dalton thinketh it to be se defendendo, though A. made the first assault, either with or without malice, and then retreated.

\* \* It seems to me that if A. did retreat to the wall, upon a real intent to save his life, and then, merely in his own defense, killed B., it is se defendendo.' This is the doctrine now. 2 Bish. Cr. Law, § 566; Stoffer v. State, 15 Ohio St. 47 [86 Am. Dec. 470]" (a finely-reasoned case).

64—Pulpus v. State, 82 Miss. 548, 34 So. 2 (3).

"We think, on the evidence in this record, the granting of this instruction was a fatal error. Lofton v. State, 79 Miss. 723, 31 So. 420, and the other citations in the briefs for appellant. It must be quite an overwhelming case for the state on the facts to keep this instruction from being reversible error. It wholly excludes any consideration of the doctrine of locus penitentiae, even where, as here, there is evidence of an abandonment of the conflict. It is not strictly correct as written. One may provide himself with a deadly weapon and hunt another, with design to kill him with it, and provoke and be the aggressor in the encounter in which he kills the other, and still, in the progress of it, not be denied the right of self-defense, if the killing be not pursuant to the original purpose to kill. If he abandons the conflict, and is fleeing from it in good faith, and not for vantage, he may defend himself from threatened death or great bodily harm."

65—Crawford v. State, 112 Ala. 1, 21 So. 214 (225).

"The general rule that an aggressor—one who provokes or incites a difficulty—cannot excuse or justify himself in taking life, is not of absolute and universal application. An exception to it exists when, in good faith, he abandons the difficulty, retires or retreats from it clearly announcing his desire for peace. Then

**§ 4726. Defendant Pursuing and Beating With Deadly Weapon.** The court instructs the jury for the state that if you believe, from the evidence, beyond a reasonable doubt, that R. began the difficulty with the defendant, and was the aggressor in said difficulty, but that he in good faith abandoned the difficulty, and fled, and the defendants pursued him, and assaulted and beat at R. with sticks, which you believe, from the evidence, beyond a reasonable doubt, were deadly weapons, or means and force likely to produce death, used in the manner they were used, then the defendants are guilty as charged in the indictment, and you should so find.<sup>66</sup>

**§ 4727. Self-Defense—Previously Formed Design Does Not Bar Plea of.** Previously formed design on defendant's part unlawfully to kill S., or any steps taken by defendant to bring on the difficulty, if found to exist, will deny to defendant the right to the plea of self-defense.<sup>67</sup>

**§ 4728. Whether Engaging in Mutual Combat Bars Plea of Self-Defense.** (a) If the jury have a reasonable doubt as to who brought on the difficulty, and if they have a reasonable doubt as to whether it was necessary for G. to shoot, to save his own life, or to protect himself from great bodily harm, either actual or apparent, then you will find the defendant not guilty.<sup>68</sup>

if he be pursued, his right to defend himself is revived. 1 Whart. Cr. Law § 486; 1 Bish. Cr. Law § 871; Parker v. State, 88 Ala. 4, 7 So. 98; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; Horr & T. Cas. Self-Def. 213. It will be observed that neither of these instructions directs inquiry to the important controlling fact, without the existence of which the exception to the general doctrine can have no room for operation; and that is whether the acts and conduct of the defendant manifested, so clearly manifested, that peace was his desire, that to secure it he had abandoned and was retiring from the contest, removing from the mind of the deceased all reasonable apprehension of a continuance of the difficulty, and of the imminent peril in which he was involved. Less than this cannot give rise to the exception, or the assailed would be subject to the perils of colorable retreats, intended to gain 'fresh strength or some new advantage.' The deceased did not pass beyond the door of the dwelling. He was slain at or near the door, and that which is termed 'pursuit' was the following of the defendant and within the room of the dwelling they had entered. It was a right to follow them so long as they were within the dwelling with arms in their hands, and the appearances of imminent peril they created were continuing. Notes to Stoffer's Case, Horr & T. Cas. Self-Def. 231. Without additional instructions directing the attention of the jury to a consideration of these inquiries, the instructions may have misled them; and as construed the instructions do not assert a correct proposition of law. Parker v. State, supra."

66—Reed v. State, — Miss. —, 24 So. 312 (313).

"The instruction for the state is erroneous, falling under the condemnation of Jeff v. State, 37 Miss. 321 and it is reversible error, for we cannot confidently say that no other result could be reasonably reached, with this error corrected on a new trial."

67—Karr v. State, 106 Ala. 1, 17 So. 328 (332).

"It is not true that previously formed design on the part of the defendant to take the life of the deceased, as is asserted in one of the alternatives of the instruction, will, of itself, preclude the idea of self-defense. Hornsby v. State, 94 Ala. 55, 10 So. 522; Domingus v. State, 94 Ala. 9, 11 So. 190. If there be evidence tending to show that prior to the killing the defendant had the deliberate purpose or the formed design, to take the life of the deceased, or to do him great bodily harm, and evidence tending to show that at the time of the killing he was rightfully defending himself or his father, from a felonious assault made or threatened by the deceased, the true inquiry is, whether he availed himself of the circumstances as a pretext for carrying out the previous purpose or design. If that is not true, the existence of such purpose or design should not debar him from the right of defending himself or his father, to the extent the right would exist, if he had never entertained such purpose, or formed such design. De Arman v. State, 71 Ala. 351."

68—Gilmore v. State, 126 Ala. 20, 28 So. 595 (601).

"It is a mistake to postulate a charge on the theory that the de-



(b) If you should find from the evidence, beyond a reasonable doubt, at the time the defendant went to the landing he had reasonable grounds for believing that if he went there he would be attacked by C., or some of his sons, or all of them, and that he armed himself, and went there, intending and willing to enter into mortal combat with them, and that by his acts and demonstrations he caused or provoked an attack to be made upon him, with intent then and there to kill either C. or one of his sons, and that he was so attacked, and that he killed the deceased, then, having voluntarily entered into the contest, he cannot claim the benefit of the plea of self-defense, and you should find him guilty of murder in the first degree.<sup>69</sup>

§ 4729. **Both Parties to Mutual Combat May Act in Self-Defense.** You are instructed that two persons cannot engage in a mortal combat, and each be acting in self-defense. You are further instructed that deceased had the same right to act upon the appearance of danger as had the defendant.<sup>70</sup>

§ 4730. **Defendant Provoking Attack by Slandering Deceased's Family.** Although the evidence shows that the deceased first assaulted the defendant, still, if you believe that defendant with preconceived malice, and in order to have an excuse or pretext for killing deceased or for doing some great bodily harm, intentionally, by the utterance of false and degrading statements concerning the family of the deceased provoked the difficulty, or on

a reasonable doubt as to defendant's having provoked the difficulty, or as to which of the two provoked or brought on the difficulty, as these are not equivalent to that freedom from all fault on the part of the defendant which the law enjoins, either in bringing on, provoking or encouraging the difficulty, or the freedom from willingness of the defendant to enter into the difficulty and slay the deceased; for although the deceased may have provoked or brought on the difficulty, yet if the defendant willingly enters into the difficulty,—is willing to engage in the deadly combat, and manifests such willingness by word or deed,—and in such mutual combat slays the deceased, he is not free from fault and is not guiltless. *Boulden v. State*, 102 Ala. 83, 15 So. 341; *Baker v. State*, 81 Ala. 38, 1 So. 127; *Kirby v. State*, 89 Ala. 63, 8 So. 110; *Gibson v. State*, 91 Ala. 64, 9 So. 171."

<sup>69</sup>—*Nash v. State*, 73 Ark. 399, 84 S. W. 497 (1899).

The court said that according to this "if the jury believed beyond a reasonable doubt that the defendant, at the time he went to the steamboat landing, 'had reasonable grounds for believing that if he went there he would be attacked by C., or some of his sons, or all of them, and that he armed himself and went there, intending and willing to enter into mortal combat with them,' and that by going there armed he caused an attack to be made upon him, and that he so caused such attack with the intent then and there to kill either C. or

one of his sons, and that he killed the deceased, they, the jury, should find him guilty of murder in the first degree; and they might so find even if the defendant went there carrying a shotgun solely for self-defense, and did nothing more to provoke an assault, and killed the deceased for the purpose of saving his own life or preventing a great bodily injury. There was some evidence tending to prove such a state of facts. This instruction was clearly wrong and prejudicial."

<sup>70</sup>—*Bradburn v. U. S.*, 3 Ind. T. 604, 64 S. W. 550 (1893).

"In point of fact, as well as matter of law, it is not correct to say that two persons cannot engage in mortal combat, and each be acting in self-defense. Many cases could be imagined, and doubtless have occurred, where two persons might, reasonably judging from appearances of danger as presented to them, fight to the death for their lives, and both be acting within the law of self-defense. The case put by counsel for appellant in their brief is in point: Two brothers at night each mistook the other for a burglar, and engaged in mortal combat. Each acted upon reasonable appearance of danger. Indeed, the danger was real; for each, thinking the other a burglar, intended to kill. One was killed, and if he who killed in good faith believed the other to be a burglar, and had reasonable ground to so believe, he clearly acted under the law of self-defense, but no more so than he who was slain; and either, if he should slay the other, under the circumstances, might invoke the law of self-defense."

ceased, provoked the deceased to wrath for the purpose of inciting the deceased to attack him and make the first assault, then in such case the killing of deceased would be murder in the first degree, no matter how severe may have been the attack of deceased upon him.<sup>71</sup>

§ 4731. **Dangerous Character of Deceased—Overt Acts.** (a) If you believe from the evidence that deceased threatened to take the life of the defendant prior to the alleged killing, that this would give the defendant no right to take the life of the deceased, unless you further believe that at the time of the alleged killing the deceased was making or immediately preceding the killing had committed some overt act towards carrying such threats into execution.—The evidence respecting the dangerous character of the deceased can only be considered by you in the event of you finding from the evidence that the deceased was making or had made, immediately preceding the alleged killing an attack upon the defendant of such a character as would justify the defendant in using deadly weapons in repelling the same.<sup>72</sup>

(b) So if the evidence satisfies the jury that T. had made threats against the life of M., and if it further shows that some of these threats were communicated to him before the killing, then he would be justified in taking more prompt and vigorous measures of self-defense, if attacked by him than if attacked by a man who had made no such threats.

(c) If the evidence satisfies the jury that T. was a quarrelsome, dangerous man, then defendant would be justified in looking at his conduct in the light of his bad character, and would be justified in acting more promptly and vigorously if attacked by him than if he were attacked by a man of good character.<sup>73</sup>

(d) Evidence of bad character of the deceased, of bad disposition and overbearing manner, may be considered by the jury in connection with the other evidence, if the defendant knew of it, as putting him upon his guard, and impelling him to a commission of the act alleged in defense of his personal life, under apprehension aroused by such character.<sup>74</sup>

71—State v. Bartlett, 170 Mo. 658, 71 S. W. 148 (1902), 59 L. R. A. 756.

"There was no law to warrant such an instruction. Provocation in such case must be personal, and even then would not authorize, as does the litigated instruction, the infliction of a horsewhipping. Besides, that instruction abrogates all right of self-defense. All evidence about such slanders should have been rigorously excluded by the trial court when offered by the state, and only admitted on behalf of defendant to show threats made by B. and the basis and conditions of such threats."

72—State v. Ellis, 30 Wash. 369, 70 Pac. 963 (1904).

"The two instructions taken together require the finding by the jury of a preceding attack or overt act, at the time, before the dangerous character and threats of the deceased can be considered. On the contrary, the apparent facts should

all be taken together to illustrate the motives and good faith of the defendant at the time of the homicide."

73—Mitchell v. State, 129 Ala. 23, 30 So. 348 (1901).

"Neither threats by the deceased, nor his character, however bad, would have justified the defendant in killing him, if defendant was the aggressor. Winter v. State, 123 Ala. 1, 26 So. 949; De Armand v. State, 71 Ala. 351. Therefore, in view of the evidence tending to show he was the aggressor, these charges were each bad, if for no other reason, because they did not hypothesize that the defendant was without fault in commencing the difficulty."

74—Thomas v. State, 47 Fla. 99, 36 So. 161 (1904).

"This instruction was properly refused, because it is so framed as to impress the jury with the view that defendant might have been justified if the bad character of the

(e) The court charges the jury that if from the evidence they believe that the deceased was a quick, impulsive man his (the deceased's) acts would afford much stronger evidence that the life of the defendant was in peril than the same acts performed by one possessing an entirely different disposition, and justified a resort to more prompt measures of self preservation; and if the deceased had threatened the life of the defendant, and said threat was known to the defendant, and by some act or demonstration at the time of the killing taken in connection with such character and threats the deceased induced a reasonable belief in the mind of the defendant that it was necessary to deprive the deceased of life in order to save his own (the defendant's) life, and the defendant was free from fault in bringing on the difficulty—and had no reasonable way of escaping—they must find the defendant not guilty.<sup>75</sup>

(f) If from the evidence you believe the defendant killed the said D., but further believe that, at the time of so doing, the deceased had made an attack on him which, from the manner and character of it, and from the character of the weapon used, if any, and the defendant's knowledge of the character and disposition of the deceased, and from all the evidence in this case, caused him to have a reasonable expectation or fear of death or serious bodily injury; and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him; and if the deceased was armed at the time he was killed, and was making such attack on defendant, and if the weapon used by him and its manner of its use was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict bodily injury upon the defendant.<sup>76</sup>

**§ 4732. Threats by Deceased May be Considered by Jury but Court Should Not Single Out and Give Undue Prominence to Them.** The jury in determining who provoked the difficulty may consider in connection with all the evidence the fact, if it be a fact, that deceased had made threats to take the life of the defendant.<sup>77</sup>

**§ 4733. Threats by Deceased Against Defendant for What Purposes Admissible.** (a) The court instructs the jury that the only reason

deceased aroused in his mind an apprehension of danger to his life or person. Bad character of the deceased can only be considered in connection with and as illustrating or explaining some overt act on his part, and is never sufficient, standing alone, to justify the accused in striking the fatal blow. *Hart v. State*, 38 Fla. 39, 20 So. 805, and *Bond v. State*, 21 Fla. 738."

75—Held bad as argumentative, *Wilson v. State*, 140 Ala. 43, 47 So. 93 (94).

76—*Wallace v. State*, — Tex. Cr. App. —, 97 S. W. 471.

"The error pointed out by appellant is that such charge is too restrictive and limited the evidence with reference to the character of deceased and defendant's knowledge of the character and disposition of the deceased; there being no testimony whatever that defendant had

any knowledge of the character and disposition of the deceased. This charge is erroneous. It was a matter of indifference to appellant whether deceased was a dangerous man or not. When he was shooting at appellant, appellant had the right to defend against such assault. *Hickey v. State*, 45 Tex. Cr. App. 297, 76 S. W. 920."

77—*Gilmore v. State*, 126 Ala. 20, 28 So. 595 (601).

Held properly refused. It is "faulty in singling out and giving undue prominence to a particular fact, and it is not relieved of this objection by adding that it is to be taken in connection with the other evidence in the case. Such charges have been condemned by this court as being argumentative. *Brantley v. State*, 91 Ala. 47, 8 So. 816; *Watkins v. State*, 89 Ala. 55, 8 So. 134; *Hussey v. State*, 86 Ala. 34, 5 So. 484."



the defendant has been permitted to introduce evidence to show that deceased had, prior to the killing, made threats against or about the defendant, is for the purpose of showing who was the aggressor at the time of the killing. So if, in this case, you do not believe that the deceased, M., was the aggressor at the killing, but believe beyond a reasonable doubt that the defendant was the aggressor from all the circumstances and evidence in proof, then in that event the evidence as to threats, if you believe any had been made by M. against defendant, should not be considered by the jury in arriving at a verdict.<sup>78</sup>

(b) Upon the question of threats, you are instructed that threats made by the deceased against the person charged with the killing of the deceased are admissible as evidence, and may be considered by you regardless of the character of such threats, if any were communicated to defendant prior to the killing, for the purpose of assisting the jury in determining the state of mind and intent of deceased at the time of the homicide. But, before a homicide can be justified upon the ground of threats, it must appear from the evidence that the threats, if any, made by deceased to take the life of defendant, or to do him serious bodily injury, were communicated to defendant prior to the homicide, and must further appear from the evidence that at the time of the homicide deceased by some act then done manifested an intention to then and there execute the threats so made, if any; and unless such threats, if any were made by deceased, were communicated to defendant prior to the homicide, and unless you further find that deceased at the time of the homicide committed some overt act from which it reasonably appeared to defendant that deceased intended then and there to execute such threat, it would afford no justification for taking the life of deceased.<sup>79</sup>

<sup>78</sup>—*Lee v. State*, 72 Ark. 436, 81 S. W. 385 (386).

Held error. "Nearly all the threats proven in this case were communicated to the appellant (defendant) before the killing: This court has said: 'Threats, as well as the character and conduct of the deceased, are admissible when these circumstances tend to explain or palliate the conduct of the accused. There are circumstantial facts, which are part of the *res gestae*, whenever they are sufficiently connected with the acts and conduct of the parties so as to cast light upon the darkest of all subjects—the motives of the human heart.' *Palmore v. State*, 29 Ark. 248, 261, 262; *Bell v. State*, 69 Ark. 149, 61 S. W. 918, 86 Am. St. 188; *Brown v. State*, 55 Ark. 593, 18 S. W. 1051. 'Former threats by the deceased against the accused, may generally be given in evidence, as tending to show defendant's motive, when they were communicated to him before the killing; and evidence of former threats by the deceased against the accused, even though they were not communicated to the defendant prior to the killing, may be received where there is a doubt as to who was the aggressor, and some evidence has been given which tends

to show the act was done in self-defense.'"

<sup>79</sup>—*Sebastian v. State*, 42 Tex. Cr. App. 84, 57 S. W. 820.

"The record shows that deceased had threatened to take the life of appellant; that at least some of these threats were communicated to appellant. Now, it will be seen from the charge quoted that the court instructed the jury that threats could be considered by them, if they were communicated to defendant prior to the killing, for the purpose of assisting the jury in determining the state of mind and intent of deceased at the time of the homicide. In some instances uncommunicated threats may be used to show which was the aggressor of the two parties engaged in a difficulty. But here we have the court telling the jury that they could look to communicated threats—that is, threats communicated to defendant prior to the killing, made by deceased—for the purpose of determining the intent of deceased at the time of the homicide. In a certain sense this may be correct, but we are not particularly concerned about the state of mind or intent of deceased, save as it may have a bearing on the state of mind or intent of defendant at the time of the homicide. Where self-defense

§ 4734. **Threats by Deceased Against Defendant—When Not Admissible.** Any threats made by deceased towards defendant, if such threats are shown to have been made by deceased, whether recently made or not, may be considered by the jury, in connection with all the other evidence in the case, in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot.<sup>80</sup>

§ 4735. **Defendant Cannot Act on Mere Threats—Must Await Overt Acts.** Where threats are made against a man's life \* \* \* he is not required to wait until he is assaulted or out in imminent danger of having such threats executed by the person making the same, but he has a right to act upon appearances, and if it shall reasonably appear to him that the person making such threats is about to execute the same, he may use all reasonable means at his command which appear necessary to him at the time, to defend himself, and prevent the execution or carrying out of such threats, and if he does so he is not guilty of any offense.<sup>81</sup>

§ 4736. **Lawful to Fire to Scare Another and Prevent Attack.** If you believe from the evidence that at the time the defendant began to shoot, the deceased had not made an attack on defendant, and it did not then reasonably appear to her that she was then in danger of death or serious bodily harm at the hands of deceased, but that she first fired at deceased, not with intent to kill him, but for the purpose of frightening him or for the purpose of compelling him to leave the premises, or if she fired at him for any other purpose than to take his life, and if deceased after defendant had fired one or more shots at him (if she did fire at him) then made an attack upon defendant, or did some act or made some demonstration, which by itself, or by words accompanying it made it reasonably appear to defendant that she was then in danger of death or serious bodily injury at the hands of the deceased, and that such an attack by deceased or such danger was brought about by the willful acts of the defendant in thus shoot-

is set up, communicated threats are generally invoked to render some act of deceased significant, as tending to show it was of a hostile character, or to intensify and render more significant some act of deceased towards defendant, and thus to enable the jury to determine how the act or conduct of deceased, in the light of the threat, may have operated upon the mind of defendant at the time, justifying him in the commission of the homicide. On the contrary, here the effect of the charge given was to limit the inquiry of the jury in regard to threats as to how they may have operated on the mind of the deceased. This charge was clearly misleading, and, instead of giving the jury a proper rule on the subject of threats, gave them an instruction which was calculated to deprive defendant of any benefit he might have otherwise derived from the evidence introduced on the subject of threats in connection with his plea of justifiable homicide."

<sup>80</sup>—Held properly refused as argumentative. *Campbell v. State*,

133 Ala. 81, 31 So. 802, 804, 91 Am. St. 14.

<sup>81</sup>—*State v. Smith*, 43 Ore. 109, 71 Pac. 973 (1897).

"The statement in the refused instruction that defendant was not required to wait until out in imminent danger is clearly erroneous. The right of self-defense will not avail where the difficulty was induced by the party himself. *State v. Hawkins*, 18 Ore. 476, 23 Pac. 475. Before one can excuse his conduct in taking the life of another it must appear that it was done to prevent the apparent commission of a felony by the latter upon him. *State v. Olds*, 19 Ore. 397, 24 Pac. 394. No one is justified in taking the life of another unless the danger of suffering great bodily harm or of losing his own life is imminent. *Goodall v. State*, 1 Ore. 334, 80 Am. Dec. 396; *State v. Tarter*, 26 Ore. 38, 37 Pac. 53; *State v. Porter*, 32 Ore. 135, 49 Pac. 964. The legal principle stated in the instruction asked for, being erroneous no error was committed in refusing the request therefor."

ing at deceased, and that if, acting upon such danger, if any, thus produced by the acts of defendant, if it was so produced, the defendant shot and killed deceased, as charged in the indictment, then, in such event defendant would not be guilty of a higher grade of offense than manslaughter; and if you believe from the evidence beyond a reasonable doubt that defendant so shot and killed deceased, you will find her guilty of manslaughter, and assess her punishment as heretofore directed.<sup>82</sup>

§ 4737. **Killing Policeman Who Attempts to Arrest.** (a) If you do not believe from the evidence that G. was in good faith attempting to arrest defendant, immediately before the difficulty in question, for an alleged violation of the city hack ordinance introduced in evidence; or if you believe that he was attempting to make such arrest, but further believe and find, under foregoing instructions, that he had no lawful authority to make such arrest; and further believe from the evidence that at the time defendant began to shoot at G., if he did shoot at him, it reasonably appeared to defendant from act or acts then done by G., or from some words coupled with his act or acts, that it was the purpose and intent of G. to shoot defendant with a pistol, and that defendant began firing at G. for the purpose of preventing being shot by him; and if you do not believe from the evidence, beyond a reasonable doubt, that defendant willfully and intentionally provoked said difficulty, if he did provoke it, for the purpose of using unlawful violence upon G., you will find that the killing of G. by defendant, if he did kill him, was not an unlawful killing, but was done in his lawful self-defense, and therefore justifiable, even though you should further believe that said apparent danger to defendant, if any, was not real.<sup>83</sup>

(b) If you find from the evidence that there was a mere attempt at defiance or preparation to resist upon the part of the defendant, not amounting to an assault, then the deceased in attempting to arrest the defendant would not be justified in shooting at him with a deadly weapon. And if the defendant under those circumstances had a reasonable belief that he could not protect his life by retreating, then he would have been justified in defending himself even to taking the life of his adversary.<sup>84</sup>

(c) Where a man in the lawful pursuit of his business is attacked, and where, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or

<sup>82</sup>—White v. State, 29 Tex. App. 530, 16 S. W. 340.

"While the statute makes the use of any dangerous weapon in an angry or threatening manner with intent to alarm another, and under circumstances calculated to effect that object, an assault, yet the use of the weapon, in order to constitute this an assault, must be unlawful. If A. about to be attacked by B., fires his pistol off not at B. but merely to frighten him, so as to prevent the attack, this might not constitute an assault, because the act would be lawful on the part of A."

<sup>83</sup>—Vann v. State, 45 Tex. Cr. App. 434, 77 S. W. 813 (816).

"It will be noted in the first statement of this charge that it required the jury to find as an affirmative fact that G. was not in good faith attempting to arrest appellant; in other words, it shifts the burden of proof. Appellant is entitled to the reasonable doubt on every proposition where his life or liberty is sought to be taken. This, as every other charge given in self-defense, is limited and restricted by a charge on provoking the difficulty."

<sup>84</sup>—Held that this "not only



justifiable, although it should afterwards appear that no injury was intended, and no real danger existed.<sup>85</sup>

§ 4738. **Plea Not Necessarily Barred Because Policeman Kills in Making Arrest.** In this case, if you find, from the evidence, beyond a reasonable doubt, that the defendant went into the back yard behind the saloon, where the deceased was, and provoked and brought on a difficulty with the said deceased in which he, the defendant, voluntarily entered and in which he used a deadly weapon and killed the said deceased, then you are instructed that the defendant could not excuse said killing on the ground that it was necessary for him to do said killing in order to prevent the said deceased from committing a great bodily injury upon him or taking his life, and you should find the defendant guilty.<sup>86</sup>

§ 4739. **Duty of Retreat—Assault with Deadly Weapon.** The defendant was under no duty to retreat, if she was assaulted by the deceased with a deadly weapon.<sup>87</sup>

§ 4740. **Common Law Doctrine of Retreat Qualified by Modern Cases.** In order to justify the accused in killing the deceased, S., in self-defense, if you find from the evidence that he did kill him, you must be satisfied from the testimony that the defendant had reasonable ground to fear that the deceased was about to inflict upon him great bodily harm or to kill him, and that the defendant honestly and seriously believed that he was in such danger, and that he was not able to escape from such injury or death, or to prevent the same by retreating, or in any other manner than by shooting the deceased, and that he fired the fatal shot for the purpose of so defending himself.<sup>88</sup>

ignores the question of fault on defendant's part in bringing on the difficulty but implies his fault." *Golson v. State*, 124 Ala. 8, 26 So. 975 (1978).

85—*Hans v. State*, 72 Neb. 288, 100 N. W. 419 (420).

"The vice of this instruction will be more apparent upon consideration of the condition of the evidence in the case. The defendant insisted that he had been deputized by the sheriff to arrest the deceased, and that he was at the time, therefore, in the lawful pursuit of his business. The state as strenuously insisted that he was not properly deputized, that the attempted appointment by the sheriff gave him no authority whatever, and that he was therefore a trespasser, and not in the lawful pursuit of his business. In this condition of the evidence, this instruction informed the jury that, if they should find that the defendant was not properly deputized, then they must find that he was not entitled to the right of self-defense, which clearly is not the law. A trespasser may defend himself against murder, and the fact that a man may be upon another man's premises, and that he may mistakenly suppose that he is acting lawfully, will not justify the taking of his life."

86—*Lynn v. People*, 170 Ill. 527 (535), 48 N. E. 964.

"This instruction was erroneous

and misleading in view of the testimony in the case. He was a peace officer and under the law could arrest without a warrant for a criminal offense committed in his presence or if a criminal offense had in fact been committed and he had reasonable ground for believing that the person arrested had committed it."

87—*Stoball v. State*, 116 Ala. 454, 23 So. 162 (163).

"When an assault is made on a sudden quarrel, and a mutual combat ensues, as in the present case, though the assault may be made with a dangerous or deadly weapon, it is the duty of the assailed to retreat, that its threatened consequences may be avoided, if the circumstances are not such as to impress him with the reasonable belief that retreat would increase his peril."

88—*Boykin v. People*, 22 Colo. 496, 45 Pac. 419 (422), citing *Alexander v. People*, 134 Ill. 438, 25 N. E. 564.

The slayer was a policeman. Held that this and like instructions imposed upon him too great a burden of proof. The court said: "As to this doctrine of retreat, it may, in general, be safely said that the tendency of the modern cases is greatly to qualify the common-law rule. There are, doubtless, cases where it is the duty of the party assailed to retreat to the wall be-

§ 4741. **Retreat Necessary Unless it Would Increase Defendant's Peril.** If the jury believe from the evidence in the case that at the time of the killing the deceased was attacking or in the act of attacking the defendant with a deadly weapon, then the defendant was not bound to retreat, but had the right to stand and defend himself, provided he was without fault in bringing on the difficulty which resulted in the killing, and could not have retreated without endangering his safety.<sup>89</sup>

§ 4742. **Retreat Unnecessary When More Dangerous than to Fight.** Where a man, without fault on his part, is suddenly and violently assaulted, under such circumstances as to induce in his mind an honest and reasonable ground of apprehension that he is in danger of life or limb, and the assault is of such fierceness as to make an attempted retreat even more hazardous, he may at once use necessary force to prevent the threatened blow.<sup>90</sup>

§ 4743. **Doctrine of Retreat Does Not Apply to Policeman Lawfully Making Arrest.** A person when assailed is required to decline the combat in good faith, if by so doing he could put himself out of danger, and use all means that would be adopted by reasonable men to procure their safety under similar circumstances; and he has no right to take the life of another unless it is actually or apparently necessary, and the necessity, real or apparent, must be so pressing as to exclude all other reasonable means of safety before he will be justified in slaying his assailant.<sup>91</sup>

fore taking human life; as, for example, where the case is one merely of simple assault, or where the parties engage in mutual combat, or where the defendant is the assailant, and has not in good faith declined further struggle before resorting to self-defense, or has provoked the assault with intent to commit a felony. To this class of cases, we are told, the doctrine is usually applied. 1 Bish. Cr. Law pars. 850 et seq., 869, 870; 2 Whart. Cr. Law. (7th Rev. Ed.) par. 1019. But where a defendant is where he has a right to be, as, for example, a police officer engaged in making an arrest, and is assaulted by the deceased in a way that defendant honestly and in good faith believes, and the circumstances being such as would induce a like belief in a reasonable man, that he is about to receive at the hands of his assailant great bodily harm, or to lose his life, the defendant, if he did not provoke the assault, or is not within some of the exceptions above noted, is not obliged to retreat or flee to save his life, but may stand his ground, and even, in some circumstances, pursue his assailant until the latter has been disarmed or disabled from carrying into effect his unlawful purpose; and this right of the defendant goes even to the extent, if necessary, of taking human life. In a late case decided by the supreme court of the United States—*Beard v. U. S.*, 158 U. S. 550, 15 S. Ct. 962,—the doctrine just noted has been expressly declared.

This, also is in accordance with the doctrine announced in *Babcock v. People*, 13 Colo. 515, 22 Pac. 817."

89—*Pugh v. State*, 132 Ala. 1, 31 So. 727 (728).

Held properly refused. It "would have authorized the jury to acquit the defendant on the ground of self-defense, even though they should have found that defendant might have retreated without increasing his peril."

90—*State v. Carter*, 15 Wash. 121, 45 Pac. 745 (746).

"It is contended that this was, in effect, telling the jury that it was the duty of the appellant to have retreated, unless it would have been more hazardous to have done so. The instruction was inapt, and, in a sense, misleading; and if it stood alone, we would not hesitate, upon the authority of *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883, to condemn it." Other instructions told the jury that when a person "being where he has a right to be and without fault, is violently assaulted he may, without retreating, repel force by force."

91—*Lynn v. People*, 170 Ill. 527 (536), 48 N. E. 964.

"Is it true that an officer whose duty it is to preserve the peace is required to decline a combat when resisted, and should put himself out of danger? Clearly not. The court should give the law as applicable to the facts in evidence in the case. An officer lawfully in the discharge of his duty would be protected where a different rule would

§ 4744. **No Duty of Flight When Defendant Attacked Without Fault on Public Highway.** To justify the defendant on the ground of self-defense, the apprehended danger must have been apparent, impending and one from which it must have reasonably appeared to the defendant that he could not escape otherwise than by firing the fatal shot. If it reasonably appeared to defendant that he could have escaped the apprehended danger otherwise than by shooting the deceased, then it was his duty to have done so, and he cannot be justified on the ground of self-defense.<sup>92</sup>

§ 4745. **Duty to Retreat a Question for the Jury.** If the jury believe from the evidence that G. did not commence the difficulty, and that S. commenced the difficulty, and snapped his pistol at G., without shooting distance, G. was not required to retreat.<sup>93</sup>

§ 4746. **Duty of Retreat When Attacked on Defendant's Own Ground.** (a) Before a person can justify taking the life of a human being by self-defense, he must employ all reasonable means within his power, consistent with his own safety, to avert the necessity for the killing.<sup>94</sup>

(b) To justify the taking of life in self-defense, it must appear from the evidence that the defendant not only really and in good faith endeavored to decline any further trouble, and to escape from his assailant before the fatal shot was fired, but it must also appear

apply as to private individuals." The above instruction was given in a case where an officer in endeavoring to preserve the peace killed the offender. The court says the instruction was clearly erroneous in view of all the facts in the case. 92—State v. Hudspeth, 150 Mo. 12, 51 S. W. 483 (488).

"We think the defendant, being without fault himself had a right if attacked in such a manner as to furnish reasonable ground for apprehending a design to take his life or do him great bodily harm, to act upon appearances, and to defend his life, and was not required to flee from the public highway in which he had been assailed. Hence the qualification to the instruction should not have been given, and was erroneous. People v. Newcomer, 118 Cal. 263, 50 Pac. 405; La Rue v. State, 64 Ark. 144, 41 S. W. 53; Beard v. U. S., 158 U. S. 550, 15 S. Ct. 962; Page v. State 141 Ind. 236, 40 N. E. 745; Williams v. State, 30 Tex. App. 429, 17 S. W. 1071; Baltrip v. State, 30 Tex. App. 545, 17 S. W. 1106; State v. Sherman, 16 R. I. 631, 18 Atl. 1040; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Bohannon v. Com., 8 Bush. 481."

93—Gordon v. State, 129 Ala. 113, 30 So. 30 (31).

"It is clearly the law that the defendant was under the duty to retreat, unless by doing so he would thereby have apparently placed himself in greater peril. Carter v. State, 82 Ala. 13, 2 So. 766, and authorities therein cited; Roden v. State, 97 Ala. 54, 12 So. 419; McDaniel v. State, 97 Ala. 14, 12 So.

241; Gilmore v. State, 126 Ala. 20, 28 So. 595; and it is generally a question for the jury under all the evidence. De Arman v. State, 77 Ala. 10; McDaniel v. State, supra. Defendant's counsel concede this to be the law, but they contend that the charge under consideration submits this question of defendant's duty to retreat to the jury. In this we cannot concur."

94—State v. Cushing, 14 Wash. 527, 45 Pac. 145 (146), 53 Am. St. 883.

"We think that this instruction, in connection with the entire charge, might reasonably have tended to create the impression upon the minds of the jurors that it was the duty of the appellant, notwithstanding that he was upon his own premises, where he had the lawful right to be, to retreat from any assault then being made or threatened by the deceased; and this impression is strengthened by the fact that the instruction requested by the appellant and refused by the court contained a correct statement of the law upon the subject, as laid down by the supreme court of the United States in the case of Beard v. U. S., 15 Sup. Ct. 962, and supported in Baker v. Com. 98 Ky. 302, 19 S. W. 975; Runyan v. State, 57 Ind. 80, 2 Am. Cr. Rep. 318; Miller v. State, 74 Ind. 1; Erwin v. State, 29 Ohio St. 186, 2 Am. Cr. Rep. 251; Bohannon v. Com. 8 Am. Rep. 474, 38 Bush. 481; White v. Territory, 3 Wash. T. 397, 19 Pac. 37; Williams v. State, 30 Tex. App. 429, 17 S. W. 1071; Fields v. State, 134 Ind. 46, 32 N. E. 780."



that the circumstances were such as to excite the fear of a reasonable person that the deceased intended to take his life or do him great bodily harm, and also that the defendant really acted under the influence of these fears, and not in a spirit of revenge.<sup>95</sup>

(c) No duty rests upon a person to retreat from a room which he has rented and is occupying as a bedroom, but he may stand his grounds therein, and defend himself even to the death of an adversary who is, or reasonably appears to be about to kill him or inflict grievous bodily harm upon him. No duty rests upon a person to retreat from a room which he has rented and is occupying as a bedroom, by himself and family, but he may stand his ground therein and defend himself and family even to the death of an adversary, who is, or reasonably appears to be about to kill him, or inflict grievous bodily harm upon him or any member of his family.<sup>96</sup>

§ 4747. **Error to Omit Duty of Retreat in Instruction to Acquit.** (a) The court charges the jury that if the defendant did not provoke or encourage the difficulty, but approached the deceased in an orderly and peaceful manner, and the deceased replied angrily and insultingly, and advanced towards the defendant, and placed his hands behind him in such manner as to indicate to a reasonable man that his purpose was to draw a pistol and fire, the defendant was authorized to anticipate him and stab him; and the rule in such case would not be raised if it should turn out that the deceased was in fact, unarmed, as the law of self-defense does not require the defendant to wait until the weapon is presented ready for deadly execution.<sup>97</sup>

95—*Willis v. State*, 43 Neb. 102, 61 N. W. 254 (258).

"The rule of the common law that to justify a party assaulted in taking the life of his assailant he 'must retreat to the wall' is not applicable to the facts of this case. That rule probably had its origin in an age before the use of firearms and gun-powder became general. The common-law rule, however, is a general one, and varies with the circumstances of each case. If the encounter between B. and W. had taken place in an open field or in a street, the instruction of the court would have been less objectionable, and less prejudicial to the plaintiff in error. W. was in his own house, engaged in the pursuit of his business; and to say to the jury that when B. approached him with threatening gestures, if W. honestly believed that B. was then about to shoot him, or make an assault upon him which might result in seriously injuring him or depriving him of his life, at that moment it was his duty to endeavor to escape, was equivalent to telling the jury that it was the duty of W. at the time to fly, though by so doing his danger might be augmented."

96—*Golson v. State*, 124 Ala. 8, 26 So. 975 (978).

"The charges were written on one and the same piece of paper and the presiding judge wrote across the paper 'Refused' and signed his name. In such case each

charge must be good, or the exception fails. *Horn v. State*, 98 Ala. 24, 13 So. 329. Both of these charges however are bad in ignoring the guilt of the defendant in precipitating the difficulty."

97—*Sullivan v. State*, 102 Ala. 135, 15 So. 264 (267), 48 Am. St. 22.

The court said that this might "find support in charges which were pronounced correct in *De Arman's Case*, 71 Ala. 351, but in view of the more recent rulings the city court properly refused to give it. When an assault is made on a sudden quarrel, and a mutual combat ensues, retreat, if possible to avoid the threatened danger is a duty; for, as was said in *Com. v. Drum*, 58 Pa. St. 91, 'when it comes to a question whether one man shall flee, or another shall live, the law decides that the former shall flee rather than that the latter shall die.' *Eiland v. State*, 52 Ala. 322; *Pierson v. State*, 12 Ala. 149. There may be cases of murderous assault, or of assaults with intent to commit other atrocious felonies, from which it is not the duty of him who is assailed to retreat, or employ any other effort to avoid taking life; but in all cases of sudden combat, to establish excusable homicide in self-defense, it must appear that the party killing had retreated—had made real effort to avoid the necessity of taking life. Any instruction to the jury in such case, though it may assert every other fact essential to constitute homi-

(b) It is not necessary that there should be actual danger of death or great bodily harm in order to justify the taking of human life; but if the jury are satisfied from all the evidence in the case, that the circumstances attending the firing of the fatal shot were such as to impress G., the defendant, with a reasonable belief that at the time of firing the shot it was necessary in order to prevent death or great bodily harm to his person, then they must acquit the defendant, unless they further believe that the defendant was not free from fault in bringing on the difficulty.<sup>98</sup>

(c) If the jury believe from the evidence that the defendant was not free from fault in bringing on the difficulty, but abandoned the same in good faith, and after such abandonment that the defendant at the time of the fatal act was surrounded by such circumstances as to have created in his mind a reasonable belief, well founded and honestly entertained, of his own present and immediate, imminent peril, and of an urgent necessity to take the life of his assailant, as the only alternative [means] of saving his own life or preventing grievous bodily harm (and of the existence of these facts the jury are the judge), then they must acquit.<sup>99</sup>

**§ 4748. All Other Means Need Not be Resorted to Before Killing.**

(a) You are further instructed that the defendant, in addition to his plea of not guilty, interposes the plea of self-defense; and upon this issue, and as the law governing the same, you are instructed as follows: Homicide is justifiable in the protection of the person from an unlawful and violent attack, and in such case all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the act of making such unlawful and violent attack, or while the person killed is doing some hostile act or making some hostile demonstration that would, viewed from the standpoint of the slayer, produce in his mind a reasonable fear of death or some serious bodily injury.<sup>100</sup>

cide in self-defense, which does not necessitate the inquiry whether retreat or other effort to avoid the taking of life was practicable is properly refused."

98—Goodwin v. State, 102 Ala. 87, 15 So. 571 (575).

Held properly refused for omitting duty of retreat. "It seems to be a copy of one refused in the case of Keith v. State, 11 So. 914, 97 Ala. 32, which was there held to be a proper one, and its refusal error. We have other and some later adjudications, however, which make that an erroneous ruling. There was no error in the refusal of the court to give said charge, Sullivan v. State, 102 Ala. 135, 15 So. 264, 43 Am. St. 22; Holmes v. State, 100 Ala. 80, 14 So. 864; Webb v. State, 100 Ala. 47, 14 So. 865; Gibson v. State, 89 Ala. 121, 8 So. 98, 18 Am. St. 96." To the same effect see Bondurant v. State, 25 Ala. 31, 27 So. 775 (777); Goodwin v. State, 102 Ala. 87, 15 So. 571.

99—Ford v. State, 129 Ala. 16, 30 So. 27 (29). Citing Gilmore v. State, 126 Ala. 20, 28 So. 595.

"Faulty in not including in it the element of retreat."

100—Casner v. State, 42 Tex. Cr. App. 118, 57 S. W. 821 (825).

"It is not the law of this state that 'all other means must be resorted to,' where defendant justifies a killing on the ground of self-defense, in order to prevent injury. If appellant killed deceased, and at the time he killed deceased, without any unlawful act on appellant's part, deceased was attempting to kill defendant, or it reasonably appeared to defendant, viewed from his standpoint alone, by words, or acts, or by both words and acts, that deceased was about to make an unlawful attack upon the person of appellant, then in that event appellant would have the right to use whatever means were reasonably necessary to protect his life or his person from serious bodily injury. And this would be the case although it might subsequently appear that appellant used more force and more violent means than were necessary to protect his life. In other words, appellant has a right to act upon danger or reasonable appearance of danger."

(b) The court instructs the jury that if they believe from the evidence that at the time that accused struck S. a blow or blows that caused his death, if he did strike him a blow or blows, with a stick or bludgeon, and that said blow or blows directly caused said S.'s death, he (defendant) believed, and had reasonable grounds to believe, that he was in impending danger of death or great bodily harm at the hands of said S., and that he had no means of avoiding such danger or apparent danger, they will acquit him.<sup>1</sup>

(c) But a man should never resort to violence in self-defense until necessary. It is a man's duty as a good citizen, to preserve the peace; and, when he finds he is in danger of being attacked in any way, it is his duty as a good citizen, to try every other means, first by retiring, withdrawing from the scene, or by remonstrance, or by calling in assistance; but still whenever the emergency is so quick and the danger is so present that there is no time left for anything of that kind, and you can't withdraw in season, and if you think you are liable to be hit in the back if you do withdraw, or are liable to be hit before an officer comes up, and a remonstrance will do no good, then, in self-defense of your person and in self-respect, you are authorized to strike the first blow in order to prevent an assault on you.<sup>2</sup>

**§ 4749. Defendant's Right to Fire First.** The court charges the jury that, if the defendant approached the deceased in a quiet and orderly manner; that deceased replied to him in an angry manner, and knocked defendant down; and that defendant reasonably and honestly believed that deceased struck him with a pistol, and reasonably and honestly believed that deceased had a pistol in his hand as defendant arose after he was knocked down, and that his purpose was to do defendant serious bodily harm, and the circumstances were such as to reasonably produce such belief in defendant's mind, situated as defendant was at the time, and no reasonable and safe avenue of escape was open to defendant, then defendant had the right to anticipate his assailant and fire first; and this rule would

1—Austin v. Commonwealth, 28 Ky. L. 1087, 91 S. W. 267.

"Under it, before he could strike in defense of his person, there must have been no other means of 'avoiding' the danger to himself. This is not the law.

"The instruction is open to another serious objection: It deprives the accused of his judgment in the matter of safely averting the real or apparent danger to himself, and rests that question solely with the jury. It might have been that he could safely have averted striking decedent. In the light of subsequent events, and sitting quietly in judgment on the matter, with ample time to weigh and reflect upon the whole situation, the jury might well have concluded that the accused had a safe way of avoiding or averting the danger (real or apparent) to him. But that is not the correct test. It was whether there was a safe way, as it then appeared to the accused in the exercise of a reasonable judgment to have averted

striking or killing S. The jury instead of viewing the situation wholly from their point of view, should have been instructed to consider it from the situation and under the circumstances in which the accused was then placed. Bohannon v. Commonwealth, 8 Bush 482, 8 Am. Rep. 474; Hollaway v. Commonwealth, 11 Bush 350; Pace v. Commonwealth, 89 Ky. 204, 19 Ky. L. 474, 12 S. W. 905; Utterback v. Commonwealth, 22 Ky. L. 1011, 59 S. W. 515, 60 S. W. 15; Barnes v. Commonwealth, 22 Ky. L. 1802, 61 S. W. 733."

2—State v. Carver, 89 Me. 74, 35 Atl. 1030 (1031).

"That a man when assaulted should be required to flee cowardly from danger, and not assert a manly self-defense, necessary for his protection, does not seem to comport with the laws of a free and enlightened people, and, as said by the supreme court, we cannot give our assent to such doctrine. Beard v. U. S., 158 U. S. 550, 15 S. Ct. 962, 9 Am. Cr. Rep. 324."



not be changed even though it should turn out that defendant was mistaken as to his belief that deceased had a pistol in his hand.<sup>3</sup>

§ 4750. **Assuming that a Revengeful and Unlawful Purpose Existed When the Evidence Does Not Show It.** You are instructed that a party charged in the unlawful killing of a human being cannot avail himself of the claim of necessary self-defense, or defense of family, if the necessity for such defense was brought on by his own deliberate wrongful act. Therefore, if the jury believe from the evidence that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased for the purpose of wreaking vengeance upon him, or to accomplish some unlawful purpose, or if the jury should find and believe from the evidence, beyond a reasonable doubt, that he killed the deceased at a time when he had, because of the acts of the deceased, or those with the deceased, no reasonable apprehension of immediate and impending injury to himself or family, and did so to accomplish some unlawful purpose, or did it from a spirit of retaliation or revenge, then the defendant cannot avail himself of the law of self-defense. If, from all of the evidence, they should find, beyond a reasonable doubt, that the defendant had no reason to believe that the deceased intended to take the life of his father, or inflict upon him great bodily harm, and that the defendant struck the fatal blow in revenge, or in a reckless spirit, the defendant was not entitled to claim exemption from punishment on the ground of self-defense, or defense of his father.<sup>4</sup>

§ 4751. **Instructions In Words of Statute Not Always Correct.**

(a) The court instructs the jury in the language of the statute, if a person kill another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm the killing of the other was absolutely necessary, and it must appear also that the person killed was the assailant, or that the slayer had in good faith endeavored to decline any further struggle before the mortal blow was given.

(b) Justifiable homicide is the killing of a human being in justifiable self-defense, or in the defense of habitation, property, or person against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like upon either person or property, or against any person or persons who manifestly intend and endeavor in a violent, riotous or tumultuous manner to enter the habitation of an-

3—Held argumentative and defective, also, in failing to include all the constituent elements of self-defense. *Campbell v. State*, 133 Ala. 81, 31 So. 802 (804), 91 Am. St. 14. Citing *Gilmore v. State*, 126 Ala. 20, 28 So. 595; *Bon Durant v. State*, 125 Ala. 31, 27 So. 775; *Compton v. State*, 119 Ala. 24, 26 So. 119; *Stone v. State*, 105 Ala. 60, 17 So. 114; *Fountain v. State*, 98 Ala. 40, 13 So. 492; *Roden v. State*, 97 Ala. 54, 12 So. 419.

4—*Parker v. State*, — Neb. —, 108 N. W. 121 (122).

"The tendency of the instruction was to lead the jury to believe that

there was some evidence from which the element of hatred, revenge or ill will could be attributed to the accused, and thus deprive him, as stated by the court, of the right of self-defense or defense of his father. The instruction complained of is in almost the identical language which we disapproved in the case of *Blair v. State*, 72 Neb. 368, 100 N. W. 809, where it was said: 'It is a well settled rule that the instruction must be based on the evidence, and where an instruction has been given, without any testimony to support it, and prejudice results thereby, it is reversible error.'

other for the purpose of assaulting or offering personal violence to any person dwelling or being therein. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.<sup>5</sup>

**§ 4752. Self-Defense—If Plea of, Made Out, Jury Must Be Ordered, Not Merely Permitted, To Acquit.** If you believe from the evidence that, at the time the defendant fired the fatal shot or shots which killed the said M., the defendant acted under the belief that he was in danger of immediate death or great bodily harm at the hands of said M., and that the circumstances, including the mental condition of the defendant at the time, were such as to induce such belief in the mind of an ordinarily prudent person under the same circumstances, and that the defendant was under the reasonable belief of the necessity of firing the said shot or shots in order to avoid death or great bodily harm, you will be justified in finding the defendant not guilty.<sup>6</sup>

**§ 4753. Ignoring the Theory of Self-Defense Held Erroneous.** You are instructed that if one whose mind is cool and calm, although smarting under indignity previously inflicted upon him deliberately plans to take the life of another, and in pursuance of such determination meets such person and kills him, he would be guilty of murder, no matter if at such meeting his life became in danger. Therefore, if the jury find from the evidence that the deceased, L., threatened to kill the defendant, P., or do him serious bodily injury, or in any other way mistreated him; and if you further find that because of such conduct the defendant deliberately determined to kill L., and that when he formed such determination his mind was cool and calm,

5—Healy v. People, 163 Ill. 372 (383), 45 N. E. 230.

"These instructions are mere transcripts of sections 148 and 149 of the Criminal Code, and are correct as abstract propositions of law where self-defense or justifiable homicide is relied upon as a defense to the indictment. They were not only wholly inapplicable to the case at bar, but were calculated to lead the minds of the jury away from the defense as made to another not attempted and in support of which no evidence whatever was offered. . . . It has been held times without number that it is not error to refuse instructions which contain mere abstract propositions of law. It is also true that as a general rule it is not error to give them. Ryan v. Donnelly, 71 Ill. 100; Upstone v. People, 109 Ill. 169; but instructions should be based upon the evidence. Coughlin v. People, 18 Ill. 266, 68 Am. Dec. 541; Belk v. People, 125 Ill. 584, 17 N. E. 744. If they are not based upon the evidence, and also tend to mislead the jury to the injury of the party against whom the verdict is rendered, the judgment will be re-

versed, although they are correct as abstract propositions. 11 Am. & Eng. Ency. of Law 248; Beaver v. Taylor, 1 Wall. 637; State v. Bailey, 57 Mo. 131."

6—State v. Nelson, 65 Kas. 689, 70 Pac. 632.

Reversing a conviction on account of the above instruction, the court said: "Instead of giving the jury permission to find the defendant not guilty under such circumstances, there should have been a clear and unequivocal direction to acquit. In a prosecution for murder, it is important that the charge should be so explicit and accurate as not to mislead the jury as to the law of the case, or leave them in doubt as to their duty. . . . It is true, as the state claims, that in another instruction the court directed an acquittal where certain elements of the crime were not established, but the one criticised was the only one which applied the law of self-defense to the defendant; was the only one which presented the doctrine that one assailed could act on apparent danger of his life, and on the belief of the necessity of firing the fatal shots for the protection of himself."

and in a condition to understand and comprehend the nature of the act and its probable consequences; and if you further find that in pursuance of such determination, if any, the defendant, P., on learning that L. was approaching the storehouse, armed himself; and if you further find that when L. arrived where defendant was, the defendant shot and killed L., in pursuance of a determination previously formed in his mind, if any, then he would be guilty of murder.<sup>7</sup>

§ 4754. **Hypothesizing Instructions On Fragments of the Evidence.**

(a) The court instructs you that in order to justify shooting C., it is only necessary that the evidence should show that from C.'s conduct at the time of the shooting the defendant reasonably appeared to be in danger of serious bodily harm at his hands; and, if your minds are in doubt on the evidence as to whether this was so, it is your duty to find a verdict for the defendant.

(b) You should not try the defendant in the light of after-developed facts, nor should you hold him to the same calm, deliberate judgment which you are now able to form, but you should, as nearly as possible, put yourselves in his place, and judge of his acts, situated as he was, and confronted as he was, and remember that he had a perfect right to kill C. if appearances reasonably indicated that his own life was in peril, whether C. was armed or not.

(c) If you believe from the evidence that it is reasonably doubtful as to whether or not C. struck defendant a blow with his fist, and then threw his hand behind him as if to draw a pistol, and that then defendant shot him because he reasonably believed his life in peril at C.'s hands, it is your duty to promptly acquit him.

(d) It is wholly immaterial whether C. was armed with a pistol or not. If he pretended by his conduct that he was, and it reasonably appeared to defendant that he was attempting to draw it, and shoot him, then he had as much right to shoot C. as if C. had in fact had a pistol; for the law will justify killing a man who tries to bluff and frighten his adversary by pretending that he has and is about to draw a pistol as certainly as it does killing one who really has and is about to draw a pistol and shoot.

(e) The jury are the sole judges of the facts of the case, and alone have the right to say from the whole evidence whether the defendant is guilty or not, and if you believe from the evidence in the case that the shooting was done at a time when it appeared to a reasonable man that G.'s life or limb was in danger, you must acquit him.

(f) Shooting a man with a deadly weapon with intent to kill and murder is justifiable under the law when done in necessary self-defense, and if you believe from the evidence that at the moment of the shooting it reasonably appeared from the movements and conduct of C. that G.'s life or limb was in serious danger at his hands you must acquit.<sup>8</sup>

7—Pratt v. State, — Tex. Cr. App. —, 96 S. W. 8 (9).

"This charge should not have been given in the manner it was. It is not correct to give such a charge to the jury where the facts raise the issue of self-defense, unless the charge as given is limited by the

law of self-defense. In other words, this charge is wrong because, as given, it authorized a conviction of appellant independent and outside of his theory of self-defense and ignores the testimony bearing upon that issue."

8—Godwin v. State, 73 Miss. 873,



§ 4755. **Self-defense—Need Only Raise, Not Prove Beyond, a Reasonable Doubt.** (a) If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, D., at the time the fatal shot was fired, was placed in such a situation that, as a reasonable man, he believed that a felonious assault was about to be perpetrated on him or his child—which would be the same thing—and that he acted under those fears at the time he shot, then his act would be guiltless; that is to say the law would justify that act.<sup>9</sup>

(b) If you do not believe from the evidence that defendant provoked the difficulty in question with the apparent intention of killing G., or doing him serious bodily injury, and if under foregoing instructions you find that said G. had no lawful authority to arrest defendant, and that defendant knew of such want of authority to make such arrest; and if you further believe from the evidence that immediately prior to the time defendant began firing at G., he, G., was attempting to arrest defendant, and that said attempt aroused in defendant sudden passion, as sudden passion is above defined, etc.<sup>10</sup>

(c) The burden is upon the defendant to reasonably satisfy your minds that he acted in self-defense, unless the evidence which proves the homicide, proves also the excuse of justification.<sup>11</sup>

(d) Before you can acquit the prisoner on the ground of self-defense, you must be satisfied. . . . that B. was the assailant; that he began the assault . . . and that B. manifestly and maliciously intended and endeavored to kill or do great bodily harm to the defendant. . . . You must be satisfied that the prisoner, in good faith, believed, and had reasonable grounds for believing, that he was in danger of losing his life or sustaining great bodily harm from the violence of B.<sup>12</sup>

19 So. 712 (713), 55 Am. St. 573.

The court said that the above "instructions asked by the appellant were properly refused. They too much narrow the issue before the jury, selecting fragmentarily only part of the facts necessary to any phase of the case stated in them. Besides, the first omits the word 'reasonable' before the word 'doubt.' In the second the words 'confronted as he was' are objectionable, as assuming that C. did 'confront' appellant throughout the difficulty. And the last declared that shooting a man 'with intent to kill and murder him' might be justifiable. The words 'and murder' must have been inadvertently inserted."

9—Dorsey v. State, 110 Ga. 331, 35 S. E. 651.

"If the evidence which he introduced, considered in connection with that for the state, was sufficient to raise a reasonable doubt of his guilt, he was entitled to an acquittal. Evidently the words 'beyond a reasonable doubt' were inadvertently used in this connection by the learned judge."

10—Vann v. State, 45 Tex. Cr. App. 434, 77 S. W. 813 (817).

"If there was a reasonable doubt upon either proposition, defendant was entitled to the benefit of it.

That is, the jury should be required to find beyond a reasonable doubt that defendant provoked the difficulty; and, if there was a reasonable doubt as to whether G. had the authority to arrest or not, appellant has the benefit of such doubt. But this charge solves both doubts adversely to defendant, and required the jury to find affirmatively that neither existed before they could give him the benefit of the law."

11—Ragsdale v. State, 134 Ala. 24, 32 So. 674 (677), citing Henson v. State, 112 Ala. 41 (46), 21 So. 79, "Placing too great a burden on defendant in establishing a plea of self-defense. A defendant is required to do no more for his acquittal, than raise a reasonable doubt of his guilt."

12—Foley v. State, 11 Wyo. 464, 72 Pac. 627.

Held erroneous because it puts the burden of proof on the defendant to establish his defense and requires a higher degree of proof than the law requires of the defendant in any criminal prosecution. "To 'satisfy' the mind, we think, the evidence must be such as to remove all reasonable doubt. The general definition of the word, as given in Webster's Dictionary, is 'to fill up the measure of a want of (a person

(e) Hence if you find from the evidence that the defendant, at the time and place in question, was assaulted by the said G., and that from the nature and character of the assault upon him it reasonably appeared to him, as a reasonably prudent, courageous, and cautious man, that he was about to suffer death or great bodily harm to himself by reason of the said assault, and that it further so appeared to him that the use of the gun in question was the only means of saving his life or preventing great bodily harm to himself, then he would be justified in using the gun.<sup>13</sup>

(f) Before such killing can be justified on the ground of self-defense it must appear to the reasonable satisfaction of the jury, from the whole of the evidence, that the defendant at the time of the shooting had reasonable cause to believe, and did honestly believe, that the deceased was about then to kill him (the defendant) or do him some great bodily harm, etc.<sup>14</sup>

§ 4756. **State Need Not Prove that Defendant Was Aggressor Beyond a Reasonable Doubt.** (a) The court charges the jury that the fact as to whether the defendant was the aggressor in bringing on the difficulty is just like any other fact in the case, and must be proved beyond all reasonable doubt.<sup>15</sup>

or thing),’ and more specifically ‘to free from doubt, suspense or uncertainty; to give assurance to; to set at rest the mind of; to convince.’ But even if the language employed does not necessarily require proof beyond a reasonable doubt, it is quite evident that it does impose upon the defendant the necessity of establishing his defense by something more than a preponderance of the evidence. So that if it should occur that the jury believed that the defense was supported by the weight of the evidence, but yet they were not satisfied of any of the necessary facts, it would be their duty, under this instruction, to find against the defendant on that issue. This is not the law, and we hardly see how the instruction could have failed to prejudice the defendant’s case. . . . The record indicates that the sole reliance of the accused was that the killing was in self-defense.”

13—State v. Usher, 126 Ia. 287, 102 N. W. 101 (102).

“The defendant admitted the killing and justified it on the ground of self-defense. It was therefore of the greatest importance to him that the jury be told that it must be satisfied beyond a reasonable doubt that he was not acting in self-defense when he killed C. State v. Donohoe, 78 Ia. 486, 43 N. W. 297; State v. Shea, 104 Ia. 724, 74 N. W. 687. There was a failure in this respect, and an instruction was given which may easily have been understood as placing the burden on the defendant.”

14—Zipperian v. People, 33 Colo. 134, 79 Pac. 1018 (1020).

“It is not incumbent upon the defendant in a criminal case, either

by his own evidence or that of the people, or both combined, to prove anything to the satisfaction of the jury. It is sufficient to sustain the plea of self-defense, if the defendant, by any evidence in the case, succeeds in raising a reasonable doubt in the minds of the jury of the truth of any essential element of the charge made against him.” See also Boykin v. People, 22 Colo. 496, 45 Pac. 419 (422); Kent v. People, 8 Colo. 563 (581), 9 Pac. 852; Babcock v. People, 13 Colo. 515 (523), 22 Pac. 817; Brooke v. People, 23 Colo. 375, 48 Pac. 502; McNamara v. People, 24 Colo. 61, 48 Pac. 541; Van Straaten v. People, 26 Colo. 184, 56 Pac. 905; Alexander v. People, 96 Ill. 96; Wacaser v. People, 134 Ill. 438, 25 N. E. 564, 23 Am. St. 683; Smith v. People, 142 Ill. 117 (122), 31 N. E. 599; Trumble v. Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384.

15—Pugh v. State, 132 Ala. 1, 31 So. 727 (729).

“On a trial for murder it is not necessary for the state in making out its case, to prove that the defendant was at fault in bringing on the difficulty at all, until the defendant has shown that he was in imminent peril, etc., and could not retreat without increasing his peril. This charge refused to the defendant would have required an acquittal upon failure of the state to prove that the defendant was at fault in bringing on the difficulty, although the jury may have found that he was in no danger real or apparent, when he fired the fatal shot, or that being in danger, he could have retreated without increasing his peril.”

(b) The court charges the jury that if, after looking at all the evidence in the case your minds are left in such a state of uncertainty that you cannot say beyond a reasonable doubt, whether the defendant was at fault in bringing on the difficulty, and whether he acted upon the well grounded and reasonable belief that it was necessary to shoot and take the life of Y., to save himself from great bodily harm or death, or he shot before such impending necessity arose, then this is such a doubt as will entitle the defendant to an acquittal.<sup>16</sup>

§ 4757. **Killing By Son to Protect His Father.** (a) If J. made an unlawful attack upon G. with his fist or hands, and in resisting such he was shot by G., and [J.'s son] defendant, in order to protect his father, J., from being killed, or from having serious bodily injury inflicted on his father by G., shot and killed G., then such killing would be manslaughter, etc.<sup>17</sup>

(b) But if the jury believe and find from the evidence that on \_\_\_\_\_ at \_\_\_\_\_, etc., one S., father of the defendant, began the quarrel or provoked the difficulty with the deceased, O., or voluntarily entered into a difficulty with the said deceased, yet if they also believe from the evidence that this was done by the said S. without any felonious purpose, and that thereupon the deceased attacked the said S., father of the said defendant, and that the said defendant was compelled, in order to save the life of the said S., or to save him from great bodily harm, to take the life of the said deceased, and that said defendant did, under such circumstances, shoot and kill said deceased, at \_\_\_\_\_, etc., within three years before the filing of the indictment in this cause, you will find the defendant guilty of manslaughter in the fourth degree.<sup>18</sup>

§ 4758. **Defense of Daughter By Father.** A man has the same right to protect the honor of his home and family as to protect his own life; and if you believe from the evidence that A. reasonably believed that a criminal assault was being made on his daughter, and that he fired on her assailant in her protection, you would be justified in finding him not guilty.<sup>19</sup>

16—Held argumentative and properly refused. *Campbell v. State*, 133 Ala. 81, 31 So. 802 (804), 91 Am. St. 14, citing *Gilmore v. State*, 126 Ala. 20, 28 So. 595; *Bondurant v. State*, 125 Ala. 31, 27 So. 775; *Compton v. State*, 110 Ala. 24, 20 So. 119; *Stone v. State*, 105 Ala. 60, 17 So. 114; *Fountain v. State*, 98 Ala. 40, 13 So. 492; *Roden v. State*, 97 Ala. 54, 12 So. 419.

17—*Johnson v. State*, 42 Tex. Cr. App. 298, 59 S. W. 269 (270), 51 L. R. A. 272.

"We take it to be a correct rule of law that, if J. made an unlawful attack upon G. with his fist or hands, intending no deadly assault, and appellant had knowledge thereof, and was a party thereto, and G., in resistance to said assault, drew a pistol, and was about to kill J., and defendant, in order to protect J. from being killed or from serious bodily injury, shot and killed deceased, then this would be

manslaughter, because appellant was a party to the original unlawful attack by J. on deceased. As stated, this charge is defective only on account of the court assuming knowledge of the unlawful assault on the part of appellant, and his participation therein. But, as we understand, this particular objection is not pointed out in the motion for a new trial."

18—To make the killing justifiable it is not necessary that defendant be "compelled" to kill. It is required only that the killing was apparently necessary. *State v. Harper*, 149 Mo. 514, 51 S. W. 89 (91); *State v. Palmer*, 88 Mo. 568; *Nichols v. Winfrey*, 79 Mo. 544; *Morgan v. Durfee*, 69 Mo. 469.

19—*Bradham v. State*, 41 Fla. 541, 26 So. 730 (731).

Held erroneous "because of the omission of the idea that to justify the taking of human life by a parent in defense of his child, under



§ 4759. **Husband Striking In Defense of His Wife.** If you believe from the evidence that defendant did not know who was to blame—his wife or Mrs. K.—in bringing on the difficulty between them, and not knowing this, saw K. striking his wife, or attempting to strike her with a stick, and that his wife was in apparent danger of losing her life or danger of great bodily harm, then defendant had a right to strike K. and you should find him not guilty.<sup>20</sup>

§ 4760. **Killing In Defense of Sister Need Not Be Proven "Necessary."** I charge you, under the law as applicable to the evidence in the case, that a brother has the right to protect his sister, and may justify any defense made by him for the purpose of protecting her life. In order to justify himself for a homicide in defense of his sister, it must not be for the purpose of avenging any wrong that had been perpetrated upon his sister. Apply this principle of law to the case. If you conclude from the evidence that the deceased made an assault upon the defendant for the purpose of protecting the life of his sister, and it was necessary for him to do so to save the life of his sister, he would be justified under the law; and what was justifiable on the part of the deceased, in defending his sister cannot be legal provocation to the defendant and would not justify him in taking the life of the deceased.<sup>21</sup>

§ 4761. **Self-defense—Defendant Attacking Another to Protect a Woman Not Estopped to Plead.** If the jury believe, from all the evidence, to the exclusion of a reasonable doubt, that the accused, B., provoked the difficulty in which the deceased H. lost his life, if he did so, by wrongfully and illegally assaulting the deceased, H., and the danger to the accused mentioned in the instruction, if any such existed, was caused by H.'s repelling such wrongful and illegal assault made on him by the accused, B., if such there was, and in repelling said assault, deceased, H., used no more or no greater force than was reasonably necessary to defend himself from same, then the plea of self-defense will not avail the accused in this case.<sup>22</sup>

the circumstances hypothesized in the instruction, it must have appeared to the parent that the assault upon his child would have resulted in her death, or in great bodily harm to her, unless he took the life of her assailant." Besides every assault is a "criminal assault."

20—Sherrill v. State, 133 Ala. 3, 35 So. 129 (130).

Held bad. "The defendant's right to strike depended on the right of his wife to strike regardless of who brought on the difficulty."

21—Rooks v. State, 119 Ga. 431, 46 S. E. 631 (632).

"Clearly, this charge gave to the state the benefit of a theory which was not authorized by the evidence, and the evidence of the guilt of the accused was not so convincing as that it can be said that the charge set out was harmless. While the state made out its case, the accused on his part introduced evidence which if believed by the jury, would have authorized his acquittal. This being true, the error pointed out in the charge which has been quoted

will require a reversal of the judgment overruling the motion for a new trial."

22—Brown v. Commonwealth, 21 Ky. L. 245, 51 S. W. 171 (172). Citing Allen v. Commonwealth, 86 Ky. 648, 6 S. W. 648; Wilcox v. Commonwealth, 15 Ky. L. 261, 23 S. W. 195; Martin v. Commonwealth, 93 Ky. 189, 19 S. W. 580.

"This instruction allowed the jury to infer that the appellant had no right to go to the rescue of the woman who was being assaulted by the deceased. They might have concluded that it was wrong for him to approach the deceased, and tell him not to hit her. The language of the instruction denies the appellant his right to have slain the deceased in self-defense 'if he provoked the difficulty . . . by wrongfully and illegally assaulting deceased, H.' etc. The jury doubtless concluded that the accused had no right to appeal to the deceased not to hit the woman, or to rescue her from an impending danger at the hands of the deceased, and

§ 4762. **Killing in Defense of the Domicile.** (a) An assault on the house can be lawfully resisted to the extent of killing the assailant or assailants only in case the assault is made with the intent either of taking the life of the inmate or of doing him great bodily harm, and that such resistance was necessary to prevent such crime, or in case the inmate, acting honestly, had reason to believe from the acts, facts and circumstances, and in fact did believe, that it was necessary to prevent the commission of the crime.<sup>23</sup>

(b) Every man has the right to defend his home from any illegal invasion that threatens his children, his wife or his family with personal injury, or great moral wrong.<sup>24</sup>

(c) If you shall believe from the evidence beyond a reasonable doubt that defendant, either by himself or acting with the other defendants, killed deceased, C.; but if you further believe that, at the time of said killing, deceased, or others acting with him, was attempting to enter the house where defendant resided, without the consent of defendant; or that just before the killing he, or others acting with him, had so attempted to enter said house, or that defendant had reasonable grounds to believe that deceased, or others acting with him, had so attempted, or was so attempting to enter said house, and would renew said attempt—then defendant would be justified in killing deceased, and you will acquit him; unless you shall further believe that in so doing defendant used more force than was necessary, or than might reasonably appear to them necessary, to prevent said entrance; and, in determining whether more force was used than was necessary, you should view said act or acts from the standpoint of defendant alone; but in no event, if you so believe, could you find defendant guilty of a higher grade of offense than manslaughter.<sup>25</sup>

therefore his conduct was wrongful and illegal; hence, under the instruction, must have concluded he provoked the difficulty. Such being the case, the jury necessarily reached the conclusion that he was not entitled to the law of self-defense."

23—*Thompson v. State*, 61 Neb. 216, 85 N. W. 62 (63), 87 Am. St. 453.

"The doctrine of this instruction is not, we believe, sustained by any adjudged case, although there are dicta in the opinions of courts, and expressions in the text books on Criminal Law, that seem to give countenance to it. The true rule undoubtedly is that a man may defend his domicile, even to the extent of taking life, if it be actually or apparently necessary to do so in order to prevent the commission of any felony therein. *Semayne's Case*, 5 Coke 91; *Fost. Crown Law* 273; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Wright v. Com.*, 85 Ky. 123, 2 S. W. 904; *State v. Taylor*, 143 Mo. 150, 44 S. W. 785. Whether this is the precise limit of the domiciliary right, it is not here necessary to determine; but, if it is the limit, then popular sentiment is not in accord with the law."

24—*State v. Powell*, 109 La. 727, 33 So. 748 (750).

"The judge said in part in refusing this charge: This statement is so broad and comprehensive in terms that it appears ambiguous and uncertain, and does not convey an exact or adequate conception of any particular principle of law. However, there is no principle of law which may be considered as covered thereby which is applicable to the issue involved in this case."

25—*Allen v. State*, — Tex. Cr. App. —, 66 S. W. 671 (675).

"We do not think the court erred in failing to give this charge. If appellant shot deceased upon sudden impulse aroused from adequate cause, which cause had produced sudden rage, resentment or terror in his mind, thereby rendering the same incapable of cool reflection, and this last condition existed at the time of the shooting, then appellant would be guilty of manslaughter. If appellant shot deceased while deceased and other parties were making unlawful assaults upon his house, trying to break into the same for the purpose of inflicting death or serious bodily injury upon defendant, and he thought it necessary, viewing the surroundings from his standpoint, to shoot to protect himself from serious bodily injury at the hands of the deceased and the other

§ 4763. **Homicide—When Allowable to Prevent Intrusion on Defendant's Premises.** But if you shall believe that deceased and R. had gone to the house where defendant, A., was staying, not for the purpose of investigating such threats reported to have been made by said defendant, and preventing by lawful means the carrying out of such threats, but for the purpose of doing unlawful violence to said A., and had made an unlawful and violent attack on said house, then defendant had the right to defend himself from such an unlawful and violent attack, either upon himself or in preventing or interrupting such unlawful intrusion upon such premises, but would be required to resort to all other means within his power to prevent such unlawful violence upon his person, or unlawful intrusion on said premises, except to retreat; and if defendant, A., in shooting and killing deceased, resorted to all the means within his power, or from all the facts and circumstances surrounding him at the time, and viewed from his standpoint at the time, reasonably appeared to him was within his power, to protect himself from such unlawful violence, or preventing or interrupting such unlawful intrusion upon such premises before shooting deceased, and that defendant in shooting deceased used no more force than was necessary, or from all the facts and circumstances surrounding him at the time, and viewed from his standpoint at the time, reasonably appeared to him was necessary to protect himself from such unlawful violence, reasonably apprehended by him, or to prevent or to interrupt such unlawful intrusion upon such premises, then defendant, A., would be justified, and you will acquit him, and also in such case you will acquit the other defendants. And in this connection you are instructed that, even if you should believe that deceased and R. went to the house in question for a lawful purpose, concerning which you have hereinbefore been instructed, but that defendant did not know of such lawful purpose on their part, and that the acts and conduct of deceased and R. were such as to create in the mind of defendant a reasonable apprehension that deceased and R. were there to make an unlawful and violent attack on him, or were making an unlawful intrusion on said premises, then defendant had the right to defend against such apparent intrusion to do violence to him, or such apparent intrusion on said premises, the same as if the same was real, and in considering these matters you will consider the same from the standpoint of defendant, and from no other standpoint.<sup>26</sup>

§ 4764. **Guest in House May Protect It from Invasion.** If the jury believe from the evidence that the deceased was in a house, not his own house, and that he was only boarding there temporarily, and

parties, and, so believing, he shot and killed deceased, then under the law he would not be guilty of any offense. As indicated in the charge of the court, if appellant shot merely to scare the parties away, and with no thought or expectation of injuring either one of them, he could not be guilty of any offense."

<sup>26</sup>—Allen v. State, supra.

"If appellant was defending his person from unlawful assault, he had the right to use whatever force

was necessary, as indicated above, viewed from his standpoint, that might be necessary to protect his life or person from serious bodily injury. Article 677, Pen. Code, contemplates that, if he is trying to protect his property, then he must resort to all other means to do so before slaying the party injuring or intruding upon his property. This distinction is clearly made in the statute and laid down by the authorities construing it."



that his house and where his family resided was at another place, then he could not be protected as being in his own house.<sup>27</sup>

§ 4765. **Defense of Property—Shooting Trespasser.** (a) If you believe from the evidence that the deceased was trespassing upon the premises of the defendant after the defendant had forbade his coming on his place, and at the time the defendant fired the gun he did not intend or expect to hit or injure the deceased, but merely to intimidate or frighten him away, but contrary to his reasonable expectations did wound the deceased, he is not liable for the result and you will acquit him.<sup>28</sup>

(b) The court instructs the jury that the owner or occupant of property, in the lawful possession of the same, has a right to use as much force as is necessary to prevent an unlawful and forcible trespass upon the same; and if they find that the defendant was standing upon his own ground, or upon ground of which he was in lawful possession, and that in attempting to force a passage over same, if they so find, the deceased, D., was violating the law and was a trespasser, with the intent and with the means of committing a felony, and was attempting to commit a felony against the person or property of the prisoner, then the defendant, as owner or occupier of the land, if they so find, might repel force by force, to the extent of killing the said D., if necessary so to do to prevent the commission of said felony, and such killing would be excusable.<sup>29</sup>

§ 4766. **Killing in Defense of Property—Defendant Not Limited to Force "Actually" Necessary.** The defendant, being in charge of the saloon, had a right to use force to quell a disturbance therein, and if, in so doing, he was assaulted by the deceased, had a right to repel such assault with reasonable force, and such as was necessary to accomplish that purpose, and no greater or other force than was actually necessary under all the circumstances.<sup>30</sup>

27—*Crawford v. State*, 112 Ala. 1, 21 So. 214 (223).

"The instruction was erroneous and was properly refused. The law has been long settled that a guest in a dwelling house is entitled to the protection the law affords to the owner or more permanent occupant. He may repel trespasses in and upon the house, or repel assaults, actual or menaced, as if he was under his own roof, and within his own doors. 1 Whart. Cr. Law 505; *Curtis v. Hubbard*, 1 Hill 336, 40 Am. Dec. 292; *People v. Hubbard*, 24 Wend. 369; *Scribner v. Beach*, 4 Denio 448, 47 Am. Dec. 265; *Gordon v. Clifford*, 28 N. H. 416."

28—*Lewis v. State*, 42 Fla. 253, 28 So. 397 (398).

"Properly refused. It erroneously holds out the idea that, because a party forbids another to come on his premises, he is entirely exempt from criminal responsibility if in carelessly and recklessly shooting at him with intent to frighten him off, he unexpectedly wounds and kills the trespasser."

29—*State v. Clark*, 51 W. Va. 457, 41 S. E. 204 (209).

"A bare trespass against the property of another not his dwelling

house, is not sufficient provocation to warrant the owner in using a deadly weapon in its defense, and if he do and with it kill the trespasser, it will be murder; and this though killing were actually necessary to prevent the trespass."

30—*Schmidt v. State*, 124 Wis. 516, 102 N. W. 1071 (1072).

"This was error. It is no less true that one assaulted is entitled to act upon his apprehensions, reasonably justified by the circumstances, in deciding as to the amount of force which he may use, than that such apprehension may justify him in using force at all; and to tell the jury that he may use no more force than is 'actually necessary' is as erroneous as to tell them that, before he can use force at all, the peril of an assault must be actually imminent, instead of merely imminent to his reasonable apprehension. *Perkins v. State*, 78 Wis. 551, 47 N. W. 827; *Richards v. State*, 82 Wis. 172, 51 N. W. 652; *Ryan v. State*, 115 Wis. 488 (502), 92 N. W. 271; *State v. Hickam*, 95 Mo. 222 (328), 8 S. W. 252, 6 Am. St. 54; *State v. Brooks*, 99 Mo. 144, 12 S. W. 633; *State v. Harper*, 149 Mo. 514 (528), 51 S. W. 89; 1 Bish. New Cr. Law, §§ 305, 874."

## CHAPTER CLXXXI.

### CRIMINAL—INTOXICATING LIQUORS.

See Approved Instructions, Chapter C, Vol. II.

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| <p>§ 4767. Not necessary for defendant to be the owner of the liquor.</p> <p>§ 4768. Place where the sale was consummated is material for conviction—Pecuniary interest or receiving profits from the transaction would constitute a sale.</p> <p>§ 4769. Evidence that some men could drink the liquor without feeling its effect, would constitute no defense.</p> <p>§ 4770. Either giving away or selling is sufficient to convict.</p> | <p>§ 4771. Liquor dealer is held responsible for the acts of his bartender even without his knowledge and against his express orders.</p> <p>§ 4772. It is not a trick or evasion to avoid the local option law of a party's residence that he goes to another county and sells his liquor—Connivance to evade the law.</p> <p>§ 4773. Sale by druggists, purchased for medicinal purposes but diverted to other uses.</p> <p>§ 4774. The reasonable doubt must be on the whole evidence.</p> |
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**§ 4767. Not Necessary for Defendant to Be the Owner of the Liquor.** (a) You are instructed that if the liquor in this case was not the property of defendant, then, under the evidence in this case, the defendant is not guilty of a sale of the liquor in controversy.

(b) If the liquor in this case was not the property of the defendant, then, under the evidence in this case, the defendant is not guilty of giving away the liquor in controversy.<sup>1</sup>

**§ 4768. Place Where the Sale Was Consummated Is Material for a Conviction—Pecuniary Interest or Receiving Profits from the Transaction Would Constitute a Sale.** (a) You are instructed that if you believe from the evidence, beyond a reasonable doubt, that in K. county, Texas, on or about the time alleged in the indictment, the defendant received from one B. the sum of one dollar and fifty cents, and in consideration thereof, agreed to order for the said B. one half-gallon of intoxicating liquor, to be shipped into G., K. county, Texas, and to be delivered by him to said B.; and if you so further believe that in pursuance of such agreement the defendant procured a half-gallon of intoxicating liquor to be shipped into G., and delivered the same to said B.; and if you further believe that the defendant was pecuniarily interested in such transaction, or received any profit therefrom—he would be guilty of selling intoxicating liquor. \* \* \* Or if you believe from the evidence, beyond a reasonable doubt, that at

<sup>1</sup>—In *Winter v. State*, 132 Ala. 32, 31 So. 717 (719), the court held that "it was not necessary to a conviction that the jury should find that the whisky was the property of the defendant. He would be equally

guilty if he had control of it, as agent or otherwise, and sold it or gave it away." See also *Winter v. State*, 133 Ala. 176, 32 So. 125; *State v. Fleming*, 86 Ia. 294, 53 N. W. 234.

the time such arrangement was made, if it were made, the defendant was acting as the agent of T. Drug Company, made this sale of intoxicating liquor for them in K. county, or aided them in making such sale, if any such were made, he would be guilty, whether he received any profit or not.<sup>2</sup>

(b) The court charges the jury that if the jury have a reasonable doubt growing out of the whole evidence or any part of it, whether the defendant sold the liquor to the witness or was interested in the liquor or the money thrown down by the witness, or whether the defendant acted merely as the agent of the witness in procuring the liquor for him, then the jury cannot convict him.<sup>3</sup>

§ 4769. **Evidence That Some Men Could Drink the Liquor Without Feeling Its Effect, Would Constitute No Defense.** If defendant kept "B. B.," and it was not in the least intoxicating, you should acquit; but if the B. B. was in fact beer, or intoxicating liquor, then the fact that some men could drink it without feeling the effects of the same will constitute no evidence for defense in this case. If it did intoxicate, or if it did contain as much alcohol as beer, which is intoxicating, then such B. B. was intoxicating; and, if defendant was concerned in keeping or selling the same, or keeping with intent to sell the same, you should convict.<sup>4</sup>

§ 4770. **Either Giving Away or Selling Is Sufficient to Convict.** (a) The jury before they are authorized to convict in this case, must believe from the evidence, and the evidence alone, that defendant either sold or gave away liquor as charged in the indictment; and in order to establish either charge, they must find from the evidence that he had control of the liquor at the time that witness A. got the liquor; and it is necessary for each juror to be convinced beyond a reasonable doubt whether defendant either sold or gave away the liquor, and if they so find he did either, then they must all agree as to whether he sold or gave away the liquor before they are authorized to convict.<sup>5</sup>

2—*Blasingame v. State*, — Tex. Cr. App. —, 85 S. W. 275 (277).

"This charge was objected to, among other things, that it authorizes a conviction regardless of where the sale was consummated. We think this objection was well taken."

3—*Winter v. State*, 133 Ala. 176, 32 So. 125 (126).

The above instruction was held bad for predicated an acquittal on a part of the evidence. See also *Nicholas v. State*, 117 Ala. 32, 23 So. 792; *Winter v. State*, 132 Ala. 32, 31 So. 717.

4—*State v. Lindoen*, 87 Ia. 702, 54 N. W. 1075.

"The language of this instruction cannot be approved. It is not true that if the beverage was intoxicating 'the fact that some men could drink it without feeling the effects of the same will constitute no evidence for defense in this case.' Proof of that fact would be evidence for the defense, but the meaning of the instruction is evidently that if the beverage was beer, or in-

toxicating, then the fact that some men could drink it without feeling its effects would not constitute a defense. The jury could not have believed that they were authorized to disregard evidence as to the effects of the beverage upon defendant's witnesses, unless they should first find that the beverage was in fact beer, or intoxicating. The term 'intoxicating liquor,' as used in our statute, includes beer. Code, § 1555. Therefore, if the jury found that the beverage was beer, or intoxicating, evidence that some men drank it without feeling its effects, even though true, could not have affected the verdict, and for that reason the erroneous part of the instruction was not prejudicial."

5—*Winter v. State*, 132 Ala. 32, 31 So. 717 (719).

"The statute is directed against the disposition of spirituous liquors, etc., by sale or gift. It was only necessary to a conviction that the jury should have believed beyond a reasonable doubt that the defendant either gave the whisky to A., or



(b) Under the statute, courts and jurors are required to so construe the law relating to the suppression of intemperance as to prevent evasion, and so as to cover the act of giving as well as selling by persons not authorized to sell; and if you find from the evidence that the defendant during the time in question gave intoxicating liquors to others, you should carefully scrutinize the transaction, to the end that such acts may not be used to cover violations of the law.<sup>6</sup>

§ 4771. **Liquor Dealer Is Held Responsible for the Acts of His Bartender Even Without His Knowledge and Against His Express Orders.** There has been some evidence given tending to prove that the applicant in this case has heretofore been granted a license to sell intoxicating liquors, in less quantity than a quart at a time, in the town of B., but that he intrusted the management of the business to a bartender; that said bartender violated the law in selling to persons in the habit of becoming intoxicated, and that he allowed parties to shake dice for the drinks in said place of business. A person to whom a license is granted is responsible for the manner in which the house is kept; but if he employs a competent and careful person as bartender, and gives him positive instructions that he is in all respects to comply with the law, and not to violate it, but, notwithstanding this, the bartender has, in the absence of the applicant, and without his knowledge, violated the law, this fact alone should not deprive the applicant of his right to a license.<sup>7</sup>

that he sold it to him, and not at all necessary that all the jurors should concur in finding that it was a sale or that it was a gift; nor, indeed, was it necessary for any one of the jurors to believe that the defendant sold the liquor, and did not give it away, or vice versa. Above charge is bad under this view."

6—*State v. Fleming*, 86 Ia. 294, 53 N. W. 234 (236).

"We think this instruction might well have been made clearer with respect to gifts and evasions of the law, although it is at least doubtful if any prejudice could have resulted in this case from the language used."

7—*Pelley v. Wills*, 141 Ind. 688, 41 N. E. 354 (355, 356).

"The question of fitness is one of fact, for the jury, not the court, to determine. *Hardesty v. Hine*, 135 Ind. 72, 34 N. E. 701. The fitness of appellee, who resided at a point remote from the place where he seeks a license to sell intoxicating liquors, and who intrusts his business to the management of a bartender, would be of small importance if he could avoid responsibility in the manner stated in the instruction. A liquor dealer is responsible for actionable injuries caused by sales of liquor made by his agent or servants, and it is no defense that such sale was made without his knowledge, or against his express orders. *Barnaby v. Wood*, 50 Ind. 405; *Keedy v. Howe*, 72 Ill. 135; *Worley v. Spurgeon*, 38 Ia. 465; *George v. Gobbey*, 128

Mass. 289, 35 Am. Rep. 376; 3 Am. & Eng. Enc. Law 258; *Carey v. Railway Co.*, 48 Am. Dec., note on p. 627; *Black, Intox. Liq.*, § 298. So, in this case, if the appellee's saloon was run in violation of the law, his agent selling intoxicating liquors to persons in violation of law, playing and permitting games of chance to be played in the saloon, he cannot avoid the effect of such conduct by merely showing that the bartender was a competent and careful man when he employed him, and that he gave him positive instructions to comply with the law, and not to violate it, and that such violations of the law were in his absence, and without his knowledge. The court well said, in the instruction, that 'a person to whom a license is granted is responsible for the manner in which the house is kept;' and it is equally true that such responsibility cannot be avoided by merely hiring a competent and careful man, and giving him instructions to obey the law. He must, in addition, at least, use proper care and diligence to see that the business is carried on by whoever he employs in the manner required by law. And whether the appellee had done this was a fact to be determined by the jury. It was the exclusive province of the jury to say what weight the facts stated in the instruction, if true, should have in determining the fitness of appellee to be intrusted with the sale of intoxicating liquors. It is clear that the court erred in giving said instruction.

§ 4772. **It is Not a Trick or Evasion to Avoid the Local Option Law of a Party's Residence That He Goes to Another County and Sells His Liquor—Connivance to Evade the Law.** (a) If you further believe from the evidence in this case that the defendant kept his whisky stored at his residence in P. county, and carried across the line in jugs to sell it, and that the same was done as a trick, device, or subterfuge to avoid the local option law in P. county, then, and in that event, you will find him guilty, and fix his penalty as above stated.<sup>8</sup>

(b) If you believe beyond a reasonable doubt that defendant and B. connived together to make a sale of intoxicating liquor to prosecuting witness, H., through the semblance of a loan from B. to the said witness, for the purpose of evading the law, and that such loan by B. to prosecuting witness was not in good faith, but was a subterfuge to evade the law, then such transaction would be a sale under the meaning of the law.<sup>9</sup>

§ 4773. **Sale by Druggists, Purchased for Medicinal Purposes, but Diverted to Other Uses.** The court instructs the jury that a pharmacist selling intoxicating liquor under a permit from the board of trustees of a village assumes all the hazards of the business, and makes the sale of such liquors at his peril. And if such pharmacist sells intoxicating liquor to one who purchased the same for the purpose of using it as a beverage, and who afterward does use it for such purpose, such a pharmacist is guilty of an unlawful sale of intoxicating liquor, even though such purchaser should falsely state that the liquor was wanted for medicinal purposes.<sup>10</sup>

Hardesty v. Hine, *supra*; Groscup v. Rainier, 111 Ind. 361, 12 N. E. 694; Bronson v. Dunn, 124 Ind. 252, 24 N. E. 749."

8—Duff v. Commonwealth, 24 Ky. L. 201, 68 S. W. 390.

"By this instruction the court erroneously assumed that the defendant may have violated the local option law of P. county by resorting to a trick, device, or subterfuge. It is true the statute makes one guilty who resorts to a trick or device in selling liquor to evade the local option law, but it cannot be said that the defendant does so violate the local option law of the county when he leaves that county and goes into another county and sells liquor. The act of selling takes place in another county, and if it be in violation of the law, he must be punished in the county where the sale took place. When a party lives in a county where local option prevails, and will not sell it in that county, but will go into another county and sell liquor, he cannot be said to be resorting to a trick or device to evade the local option law of the county in which he is domiciled. If that were true, then, if the local option law was in force in B. county, and one of its citizens should go to C. and sell liquor, he could be held to have violated the local option law in B. Our opinion is that the court erred in instructing the jury."

9—Randell v. State, — Tex. Cr. App. —, 90 S. W. 1012 (1013).

"In this charge the jury was authorized to find a connivance between the parties for the purpose of evading the law, and that such connivance was not in good faith, but a subterfuge. This charge assumes facts not proved as a basis of conviction, and requires appellant to disprove the assumed untestified facts."

10—Commonwealth v. Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; Commonwealth v. Gould, 158 Mass. 499, 33 N. E. 656; Owens v. People, 56 Ill. App. 569 (570).

"Under this instruction, no matter how honest the purpose of a druggist selling under a permit for medicinal purposes, he could be visited with punishment if a purchaser could by deception as to the intended use of the liquor induce a sale of it. The sale of liquor by a druggist holding a permit like the one in evidence is legal if he acts in good faith and under such circumstances as are sufficient to create in the mind of a reasonable man belief that the liquor is bought for a purpose authorized by the permit."

But see also State v. Costa, 78 Vt. 198, 62 Atl. 38, where the following instruction was given:

"If this preparation was bought and used as a beverage because of the intoxicating ingredient con-

§ 4774. **Sale or Gift—The Reasonable Doubt Must Be on the Whole Evidence.** (a) The court charges the jury that if the jury or any individual member of the jury have a reasonable doubt growing out of the evidence or any part thereof, that there was neither a sale nor a gift of the liquor by the defendant to the state's witness, the jury cannot convict.

(b) The court charges the jury that if there is a reasonable doubt growing out of the entire evidence or any part thereof, as to who owned or controlled the liquor, then, unless the evidence shows that defendant did or said something promoting the alleged sale or gift of the liquor, then the jury cannot convict.<sup>11</sup>

tained in it, it was a beverage, and an intoxicating beverage, within the meaning of the law."

The court said that the correct rule was "to the effect that, since it had a legitimate use as a medicine, its use as a beverage would not make the respondent liable, unless he kept it to sell for use as a beverage."

The court charged the jury that, "in determining whether or not this preparation, such as it was, was kept to be sold for use as a beverage, 'all the evidence in the case bearing upon the composition of the liquid and the medicinal properties of the various ingredients, the percentage of alcohol contained in it, its effect or lack of effect in the quantities testified to, whether it is pleasant or unpleasant to the taste, and what is shown regarding its use as a medicine,' was for the consideration of the jury. *Russell v. Sloan*, 33 Vt. 656; *Fabor v. Green*, 72 Vt. 117, 47 Atl. 391, and *State v. Kezer*, 74 Vt. 50, 52 Atl. 116, all cited by the respondent, were obviously and rightly treated as sound law and as still applicable to the extent to which the *Kezer* Case is held to be applicable in *State v. Krinski*, 78 Vt. 162, 62 Atl. 37; that is, the principle laid down in those cases were given such effect as could be given them under a statute which treats a beverage as intoxicating liquor if it contains more than 1 per cent. of alcohol."

11—*Winter v. State*, 132 Ala. 32, 31 So. 717 (719).

"The first charge would have required the jury to acquit upon a doubt arising upon some part of the evidence, though such doubt had been entirely dissipated upon consideration of the whole evidence. The charge, moreover, is confusing

and inapt in the use of the words 'neither a sale nor a gift.' The purpose was to tell the jury that they should not convict if they had a reasonable doubt as to whether there was a sale, and also such doubt as to whether there was a gift; but as expressed it calls for an acquittal if the jury should have a reasonable doubt that there had not been a sale, etc.

"The second charge is subject to the same infirmity as that first noted. It would have required an acquittal on a doubt which arose on consideration of a part of the evidence but disappeared on a consideration of the whole of it."

In *McCormack v. State*, 133 Ala. 202, 32 So. 268 (269), the following charge was held to require too high a degree of proof:

"It devolves upon the state to prove to your satisfaction a sale of liquor by defendant to A. on August 7, 1905."

The court said: "The exception to the portion of the oral charge can avail the defendant nothing. It was too favorable to him, in that it exacted too high a degree of proof. It required the state to prove to the satisfaction of the jury a sale of the liquor by defendant, etc. 'Before it can be said that the mind is satisfied of the truth of a proposition, it must be relieved of all doubt or uncertainty; and this degree of conviction is not required' in any case. *Torrey v. Burney*, 113 Ala. 504, 21 So. 348; *Dennis v. State*, 118 Ala. 79, 23 So. 1002; *Ala. G. S. R. Co. v. Burgess*, 119 Ala. 555 (564), 25 So. 251, 72 Am. St. 943; *Abbott v. City of Mobile*, 119 Ala. 599, 24 So. 565; *Coghill v. Kennedy*, 119 Ala. 667, 24 So. 459; *Moore v. Heineke*, 119 Ala. 639, 24 So. 374."



## CHAPTER CLXXXII.

### CRIMINAL—LARCENY.

See Approved Instructions, Chapter CI, Vol. II.

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| <p>§ 4775. Larceny—Definition of—Should include all essential elements.</p> <p>§ 4776. There must be asportation of the property.</p> <p>§ 4777. Removal of stolen property to another county for purpose of sale—Belief of jury to be limited to the evidence.</p> <p>§ 4778. Color of title—Belief as to ownership.</p> <p>§ 4779. Intent—Honest belief of ownership—Reasonable doubt—Burden of proof.</p> <p>§ 4780. Ownership of property—Tax schedules admissible to attack the credibility of the prosecuting witness.</p> <p>§ 4781. Felonious intent.</p> <p>§ 4782. Open taking—Presumption of innocence, when.</p> <p>§ 4783. Sale of property alleged to be stolen—Presumption of.</p> <p>§ 4784. Possession of stolen property is not a material ingredient of larceny.</p> <p>§ 4785. Recent possession of stolen goods — Presumption — Good character.</p> | <p>§ 4786. Fruits of larceny recently committed—Possession of—Presumption.</p> <p>§ 4787. Unexplained possession of stolen property—Whether sufficient to convict.</p> <p>§ 4788. If explanation of possession of stolen goods raises a reasonable doubt, the fact of possession shall not weigh against him.</p> <p>§ 4789. Number of parties interested in the larceny—Only one indicted.</p> <p>§ 4790. Conviction of crime by comparison with another's guilt—Proving theft of other property.</p> |
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#### RECEIVING STOLEN PROPERTY.

- § 4791. Direct or absolute knowledge that the goods were stolen is not required.
- § 4792. Receiving stolen property, knowing same to be stolen—Record of another prosecution when he was not present or identified is not proper evidence—Series.

§ 4775. Larceny—Definition of—Should Include All Essential Elements. (a) The court instructs the jury that larceny is the felonious taking and carrying away the personal goods of another.<sup>1</sup>

(b) The jury are further instructed that if you believe, from the evidence, beyond a reasonable doubt, that the defendant took the goods in question from the owner, with felonious intent, then it is your duty as jurors to find the defendant guilty.<sup>2</sup>

<sup>1</sup>—Hix v. People, 157 Ill. 382 (385), 41 N. E. 862.

<sup>2</sup>—It is evident that the definition of the crime as given by the instruction is materially defective, in that it omits the word "stealing." That, as applied to larceny, is a technical word, and is absolutely essential to the proper definition of the crime. The mere taking and carrying away of the personal goods of another is no crime, even though charged to be felonious. It is at

most but a trespass. To charge the felony, it must be alleged that the defendant feloniously stole, took and carried away the personal goods of the prosecutor."

<sup>2</sup>—Hix v. People, supra.

The court stated: "As defined by the statute, larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. (1 Starr & Curtis' Statutes 800.) . . . This instruction holds that, if the de-

(c) You are instructed that in this case, if you are convinced by the evidence beyond a reasonable doubt that the defendant, on or about the — day of —, in C. county, Nebraska, took the calf described in the information from the range or prairie at or near his home in C. county, Nebraska, into his possession, and on or about said time sold and delivered the same to one J., with the intention then and there to convert the said calf to his own use, and to permanently deprive the owner thereof of his said property, then you are instructed that said action on his part would constitute a larceny of said calf, within the meaning of the laws of this state.<sup>3</sup>

(d) I charge you that if you find from the evidence in this case that the defendant entered upon the lands mentioned in the indictment, and there cut down growing trees, and converted them into the logs mentioned in the indictment, and then carried these logs, or any one of them, off, this would not make the defendant guilty as charged in the fourth, fifth and sixth counts of the indictment; and if this is all the defendant did, then you must find him not guilty as charged in the said counts.<sup>4</sup>

§ 4776. **There Must Be Asportation of the Property.** (a) The court instructs you that if the defendant pointed out the cows to D. and gave him a bill of sale for same, and received in payment the sum of twenty-five dollars, that would be a delivery.

(b) The court instructs you that if the two cows were not the property of L., and the said L., knowing the same not to be his property, delivered the same to D., either upon mortgage or sale outright, he would be guilty of larceny.<sup>5</sup>

defendant took the hogs in question from the owner with felonious intent, whether that intent was to steal the same or otherwise, the offense of larceny was made out. This is clearly erroneous. The statute having defined the offense, no element of the statutory definition can be omitted. But this instruction is subject to the further objection that it assumes that X. was the owner of the hogs alleged to have been stolen,—a question of fact that was in controversy before the jury."

3—In *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843 (844), the above instruction was held bad because it omitted felonious intent.

The court said: "By this instruction the court attempted to cover the whole case. If it omitted an essential element of larceny, the giving of it was error. *Barnes v. State*, 40 Neb. 545, 59 N. W. 125; *McAleer v. State*, 46 Neb. 116, 64 N. W. 358; *Runge v. Brown*, 23 Neb. 817, 37 N. W. 660; *Gilbert v. Saddlery Co.*, 26 Neb. 194, 42 N. W. 11; *Thompson v. People*, 4 Neb. 524; *Bowie v. Spaid*, 26 Neb. 635, 42 N. W. 700; *Baldwin v. State*, 12 Neb. 61, 10 N. W. 463. This is true, even though another instruction may include the element omitted in the one by which the court attempts to state to the jury the essential ingredients of the crime. *Richardson v. Halstead*, 44 Neb. 606, 62 N. W. 1077; *Carson v.*

*Stevens*, 40 Neb. 112, 58 N. W. 845, 42 Am. St. 661; *Bank v. Lowrey*, 36 Neb. 290, 54 N. W. 568; *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *Metz v. State*, 46 Neb. 547, 65 N. W. 190. By this instruction the jury were told that it was their duty to find the defendant guilty if the facts therein set forth were proved. The instruction omits one essential element of the crime of larceny,—a felonious intent. It is true that it is not necessary that the word 'felonious' or 'feloniously' be used by the court, provided words of like import or meaning are employed. *Philamalee v. State*, 58 Neb. 320, 78 N. W. 625. In the instruction complained of not even the word 'wrongful' or 'unlawful' appears."

4—In *Carl v. State*, 125 Ala. 89, 28 So. 505 (510), the court said the above charge "was faulty in ignoring the absence of the ingredients of the offense as defined by statute, and was calculated to mislead."

5—*Long v. State*, 44 Fla. 134, 32 So. 870 (872).

"Paragraph one asserts that certain facts stated would constitute a delivery of the cattle by defendant to D., and paragraph two asserts that, if the cattle were delivered to D. by defendant, either upon mortgage or sale outright, and the cattle were not the property of defendant, and defendant knew they were not his property, he would be guilty of larceny. These instruc-

(c) The court instructs the jury that if you find from the evidence that the defendant appropriated the two cows to his own benefit; that he sold them, either by a straight bill of sale or by a conditional sale, without the knowledge or consent of the owner, and received money consideration therefor,—he would be guilty.<sup>6</sup>

§ 4777. **Removal of Stolen Property to Another County for Purpose of Sale—Belief of Jury to Be Limited to the Evidence.** The jury were instructed that the indictment charges the larceny as having been committed by defendant in the county of C. and, though you may believe that the larceny of said cattle was originally committed, if committed, in the county of M., yet, if you believe beyond a reasonable doubt that the defendant afterwards brought the said steers into the county of C., and sold them there, under the statute of the state of Illinois, the defendant is guilty of the crime of larceny of the said steers in the said county, the same as if the larceny had originally been committed in the said county of C., and you should find the defendant guilty of the crime in the said county of C.<sup>7</sup>

§ 4778. **Larceny—Color of Title—Belief as to Ownership.** (a) The court instructed the jury that if you believe from the testimony that the property described in the indictment was the property of the defendant's father, or that the defendant took the one cattle, as described in the indictment, under a fair claim or color of title, for his father, then, in either event, you will acquit defendant.<sup>8</sup>

tions, read together, authorize a conviction for larceny where there has been no asportation of the property. Where one person, having no actual or constructive possession of another's property, points out that property to a third person, and gives the latter a bill of sale for the property, receiving in payment a sum of money, but there is no actual constituting an asportation or carrying away of the property, no larceny is committed, because in larceny the asportation is a necessary element of the offense. *Mizell v. State*, 38 Fla. 20, 20 So. 769.

"No doubt, an actual manual delivery of property would constitute an asportation; but a sale and conveyance by bill of sale and a pointing out of the property, where no actual delivery is made, and no further acts done which in law would constitute an asportation, and would not make the offense of larceny complete, though for civil purposes the title of the property may pass by such transaction."

6—*Long v. State*, supra.

This was held erroneous "because it omits two essential elements in larceny, viz., the carrying away of the property, and the felonious intent. Defendant might have done all the acts mentioned in this paragraph with no felonious intent, in which event he would not be guilty of larceny. *Long v. State*, 11 Fla. 295; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417."

7—*Graff v. People*, 134 Ill. 380 (382), 25 N. E. 563.

The court held this instruction to be "objectionable in not limiting

the belief to be entertained by the jury to that produced by the evidence given on the trial. The jury have no right to act on any belief which is not produced wholly by evidence given upon the trial. (*Ewing v. Runkle*, 20 Ill. 448.) But the vital objection is, that all that is here required to authorize a verdict of guilty may have been proved, and yet the plaintiff in error have been innocent of the crime for which he was being tried. If the steers were stolen in M. county not by the plaintiff in error but by A. or someone else, and were afterwards placed by A. in the hands of plaintiff in error to sell for him, and if plaintiff in error then received them from A. in good faith and drove them to C. county and there sold them for him, it is plain that he is not guilty of the offense whereof he was convicted, and the evidence of the plaintiff in error tended to prove precisely that state of facts. But then, in the language of this instruction, the larceny of the cattle was originally committed in M. county, and the plaintiff in error afterwards brought them to C. county, and there sold them. The instruction authorizes a verdict of guilty from the mere fact that the plaintiff in error sold property which had been stolen. The instruction assumes to state a complete case, and it cannot be truly said that it is but one of a series, and supplemented or qualified by other instructions in the same series."

8—*Darnell v. State*, 43 Tex. Cr. App. 86, 63 S. W. 631.

"We are not informed by the



(b) If the jury believe from the evidence that the defendant had a good reason to believe that the cow was the property of W., your verdict should be for the defendant.<sup>9</sup>

§ 4779. **Intent—Honest Belief of Ownership—Reasonable Doubt—Burden of Proof.** In this case I charge you, as a matter of law, that if you are satisfied from the evidence that this defendant took the property in question from the corral under an honest belief of ownership, although mistaken in this belief, then you would not be warranted in convicting this defendant, and it would be your duty as jurors to acquit him. In other words, where a defendant charged with larceny tells the jury, or where the jury become satisfied from the evidence, that the original taking of the property was under an honest or mistaken claim of right to the property, it is the duty of the jury to acquit him; and before you can convict the defendant in this case, the state must satisfy you from the evidence, beyond a reasonable doubt, that the defendant, by fraud or stealth, and with intent to deprive the owner of the property thereof, and knowing the same not to be his, took the property in the manner and form charged in this indictment.<sup>10</sup>

court what he means by 'fair claim or color of title,' but these terms appear to be treated by the court as synonymous. A fair claim might accord with an honest claim, or it might not. It might be fair on its face, but still be fraudulent. What is meant by 'color of title' as to personal property is not defined. With reference to real estate, under the statute of limitations, the courts have met with some difficulty in construing the statute on the subject. The statute, in defining 'color of title,' defines it as 'a consecutive chain of transfer down to the person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty,' etc. Rev. Civ. St., art. 3341. If this definition is applied, of course, we are met with difficulty because a party may honestly claim title to an animal, believing it is his own, when he has no title whatever to it. He is simply mistaken as to the identity of the animal in question. We know of no better rule on the subject than that which has heretofore been laid down by this court,—that is, if a person accused of taking property can show that he honestly believed it was his, or that he had authority to take the particular property from its owner, or the person whom he believed was its owner, then his defense is complete; and it should be submitted to the jury in this mode, in order that they may determine the fraudulency of the taking, on the one hand, or the honest mistake under an honest belief, on the other. And a charge that bases a defense

of this character of title, or a fair claim of title, or color of title, is tantamount to telling the jury that there must be some sort of title on the part of the taker to the property, whereas in fact there need be no title at all. It is only necessary that there be an honest claim of right; that is, the party must reasonably believe that the property is his, or that he has authority from the owner to take such property. It follows, therefore, that the charge given by the court was erroneous, and that the charge requested, or some such charge, should have been given. For the error discussed, the judgment is reversed."

<sup>9</sup>—Huskey v. State, 129 Ala. 94, 29 So. 838 (840).

"It pretermits the fact that defendant in part believed the heifer was the property of W. The jury might have thought that defendant had some good reason for believing that the cow was W.'s, and yet they might have been convinced beyond reasonable doubt that he did not so believe, and really knew that it was not his property."

<sup>10</sup>—State v. Weckert, 17 S. D. 202, 95 N. W. 924.

"This instruction is clearly erroneous, and in conflict with the provisions of section 7376, Comp. Laws 1887, which reads as follows: 'A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.' And the law upon this subject is stated in the American & English Encyclopedia of Law as follows: 'It is not necessary for the defendant to satisfy the jury that he was in fact the owner of the goods alleged to

§ 4780. **Ownership of Property—Tax Schedules Admissible to Attack the Credibility of the Prosecuting Witness.** The tax schedules of M. were admitted in evidence as touching the question of the ownership of the money. If the money belonged to M., then the tax schedules are no longer material. And if you find from the evidence that the money did belong to M., you are not to consider the tax schedules any further on that point. Whether or not M. is guilty of a wrong in connection with the tax schedules is entirely foreign to the question of defendant's guilt or innocence. If the money was M.'s, and the defendant stole it, or received it knowing it to be stolen, it could be no possible defense to him that M. may have omitted it from his tax schedules.<sup>11</sup>

§ 4781. **Felonious Intent.** (a) Gentlemen of the jury, I charge you that while larceny includes a trespass, it is more than a trespass in that it involves felonious intent and fraud or secretiveness in effecting it; and knowledge of another's ownership and the intent to deprive him of it are not the equivalent of these elements.

(b) Gentlemen of the jury, I charge you that knowledge of another's ownership and an intention to deprive him of his property are not equivalent to and cannot supply felonious intent and fraud or secretiveness essential to larceny.<sup>12</sup>

(c) The jury are instructed that the word "willful" as used in

have been stolen, or that he took them under a bona fide claim of right. The burden is on the prosecution to establish the guilt of the defendant beyond a reasonable doubt, and this requirement is not satisfied if the evidence leaves it in doubt whether or not the property taken was the defendant's, or whether the defendant honestly believed either that he was the owner, or that he had a right to the possession.' 18 Am. & Eng. Ency. (2d ed.), p. 525; *State v. Huffman*, 16 Or. 15, 16 Pac. 640; *State v. Grinstead*, 62 Kan. 593, 64 Pac. 49; *State v. Evans*, 12 S. D. 473, 81 N. W. 893; *Chaffee v. United States*, 18 Wall. 516, 21 L. Ed. 908; *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358; *Bray v. State*, 41 Tex. 560; *Jones Ev.*, § 175; *Commonwealth v. McKie*, 1 Gray 61, 61 Am. Dec. 410. In *State v. Huffman*, supra, the Supreme Court of Oregon says: "The next one of said instructions, to the effect that the appellant must establish that he took the steer under claim of right, color of title, or by mistake, was all wrong. No conviction of a person charged with a crime can be had, in this state, unless he is proved guilty beyond a reasonable doubt. And it matters not whether such doubt arises out of some defect or weakness in the evidence introduced on the part of the prosecution, or is created by proof given upon the part of the accused. The burden of proof is upon the former from the beginning to the end of

the trial. It is never changed.' The Supreme Court of Kansas takes a similar view in *State v. Grinstead*, supra. That court says: "The latter portion of this instruction is erroneous. It not only shifted the burden of proof from the state to the defendant, but required the defendant to satisfy the jury that the publication was not made by his authority. It is elementary that the burden of proof as to all essentials of guilt rests upon the state, and not upon the defendant, and that burden must be discharged by a degree of evidence that will satisfy the jury beyond a reasonable doubt."

11—*Dean v. State*, 130 Ind. 237, 29 N. E. 911 (912).

There was evidence that the money alleged to have been stolen from the prosecuting witness had been in his possession for a number of years. Defendant gave in evidence the tax schedules for those years, showing that the prosecuting witness had not claimed the money as belonging to him. "This instruction deprived the appellant of the right of having the jury take this evidence into consideration for what it was worth, as affecting the credibility of the prosecuting witness, and was therefore erroneous."

12—*Carl v. State*, 125 Ala. 89, 23 So. 505 (510).

These charges "were misleading and in conflict with the views here expressed in that felonious intent and secrecy are not essential ingredients of the offense."

the fourth, fifth and sixth counts of this indictment, means not merely voluntarily, but with a bad intent.<sup>13</sup>

(d) The defendant is charged by the information filed herein with the crime of grand larceny, as follows: That he did on the first day of March, A. D. —, at Mill precinct, T. county, state of Utah, one calf of the value of \$10.00, of the personal property of one D., unlawfully and feloniously steal, take, drive, and carry away. Under the laws of this state, larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another; and when the property taken is a mare, horse, colt, gelding, cow, heifer, steer, calf, bull, sheep, mule, jack, or jenny, it is grand larceny.

(e) The burden of proving each element of the crime charged beyond a reasonable doubt, is upon the state; and, before you would be justified in finding the defendant guilty of the crime as charged in the information, you must find from the evidence, beyond a reasonable doubt, that the defendant did on or about the first day of March, 1901, at and within the county of T., state of Utah, steal, take and drive away a calf, and that such calf was the property of D.

(f) If you find from the evidence that defendant took from the possession of D. the calf mentioned in the information, and that such taking was under a claim of right,—for instance, that the defendant claimed to be the owner of the calf,—then I instruct you that such taking would not be larceny, even though the defendant was in fact mistaken, and that the said calf belonged to D.<sup>14</sup>

**§ 4782. Open Taking—Presumption of Innocence—When.** (a) Where the taking is open, and there is no subsequent effort to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized.

(b) The openness of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention.<sup>15</sup>

13—Carl v. State, supra.

This charge "was erroneous and misleading. The word 'willful' as used in the statute means either intentional, or by design regardless of the intent, that being covered by another part of the statute."

14—State v. Bates, 25 Utah 1, 69 Pac. 70 (71).

"The instructions should be taken and considered together as a whole. In the first instruction the jury were told what the charge was in the information, and that larceny was the felonious stealing, etc., of the property of another. The language of the statute was given defining the offense charged, and the jury was told that the burden of proving each element of the crime charged, beyond a reasonable doubt, was upon the state; and unless such charge as contained in the information, and each element thereof, was proved beyond a reasonable doubt, they must acquit; that larceny could not be committed without the act constituting it was committed

with a felonious intent. Taking the charge together the jury could not have been misled on this subject, although, critically speaking, it would have been better to have used the term 'felonious' in the body of the instructions. The instructions were not given in the language of the requests, yet they substantially embodied the substance of the requests so far as to embrace the material questions of law involved in the case."

Omission to inform the jury that the taking must have been felonious in order to constitute larceny held erroneous. Dean v. State, 130 Ind. 237, 29 N. E. 911.

15—Long v. State, 44 Fla. 134, 32 So. 870 (871).

"The first above requested charge is one of the head notes of the case of Dean v. State, 41 Fla. 291, 26 So. 638, 79 Am. St. 186. The sole question in that case was whether the evidence was sufficient to sustain the verdict, and the court reached the conclusion that it was not. It



**§ 4783. Sale of Property Alleged to Be Stolen—Presumption of.**

(a) If you find from the evidence that after the taking of the property by the defendant from the complaining witness, that he sold such property, or any part of it, or attempted to sell the same, or any part of it, with the intention of appropriating the proceeds thereof to his own individual use and benefit, this is presumptive evidence that the original taking of the goods was felonious; and, unless such sale or attempted sales are satisfactorily explained, you should find the defendant guilty.

(b) The court instructs the jury that if they find that the prosecuting witness parted with the possession of the property described in the information under the belief on his part that he was loaning such property to the defendant for a certain length of time, it is not necessary that such time should elapse before taking steps to regain possession of the same, and it is immaterial, as far as the crime charged in the information is concerned, what the length of said time was. But if at any time after the taking of said property by the defendant, either before or after the expiration of the time

appeared from the contradicted evidence certified to the court in that case that the accused took the property alleged to have been stolen—an ox—openly, in the daytime, in the presence and with the assistance of several persons, under a claim of ownership, and led it along the highway to his home; that he subsequently sold it to a party living in the same neighborhood of the real owner; and there was testimony of several witnesses independent of the accused himself that he had raised the ox from a calf, and had continuously owned it. There was no concealment in any way, but an open avowal of possession and ownership. The court did not find any conflict in the evidence as to such matters, nor were there discovered any infirmity or defects in it to rebut the presumption in favor of an innocent intent in the taking of the property. In weighing the testimony the court applied the principle that, where the taking in larceny was open, with no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent. It was not in terms said that this was a presumption of the law under the facts stated, but the last clause in the headnote embodied in the request would seem to indicate that it might be so regarded. The principle stated was taken from *McMullen v. State*, 53 Ala. 531, and was used argumentatively by this court in discussing the facts before it. In cases of larceny the question of the intent with which the accused took the property is always one of fact primarily to be decided by a jury, subject to review by the court. As we understand the decisions in Alabama, this is the rule there, and the question of intent as to taking

is one of fact, in all cases for the jury. It was held in *Talbert v. State*, 121 Ala. 33, 25 So. 690, that such question should be submitted to them, although the taking was open, in the presence of the owner of the property and others, and there was no subsequent denial or concealment. See, also, *State v. Powell*, 103 N. C. 424, 9 S. E. 627, 4 L. R. A. 291, 14 Am. St. Rep. 821. Where the taking is open, in the presence of others, not amounting to a robbery, and there is no concealment, or, in short, where the testimony as to the taking, standing alone, raises a presumption of fact in favor of an innocent taking, and there is nothing in it from which a jury may legitimately infer a felonious purpose, then the verdict against the accused cannot be sustained, and it would be the duty of the court to set it aside. The principle, however, announced in the headnote of the *Dean Case*, upon which this court acted in determining the sufficiency of the evidence then before it, must not be regarded as stating a principle of law which an accused has the right to have charged in his favor; and, if such is its effect, it must be limited. Where there is a conflict in the evidence as to the intent with which the property was taken, or it is of such a character as to legitimately authorize an inference of a felonious purpose, then the matter should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony. As stated, the principle is not one of law, but of fact, arising from the evidence, and under the facts of this case the court was correct in refusing to charge the jury as requested by the accused. What is said disposes also of the last request."

understood by the said G. in which said property was to be returned, the defendant sold, or attempted to sell, said property, or any part of the same, with the intention of appropriating the proceeds thereof to his own individual use and benefit, then the crime charged in the information is sufficiently proved; and, unless the defendant satisfactorily explains such sales or attempted sales, you should find the defendant guilty.<sup>16</sup>

**§ 4784. Possession of Stolen Property Is Not a Material Ingredient of Larceny.** (a) The possession of stolen property is a material ingredient of the offense, and the jury must be satisfied beyond a reasonable doubt that the defendant had in his possession the identical money stolen from W. before they can convict.

(b) In this case the jury cannot convict unless they believe from the evidence beyond a reasonable doubt that the defendant had in his possession the identical money lost by W.

(c) If there is no evidence other than the possession of the money and the proximity to the crime showing the guilt of the defendant, then the jury must believe beyond a reasonable doubt that the money found in the possession of the defendant was the identical money stolen from W.<sup>17</sup>

16—Haskins v. State, 46 Neb. 888, 65 N. W. 894.

"Obviously both of these instructions are bad. The former is so conceded by the attorney general, and for that reason he has properly declined to file a brief. By these paragraphs of the charge the jury are told that if the accused sold, or attempted to sell, the property, or any portion thereof, with the intent to appropriate the proceeds, they should infer therefrom that the original taking was felonious, and should convict, unless the sales or attempted sales were satisfactorily explained by the defendant. This is not the law for two reasons. The effect to be given to the sale or attempted disposition of the property was for the jury to determine, when considered in connection with all the other evidence adduced on the trial; hence the instructions invaded the province of the jury. Moreover, during the entire progress of the trial, the law surrounds the defendant with the presumption of innocence, and requires the prosecution to establish his guilt beyond a reasonable doubt. Yet these two instructions shifted the burden of proof from the state to the accused, by requiring him to overcome the presumption of guilt which the trial court told the jury arose from the sale or attempted disposal of the property. In a criminal trial the burden of proof does not shift but is on the state at all stages of the trial. The instructions were therefore erroneous, and prejudicial to the prisoner.' Burger v. State, 34 Neb. 397, 51 N. W. 1027; Robb v. State, 35 Neb. 285, 53 N. W. 134; Dobson v. State, 46 Neb. 250, 64 N. W. 956; Metz v. State, 46 Neb. 547, 65 N. W. 190."

17—Barker v. State, 126 Ala. 69, 28 So. 685 (686).

"These charges were bad in having a tendency to mislead and confuse the jury. If by the defendant's possession of the money, the charges intended the money which the evidence showed the defendant had 10 or 12 days after the perpetration of the crime, and they are susceptible of this meaning, then they were clearly bad; for the defendant might have between the time of the theft and the time the money was seen in his possession exchanged that which he had stolen for other money. The possession of the money by the defendant, as shown by the testimony, was not necessarily an ingredient of the crime, but was evidently matter to be taken in connection with other evidence tending to show defendant's guilt. Moreover the jury might have found the defendant guilty on the evidence in the case independent of the evidence of possession of the money. The criterion of the degree of proof necessary for conviction is not that the jury must believe beyond a reasonable doubt every part of the testimony, or the testimony as to every fact introduced in evidence, but that they must believe from all the evidence beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment. The court committed no error in refusing to give the charges requested. In support of what we have said as to the correctness of the trial court's rulings upon the evidence and the charges, see the following cases: Williams v. State, 123 Ala. 37, 26 So. 521; Smith v. State, 88 Ala. 23, 7 So. 103; Shepperd v. State, 94 Ala. 102, 10 So. 663; Leonard v.

§ 4785. **Recent Possession of Stolen Goods—Presumption—Good Character.** (a) The court instructs the jury that, if they believe from the evidence that about the time mentioned in the information, some one did unlawfully and feloniously steal said hogs mentioned in the information, and that recently thereafter the same property was found in the possession of the defendant, then the law presumes that the defendant is guilty, and, if he fails to account for his possession of said property in a manner consistent with his innocence, this presumption becomes conclusive against him.

(b) The court instructs the jury that, in determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character and should give to his testimony such weight as you deem proper, but if, from all the evidence, you are satisfied, beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot acquit, justify, excuse, palliate, or mitigate the offense, and you cannot acquit him merely because you may believe he has been a person of good repute.<sup>18</sup>

(c) You are further instructed that the possession of property recently stolen is of itself *prima facie* evidence that the person in whose possession the property is found is the actual thief, and unless this presumption is rebutted by the good character of the accused, or that he fairly acquired the property by purchase, or in some other way lawfully came into the possession thereof, it is your duty as jurors to find the defendant guilty.<sup>19</sup>

State, 115 Ala. 80, 22 So. 564; Dent v. State, 105 Ala. 14, 17 So. 94."

18—State v. Wright, 199 Mo. 161, 97 S. W. 874.

"It is insisted by counsel for defendant, in view of the good character shown by the defendant, that said instructions are too narrow as submitted. It will be observed that the testimony with respect to the good character of the defendant was entirely ignored by this instruction. An instruction in almost the exact language was condemned by this court in State v. Crank, 75 Mo. 406, upon the ground that it was too narrow, in that it did not submit to the jury the evidence of good character in connection with that of recent possession. The instruction as an abstract proposition of law is not objectionable, but in its application to the facts of the case under consideration was misleading in its character, and may have misled the jury. In State v. Gray, 37 Mo. 463, it is said the presumption arising from the recent possession of stolen property is raised, but is subject to be rebutted by character, habits, and all the circumstances. In State v. Williams, 54 Mo. 170, it was said: 'There was no error in the instructions which told the jury that the recent possession of stolen property is presumptive evidence of the possessor. Such possession, unless explained, or attending circumstances, or the character and habits, of the party with whom the prop-

erty is found, or by some other mode equally satisfactory as to the innocence of the accused, will be taken as conclusive.' See State v. Walker, 194 Mo. 253, 92 S. W. 659; State v. Kelly, 73 Mo. 608; State v. Sidney, 74 Mo. 390; State v. North, 95 Mo. 615, 8 S. W. 799.

"The instructions should have submitted to the jury the evidence of good character in connection with that of recent possession. The question then is, Was this instruction cured by the latter? We think not. It simply gives the defendant the benefit of good character as in ordinary cases, wherein guilty possession is not involved, and therefore as not rebutting the presumption of guilt consequent upon such possession as in the case at bar."

19—Hix v. People, 157 Ill. 382 (386), 41 N. E. 862.

"An instruction which directs the jury in case certain facts are proved to find the defendant guilty, must submit to the jury a hypothesis, based on the evidence, embodying all the facts necessary to be proved to establish the defendant's guilt. This instruction closes with a direction to find the defendant guilty, but it contains no hypothesis based upon the evidence. That part of it preceding the direction to find the defendant guilty is wholly abstract, making no reference to the evidence, and not being based upon it. . . . The jury are not required to find any of these facts



§ 4786. **Fruits of Larceny Recently Committed—Possession of—Presumption.** (a) The court instructs the jury that possession of the fruits of crime recently after its commission affords a strong and reasonable ground for the presumption that the party in whose possession they are found was the real offender, unless he can account for such possession in some way consistently with his innocence; and in case of murder this particular fact of presumption commonly forms also a material element of evidence, in connection with other facts proved in the case.<sup>20</sup>

(b) The fact that the goods or money was found in the possession of the defendant is not sufficient alone to sustain a conviction, nor is the fact that the defendant denied having received the goods or money sufficient alone to sustain a conviction.<sup>21</sup>

(c) Possession of property recently stolen is not evidence sufficient of itself to warrant a conviction. It is merely a circumstance to show guilt, which, taken in connection with other evidence, is to determine the question of guilt. If, however, the jury believe, beyond a reasonable doubt, that the property described in the information was stolen, and was seen in the possession of the defendant shortly after being stolen, the failure of defendant to account for such possession or to show that such possession was honestly obtained, is a circumstance tending to show guilt; and the defendant is called upon to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such.<sup>22</sup>

(d) You are instructed that the burden is upon the prosecution to

from the evidence, but for all the purposes of the instruction, they are assumed to be true, and the jury are instructed that unless the presumption of guilt arising from the facts thus assumed was rebutted in one of the ways pointed out, it was the duty of the jury to find the defendant guilty. The necessary effect of an instruction of this character must have been to mislead the jury to the prejudice of the defendant."

20—Kibler v. Commonwealth, 94 Va. 804, 26 S. E. 858 (860).

"It is true that possession of the fruits of crime recently after its commission, where that possession is not satisfactorily explained, affords the presumption that the party in whose possession they are found was the offender; but this is not a presumption of law, but of fact. It is a deduction of fact to be drawn from the circumstances of the case, and, standing alone, constitutes a prima facie, which will warrant a conviction for larceny. A failure to account for the possession, or an unreasonable account of it, or a false account of it, will strengthen the presumption; but it is for the jury under all the circumstances of the case, to determine its value as evidence."

21—Mims v. State, 42 Fla. 199, 27 So. 865 (867).

"This instruction," said the court,

"could not have been without a misleading tendency on the minds of the jury, if it had been given. The facts stated in the instruction, viz., that plaintiff in error was found in possession of the stolen money, and denied having received it from the alleged thief, were not the only facts relied upon by the state to prove guilt. There were other very pertinent facts in evidence connected with the receipt of the money by plaintiff in error from the alleged thief, and with the finding of the money in her possession recently after it was stolen, and her conduct and declarations made at the time, which, together with the facts mentioned in the charge, were sufficient to sustain a verdict of guilty, but the existence of which were wholly ignored in the requested instruction. It is proper to refuse instructions as misleading when they are based on the theory of a party as to facts in evidence, and ignore the legal effect of other facts, applicable to the relation and rights of the parties. Florida Ry. & Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714. The instruction was properly refused."

22—State v. Wright, 12 Idaho 212, 85 Pac. 493 (494).

The court criticized this instruction as correct in law but poor in form and bad as a model in not being clear and being liable to confuse.

prove beyond a reasonable doubt that the defendant is guilty of stealing the horse in question, and no presumptions arise as to the defendant's guilt because the property was found in his possession three days after the alleged theft, such possession not being the "recent possession" of stolen property as that term is understood by law.<sup>23</sup>

(e) The court instructs you that the possession of recently stolen property is a circumstance to be considered by the jury. And such circumstance, whether taken in connection with other circumstances, such as the branding of the animals, or obliterating the brand upon the same, or of cutting off or removing or obliterating the earmarks thereon, if you find from the evidence beyond reasonable doubt that any such facts exist in this case, then I charge you that such possession, together with such other circumstances, are strong criminating circumstances tending to prove the guilt of the defendant of the theft of such property.<sup>24</sup>

**§ 4787. Unexplained Possession of Stolen Property—Whether Sufficient to Convict.** (a) If you believe from the evidence that the property alleged in the indictment to have been stolen, if stolen, was recently thereafter found in the possession of the defendant, and that the circumstances connected with his possession, when first called upon, were of such a character as to demand of him an explanation of his possession, and he failed or refused to make such explanation, then I charge you that, before you would be warranted in finding him guilty from such circumstances of possession alone, you must be satisfied that his possession was personal, was recent, was exclusive, was unexplained, and that it involved a distinct and conscious assertion of property by defendant, and, if either of these constituents are wanting, defendant is entitled to be acquitted.<sup>25</sup>

(b) The court instructs that the property found in the possession of the defendant is a mere circumstance against the defendant, and, if possession of the goods has been satisfactorily explained to the jury, you must acquit the defendant, and you must believe the defendant guilty beyond a reasonable doubt and to a moral certainty before you can convict.

23—Edmonds v. State, — Tex. Cr. App. —, 51 S. W. 393.

The court said that there was no error in refusing to give this charge. The same is upon the weight of the evidence, citing Wheeler v. State, 34 Tex. Cr. App. 353, 30 S. W. 913.

24—Roberts v. State, 11 Wyo. 66, 70 Pac. 803, 100 Am. St. 925.

"This instruction is objectionable in having stated that facts as stated are 'strong' criminating circumstances tending to prove the guilt of the defendant, and is further objectionable in stating that the possession of recently stolen property is a circumstance to be considered by the jury, leaving out, as it does, the statement universally made when such an instruction is given, 'the unexplained possession.'"

25—Stewart v. State, — Tex. Cr. App. —, 77 S. W. 791.

This charge, said the court, analyzed, would amount to an instruc-

tion to the jury that they were authorized to convict on an unexplained possession alone, and was consequently on the weight of the evidence. Lockhart v. State, 29 Tex. App. 35, 13 S. W. 1012; Steiner v. State, 33 Tex. Cr. App. 291, 26 S. W. 214; Scott v. State — Tex. Cr. App. —, 36 S. W. 276, 35 Tex. 11, 29 S. W. 274. For a proper charge on this subject, where the facts show recent possession and an explanation is given, see Wheeler v. State, 34 Tex. Cr. App. 350, 30 S. W. 913. Where recent possession is relied on as a circumstance tending to show guilt, and no explanation is given, the court is not required to charge on recent possession, no more than any other fact tending to prove guilt by circumstances. Such a charge is only authorized in connection with the incriminative fact of recent possession, and then the charge is defensive.

(c) The property found in the possession of the defendant is a circumstance against the defendant, and, if possession of goods has been satisfactorily explained to the jury, you must acquit the defendant, and you must believe the defendant guilty beyond a reasonable doubt and to a moral certainty, or you ought to acquit him.<sup>26</sup>

(d) It is not every or any possession of stolen goods by a defendant which will authorize the inference of his complicity in the crime of larceny, nor in fact every such unexplained possession.<sup>27</sup>

(e) The whole matter here stands upon the possession of this property. The unexplained possession of the stolen property within a short time after the theft is evidence sufficient to convict a person of the crime by which that property came into his possession, if it produces upon your mind such an effect as enables you to feel sure, beyond a reasonable doubt, that the respondent is guilty of the offense charged.<sup>28</sup>

**§ 4788. If Explanation of Possession of Stolen Goods Raises a Reasonable Doubt, the Fact of Possession Shall Not Weigh Against Him.**

(a) You are instructed that, if the state have satisfied you, beyond a reasonable doubt, that in this county and state, on or about the 15th day of July, 1896, that X was the owner of, and had in his pos-

26—Cunningham v. State, 117 Ala. 59, 23 So. 693 (695).

"Above charges are argumentative, invasive of the province of the jury, and were calculated to confuse and mislead. In Carter v. State, 103 Ala. 93, 15 So. 893, it was held error to refuse a charge requested by the defendant in the following words: 'Unless each of you is convinced beyond a reasonable doubt of the guilt of the defendant, from the evidence in the case, then you should not convict them.' In Goldsmith v. State, 105 Ala. 8, 16 So. 933, a charge that 'if any one of the jurors has a reasonable doubt of the guilt of the accused, they must acquit him,' was held properly refused; the law not requiring acquittal of the defendant because one or more of the jurors may not be legally convinced of his guilt. A similar charge was held properly refused in Pickens v. State, 115 Ala. 42, 22 So. 551."

27—Webb v. State, 106 Ala. 52, 18 So. 491 (493).

"It will suffice to say of this charge that it may well be understood to mean that no possession of stolen goods will authorize the inference of guilt even, in the absence of explanation, which of course is not the law, and to have given it here would have been especially injurious, because the defendant's recent possession of the property stolen was clearly shown."

28—State v. Fitzgerald, 72 Vt. 142, 47 Atl. 403 (405).

"It was the duty of the court to submit the case to the jury in a manner to require a consideration of not only the fact of the respondent's recent possession of a part of the stolen property if that fact was

established, but also a consideration of all the circumstances for and against him, and on the whole say whether they were satisfied of his guilt beyond a reasonable doubt. Mr. Bishop further says: 'All the acts of possession, and all should be shown in connection with the fact of possession, and all should be taken into the account by the jury.' 2 Bish. Cr. Proc. § 745.

Mr. Wills further says: 'It is always a question for the jury, applying to the solution of the problem the common experiences and observations of life, whether they are satisfied, from all attending circumstances and other facts in evidence, that the possession was honest or felonious.' Wills Circ. Ev. 82. Under this instruction of the court the jury were at liberty to consider and determine the question of guilt upon the recent unexplained possession of a part of the stolen property alone, and to convict the respondent if they were thereby satisfied of his guilt beyond a reasonable doubt. A conviction founded upon such a basis wholly deprived the respondent of the benefit of the attending circumstances in his favor, and also of the evidence of good character. This part of the charge was too narrow and was error. Brooks v. Thatcher, 49 Vt. 492. Nor was this error rectified by giving the proper instructions upon the same subject in a later paragraph of the charge. The latter was not given to correct or supersede the former instruction, and was inconsistent therewith. The jury were left to adopt either, and it cannot be said that no harm resulted to the respondent therefrom. Bovee v. Town of Danville, 53 Vt. 183."



session the property charged in the indictment to have been stolen by the defendant, and that some one on or about said time, or a short time prior thereto, feloniously took, stole, and carried the same away from the possession of the said X., and did this without the knowledge and consent of the said X., or those having the possession or control of the same for the said X., and with the intent then and there to convert the same to the use of the taker, against the will of the said X.; and the state has further satisfied you, beyond a reasonable doubt, that soon after the felonious taking aforesaid, the identical property so taken from the possession of the said X. was found in the possession of this defendant, then this would be presumptively evidence against the defendant that he was the party so taking the property, and it will be presumptive evidence of his guilt of the charge made against him unless the defendant has explained to your satisfaction his possession of the property, and that he came by it honestly. But, before the presumption of guilt can arise, it must appear beyond a reasonable doubt, that the property in the possession of the defendant is the identical property alleged to have been stolen from the party alleged in the indictment to be the owner, and the identical property so shown to have been taken from the possession of the said owner.<sup>29</sup>

(b) If goods have been taken without the consent of the owner, and shortly afterwards are found in the possession of another, it is *prima facie* evidence that he is the taker, and it devolves upon him to explain the possession of the property; and if the explanation given by him is a reasonable and satisfactory one, it then devolves upon the prosecution to rebut it by direct evidence, or by evidence arising out of the facts given on the trial.

(c) If the defendant came into possession of the property with an honest intent, he cannot be found guilty of larceny. If his explanation of the possession is not reasonable or satisfactory he is not relieved from whatever presumption of guilt that arises from the possession.<sup>30</sup>

29—State v. Reilly, 108 Ia. 735, 78 N. W. 680 (681).

"We have held, in effect, that if the explanation of possession is sufficient to raise a reasonable doubt as to whether the property was honestly obtained, the fact of such possession shall not weigh against a defendant. State v. Manley, 74 Ia. 561, 38 N. W. 415; State v. Kirkpatrick, 72 Ia. 500, 34 N. W. 301, 7 Am. Cr. Rep. 334; State v. Hopkins, 65 Ia. 240, 21 N. W. 585. This instruction is clearly in violation of the rule of these cases."

30—Bellamy v. State, 35 Fla. 242, 17 So. 560.

"The giving of these charges was error. In them the jury are instructed that the explanation of a person found in possession of goods recently stolen as to how he acquired such possession must be satisfactory in order to relieve himself of the evidentiary presumption of guilt arising out of such possession. This is not the law. The explanation given by the possessor of stolen

goods may fall far short of satisfying the jury, and yet it may be sufficient to raise a reasonable doubt in their minds; and if it does raise such doubt, then it is sufficient to acquit him of the charge of larceny unless the prosecution overcomes it by proof that the explanation is false. Blaker v. State, 130 Ind. 203, 29 N. E. 1077. In the case of Leslie v. State, 35 Fla. 171, 17 So. 555, we have held that: "The true rule is that, where a party who is found in possession of goods recently stolen directly gives a reasonable and credible account of how he came into such possession, or such an account as will raise a reasonable doubt in the minds of the jury, then it becomes the duty of the state to prove that such account is untrue; otherwise he should be acquitted. The account given must be, not only reasonable, but it must be credible, or enough so to raise a reasonable doubt in the minds of the jury, who are the judges of its reasonableness and probability as well as of its credibility."

(d) If the defendant at one time had the stolen property or mare in his possession in this case, and afterwards abandoned or left such mare, and does not account for or explain how he honestly came into possession of her, such facts, if they be proven beyond a reasonable doubt in this case, raise the presumption that the defendant stole said mare.

(e) If you find in this case, beyond a reasonable doubt, that the defendant at one time had the stolen property or mare in his possession in this case, and left or abandoned her, and does not in some reasonable way explain to your satisfaction the possession of said mare, the presumption of guilt becomes conclusive.<sup>31</sup>

**§ 4789. Number of Parties Interested in the Larceny—Only One Indicted.** If the jury find from the evidence that there was one, two, or three or more or any number interested in the larceny of this horse and the defendant was one of them, why, it would make no difference that the other parties were not indicted and here on trial.<sup>32</sup>

**§ 4790. Conviction of Crime by Comparison with Another's Guilt—Proving Theft of Other Property.** (a) If the money belonged to Y. and was in the trunk in his house in the bedroom, and X., while occupying that room as a sleeping apartment, unlocked the trunk, took out the money, and handed it out through a window to the defendant, and the defendant there took it in charge, the defendant would be guilty of larceny as much as his wife, if she was guilty, and the defendant would be guilty under the first count.<sup>33</sup>

31—Blaker v. State, 130 Ind. 203, 29 N. E. 1077 (1078).

"Waiving any question of mere verbal criticism or inaccuracy in the two instructions, they are not correct statements of the law. They both assume that the mare was in fact stolen. This was error. *Jackman v. State*, 71 Ind. 149; *Smathers v. State*, 46 Ind. 447; *Barker v. State*, 48 Ind. 163; *Killian v. Eigenman*, 57 Ind. 480. In terms they would both apply equally to a possession of the mare before or after the time of the alleged larceny; nor do they make any note of the nearness of the possession to or its remoteness from the time of the alleged larceny; so that the jury are informed that an unexplained possession of stolen property, which may have been long removed in point of time from the larceny, not only may, but does, raise the presumption that the accused stole it. . . . The defense of an alibi, urged by the accused, did not necessarily involve any admission that the mare was stolen. The instruction last above quoted is specially objectionable. It imposes upon the accused the necessity of explaining his possession of the mare to the satisfaction of the jury; failing in which, the jury is told the presumption of his guilt becomes conclusive. This is plainly erroneous. Assuming that the jury find the mare was in fact stolen; that soon thereafter she is found in the possession of the accused; and

that he attempts to explain or account for such possession, but his explanation is not satisfactory, yet is sufficient to create in the minds of the jury a reasonable doubt,—in such case he should be acquitted. His explanation may be very unsatisfactory, and fall far short of convincing the jury; yet if, after hearing and weighing it they entertain a reasonable doubt of his guilt, they should acquit. We are supported in the conclusions above stated by the following additional authorities, with many others: *Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 182; *Howard v. State*, 50 Ind. 190; *Clackner v. State*, 33 Ind. 412; *Way v. State*, 35 Ind. 409."

32—*George v. U. S.*, 6 Ind. T. 155, 89 S. W. 1121.

"We find no evidence in the record that authorizes such an instruction, unless we are to draw the inference that every one who associated with defendant was a thief. We think this instruction was prejudicial to the defendant."

33—*Dean v. State*, 130 Ind. 237, 29 N. E. 911 (912).

"This instruction is erroneous. The defendant's wife was not on trial, and he could not be legally convicted of crime by comparison. It fails to state that in order to convict him the evidence must show that he had knowledge of the contents of the bundle handed him by his wife, or that the money was taken with a felonious intent."

(b) In this case the state has introduced evidence tending to prove the theft of other property than that alleged in the indictment to have been stolen. You are instructed that you can only consider such testimony for the purpose for which it was admitted—that is, to establish the identity in developing the *res gestae* of the alleged offense, or to prove the guilt of the accused by circumstances connected with the theft, if any, or to show the intent with which defendant acted with respect to the property for the theft, if any, of which he is now on trial; and you will consider it for no other purpose, for you cannot convict defendant for the theft of any other property than that named in the indictment; and defendant cannot be convicted for the theft of any cattle, unless the taking, if any, on part of defendant, occurred in A. county, Texas.<sup>34</sup>

### RECEIVING STOLEN PROPERTY.

**§ 4791. Direct or Absolute Knowledge That the Goods Were Stolen Is Not Required.** The court instructs you that it is not necessary to the conviction of defendant or defendants that the people should show that the defendant or defendants saw the goods stolen, or was told that they had been stolen, or had absolute knowledge that they were stolen goods. If it appears, by the evidence, that circumstances presented and manifest to the defendant or defendants at the time of the reception of the goods in question (if you believe, from the evidence, that the defendants received the same), were such as to have induced them and any man of ordinary observation to believe that the property was stolen, and was being offered for sale to the defendant or defendants by one who had no right to do so, that is sufficient.<sup>35</sup>

**§ 4792. Receiving Stolen Property, Knowing Same to Be Stolen—Record of Another Prosecution Where He Was Not Present or Identified Is Not Proper Evidence—Series.** First. In order to make out the case of the prosecution and in order that you should be authorized to return a verdict of guilty in this case, you must find beyond a reasonable doubt from the evidence in this case certain propositions to

34—Reese v. State, 44 Tex. Cr. App. 34, 68 S. W. 283 (284).

"A similar question to the one now under consideration was passed upon in Santee v. State, — Tex. Cr. App. —, 37 S. W. 436.

We there held that an instruction that evidence had been admitted tending to show that at the time defendant was charged to have received the property alleged in the indictment, etc., was erroneous, as a charge on the weight of evidence. This matter has also been reviewed by us at some length in Hudson v. State, 4 Tex. Ct. Rep. 167, 66 S. W. 668. We therefore hold that appellant's objection that the charge is upon the weight of the evidence is well taken."

35—Cohn v. People, 197 Ill. 482 (484), 64 N. E. 306.

"We said in May v. People, 60 Ill. 119: 'In order to a conviction it

was necessary for the prosecution to satisfy the jury, beyond a reasonable doubt, that the accused knew the goods had been stolen at the time he received them.' And in Aldrich v. People, 101 Ill. 16: 'Guilty knowledge on the part of the defendant is essential to the constitution of the offense.' It is true that proof of direct knowledge is not necessary, and that evidence of facts and circumstances sufficient to create in the minds of the accused a belief that the goods were stolen may amount to guilty knowledge of the fact (Huggins v. People, 135 Ill. 245, 25 N. E. 1002, 25 Am. St. 357). But this instruction goes further, and tells the jury, first, that knowledge is not necessary, nor even belief, on the part of the defendants, if the evidence be sufficient to induce a person of ordinary observation to believe."



be true. In the first place it must be found by you beyond a reasonable doubt that the property described in the indictment, and which is also described in the indictment against these three men (W. B. & K.), who it is alleged have been convicted, was actually stolen from the post office at H., was the property of the United States and of a certain value.

Second. You must find beyond a reasonable doubt that the defendant, K., received or had in his possession a portion of that property which had been stolen from the post office at H.

Third. That he received or had it in his possession with intent to convert it to his own use and gain. Now upon the first proposition—as to whether the property described in the indictment was stolen as alleged in the indictment—the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons—that is, the parties who it is alleged committed the larceny. In the absence of any evidence to the contrary, the record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the Government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and there being no such evidence in this case, you will no doubt have no trouble in coming to a conclusion that the property described in the indictment was actually stolen, as alleged, from the post office at H. But I don't want you to understand me to say that the record proves that the stamps that were found in K.'s possession were stolen property, or that they were the stamps taken from the H. post office. Upon the further proposition that the court has suggested, after you have found by a careful consideration of all the evidence, beyond a reasonable doubt, that the property alleged in the indictment was stolen, then you will proceed to consider whether or not the defendant ever at any time, either on the date alleged in the indictment or any other date within three years previous to the finding of the indictment, had in his possession or received any of this property which was stolen from the post office at H. In order to find the defendant guilty of the offense charged in the indictment you would have to find beyond a reasonable doubt from all the evidence that he either actually received a portion of all the property which was stolen from the post office at H., and that he received that property from the thief or thieves who committed the theft at the H. post office or some agent of these thieves. The statute punishes, you will observe, both the receipt of stolen property, knowing it to have been stolen, with the intent described in the statute, and also the having in the possession such property knowing it to have been stolen, with the intent to convert it to the person's own use or gain. If you find beyond a reasonable doubt that any of the property which was stolen at the post office at H. was actually received or had in the possession of the defendant, then you cannot convict unless you further find that the defendant had the property in his possession, or received it from the thief or his agent knowing at the time that it was stolen property. Upon the question of whether the defendant knew that it was stolen property, you will of course consider all the evidence in the

case. You have the right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have the right to infer that he did know. If a person received property under such circumstances that would satisfy a man of ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen. Now, the next point in the case is in regard to the intent the defendant had in regard to the use or disposal of the property. The statute requires that this receipt of stolen property, knowing it to have been stolen, must also be with the intent to convert it to the use of the party in whose possession it is found. There are statutes which simply punish the knowingly receiving of stolen property. That was the common law. But this statute has added this further ingredient that it must be done with the intent to convert it to the party's own use and gain. All these propositions that I have charged must be made out by the prosecution, of course, beyond a reasonable doubt, and in case you have a reasonable doubt of any of these ingredients, it will be your duty to acquit the defendant.<sup>36</sup>

36—*Kirby v. U. S.*, 174 U. S. Rep. 47 (55), 19 S. Ct. 574.

The court said in comment that "one of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that in 'all criminal prosecutions, the accused shall \* \* \* be confronted with the witnesses against him.' Instead of confronting K. with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence as against them, in respect of every fact essential to show their guilt. But a fact which can be primarily established only

by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial upon whom he can look while being tried, whom he is entitled to cross examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. 'This presumption,' this court has said, 'is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.' *Coffin v. United States*, 156 U. S. 432, 459, 15 S. Ct. 391."

## CHAPTER CLXXXIII.

### CRIMINAL—PERJURY.

See Approved Instructions, Chapter CII, Vol. II.

§ 4793. Willful swearing must be to a matter material to the issue.

§ 4794. Falsely swearing as to lack

of knowledge when he had read it in the newspapers and heard rumors.

§ 4795. Compelling defendant to testify against himself.

**§ 4793. Willful Swearing Must Be to a Matter Material to the Issue.** (a) The court instructs the jury for the People that if you believe, from the evidence in the case, beyond a reasonable doubt, that the defendant willfully testified falsely in a material matter in the trial of a case in court, as charged in the indictment in this case, then you should find him guilty as charged in the indictment.

(b) That if you believe beyond a reasonable doubt, from the evidence, that the defendant did execute the deed, a copy of which was introduced in evidence, and that he willfully denied having executed the same, on oath, in a trial where said deed was material, and that he willfully swore falsely about the same, as charged in the indictment, then you should find him guilty in this case.<sup>1</sup>

**§ 4794. Falsely Swearing as to Lack of Knowledge When He Had Read It in the Newspapers and Heard Rumors.** The jury are instructed that if they find from the evidence that, after being sworn by the foreman of the grand jury, and before said grand jury, he, the defendant, did then and there falsely swear and testify under oath that he did not know of and had never heard of the existence of the \$—— deposited in the A. Company, and if you further find from the evidence that in truth and in fact the defendant did, at the time he so testified under oath, well know, aside from any information he may have acquired through the newspapers, of the existence of the

<sup>1</sup>—Young v. People, 134 Ill. 37 (42), 24 N. E. 1070.

"In a case of this character, as a general rule, the materiality of testimony is a question of law, and not one of fact. (2 Bishop on Crim. Law, sec. 1039; 2 Bishop on Crim. Proc. sec. 935.) But treating it as a mixed question of law and fact, and thus one for the jury, the instructions were calculated to mislead the jury. In the first instruction, the jury were directed to find the defendant guilty, if he willfully testified in a material matter on the trial of a case in court, while the statute requires the false testimony, to make out perjury, to be 'in a matter material to the issue or point in question.' The defendant may have sworn falsely in a material matter,

and at the same time not sworn falsely in a matter material to the issue. On the trial of the ejectment suit, it may have been a material matter who held possession of the land, and the time the possession was continued, and under what title possession was held, and, under the instruction, if the defendant had sworn falsely on that branch of the case, the jury were directed to convict, although that was not the point in issue. Nor was it the false testimony for which he was indicted. The same objection exists to the second instruction. We think the instructions were both calculated to mislead the jury, and they ought to have been either refused or modified."



said \$——, and that said sum was deposited in a lock box in the safe deposit vault of said A. Company, and that when he so swore and testified under oath he willfully and corruptly testified falsely, you should find him guilty of perjury.<sup>2</sup>

**§ 4795. Compelling Defendant to Testify Against Himself.** The jurors are instructed that under the Constitution of the State of Missouri no person can be compelled to testify against himself in a criminal case, and that if you believe from the evidence that on the —— day of ——, the grand jury of the State of Missouri within and for the body of the City of S., were investigating a charge against this defendant, and he was summoned to appear before them, and that upon said hearing he was not notified that he could not be compelled to testify against himself, and that said grand jury compelled him to so testify, that then the defendant, in giving testimony at such time, before such grand jury, could not be guilty of perjury, and it is your duty to acquit the defendant.<sup>3</sup>

2—State v. Faulkner, 175 Mo. 546, 75 S. W. 116 (133).

"Under this instruction defendant might have been convicted on the charge that he had not heard of the \$——, whereas no perjury is assigned on that part of his evidence.

Another objection made to this instruction is that it impliedly, at least, authorized the jury to find that defendant knew of said \$—— if he had heard of it by rumor or otherwise than by reading of it in the newspapers. We think this is also a fair criticism of this instruction on this point. It is true the court required that the defendant should know, and as the evidence of the stenographer of the grand jury showed beyond a doubt that defendant testified that he had read of it in the newspapers, and the court properly cautioned the jury that such information was not knowledge under the indictment, we do not think that by excluding what he had read in the papers the court cured the error of submitting to the jury whether defendant had falsely sworn he had not heard of the \$—— otherwise than by reading of it in the newspapers."

3—State v. Faulkner, *supra*.

"It is obvious that there are at least two, if not three, distinct legal propositions involved in this instruction. The first is an old and time-honored maxim of the common law, 'Nemo tenetur scipsum accusare.' (No one shall be compelled to accuse himself). As said by Judge Barclay in State ex rel. Atty. Gen. v. Simmons Hardware Company, 109 Mo. 125, 126, 18 S. W. 1125, 15 L. R. A. 676. 'To fully grasp its meaning, we must note its place in the history of the law as one of the most important rules of procedure that express the fundamental difference prevailing in continental Europe and that of countries which trace their laws, as we do, to the English source. In the former the

accused is required to submit to a rigid official examination touching the charge against him. In the latter such an examination is positively forbidden. The reason of this difference is found in that higher regard for the personal rights of the individual citizen which obtains in countries following the English common law, and to which is traceable the growth of that independent spirit which has secured to the people of those countries so large a share of liberty, and placed them in the vanguard of the world's progress.' In Missouri it forms one of the sections of our Bill of Rights and organic law. 'No person can be compelled to testify against himself in a criminal cause.' In every state of the Union a similar provision is found in its Constitution. It is also firmly embodied in the Constitution of the United States. The courts have jealously enforced it in all cases in which it was properly invoked. Mr. Justice Bradley, in Boyd v. U. S., 116 U. S. 631, 6 S. Ct. 524, 29 L. Ed. 746, voiced the sentiment of all American courts and lawyers when he said, 'Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.' In our own jurisprudence, from the first volume of our Reports down to the last, the same principle has been fearlessly announced and adhered to. It is not to be abandoned to subserve the exigencies of any particular prosecution. Constitutional safeguards which have resisted the assaults of monarchial

power for centuries in England, and withstood momentary clamor in this country throughout our national existence, are not to be frittered away at the demand of those who have apparently studied the fundamental principles of our free institutions to little advantage, when they demand that this universal principle of the common law and this constitutional guaranty of our federal and state Constitutions shall be abrogated because it may prove an inconvenient barrier to the investigation of some flagrant crime or crimes. It was framed by James Madison as it appears in the federal Constitution, and no American

statesman or lawyer has ever advocated its repeal.

So far as this instruction announces this obvious and just principle of law, it is unquestionably correct, but its application to the facts of this case is another matter. \* \* \*

\* \* \* In this case, he made no claim of privilege, and it is everywhere ruled this is a personal privilege which he may waive, and must be held to have waived when he voluntarily answers without objecting that it would criminate him. *State v. Douglas*, 1 Mo. 527, and cases cited. Our conclusion is that the instruction goes too far, and was properly refused."

## CHAPTER CLXXXIV.

### CRIMINAL—ARSON—BRIBERY—CONCEALED WEAPONS— GAME AND GAMBLING—PHYSICIANS AND SUR- GEONS—TRESPASS—MISCELLANEOUS PROSECUTIONS.

See Approved Instructions, Chapter CIII, Vol. II.

#### ARSON.

- § 4796. What must be proved to convict of arson—Joint defendants.
- § 4797. Value of property must be proved.
- § 4798. Malice is presumed from the deliberate intentional, unlawful burning.
- § 4799. Lack of motive as evidence of innocence—silence when accused of crime.
- § 4800. Insanity as a defense to arson.

#### BRIBERY.

- § 4801. Bribe must be given for the purpose of influencing the opinion or action.
- § 4802. Promise of a bribe made with intent to influence a juror—Drunkenness as a defense to criminal intention.

#### CONCEALED WEAPONS.

- § 4803. Carrying concealed weapons—Apprehension of attack—Intent.
- § 4804. Carrying concealed weapons while in his own house—Place not excepted.
- § 4805. Manager of picnic grounds carrying concealed weapon.

#### GAME AND GAMBLING.

- § 4806. Card playing—Must show playing was at public house—And that there was betting on the game.
- § 4807. Card playing—Playing a joke.
- § 4808. Horse racing—Betting booth.

#### PHYSICIANS AND SURGEONS.

- § 4809. Certificate of qualification from State medical examiners and also a diploma not required.
- § 4810. Practice of dentistry without a license—Receiving pay for the work an element of the crime—Work done in another name as a defense.

#### TRESPASS.

- § 4811. Trespass is a joint and several offense—Possession of stolen goods.
- § 4812. Identification of property taken by trespasser held not requisite—Value of property taken.
- § 4813. Conversion of part of the realty to the trespasser's use with intent to benefit, held not essential.
- § 4814. Trespass justified by a valid claim of right, honestly relied upon in good faith.

#### MISCELLANEOUS PROSECUTIONS.

- § 4815. Peddling goods for a livelihood and for a profit without a license—What constitutes.
- § 4816. Prosecution for fraudulent representations — Knowledge of the falsity is material and it is error to omit.
- § 4817. Election judges refusing to receive votes.
- § 4818. Civil rights — Extending equal privileges in restaurants.
- § 4819. Placing obstruction on a railroad — Reasonable doubt.

#### ARSON.

§ 4796. What Must Be Proved to Convict of Arson—Joint Defendants. The court instructs the jury that before you can find the de-



fendants guilty, the state must prove, beyond a reasonable doubt, that in the night time, about August 6th, a certain inhabited building of C., situated in G., B. county, Iowa, was burned; that the burning was not the result of an accident; that the defendants or one of them, willfully, feloniously and maliciously set said building on fire. And if the state has failed to establish any of these facts, beyond a reasonable doubt, then you should acquit the defendants.<sup>1</sup>

§ 4797. **Value of Property Must Be Proved.** (a) If you find, beyond a reasonable doubt, that the defendants A. and B., in the county of C., Nebraska, on or about August 25, unlawfully, willfully, maliciously, feloniously and intentionally did set fire to and burn, and cause thereby to be consumed by fire, four stacks of wheat, three stacks of oats, or some part thereof, the property of one —, of some value, you will find said defendants A. and B. guilty. And if you find, beyond a reasonable doubt, the said defendants A. and B., or either of them, committed the crime of setting fire to said stacks, or some of them, as averred in the information, and you further find before the firing of said stacks of wheat and oats, or some of them, by said defendants A. and B., on or about August 24, the defendant C., in said county of C., unlawfully, purposely and feloniously proceeded, incited, abetted and aided said A. and B. in the commission of the crime of burning and firing the said stacks as accused, or some part of them, as averred in the information in this case, you will be warranted in finding said C. guilty.<sup>2</sup>

(b) If the jury believe from the evidence that the value of the warehouse, exclusive of the depot connected with it, is less than \$500. then the jury cannot convict the defendant of arson in the second degree, under the indictment.

1—State v. Harvey, 130 Ia. 394, 106 N. W. 939.

"The appellants complain that the jury was here told, or at least that the jurors could readily so interpret the language of the court that proof beyond reasonable doubt that one of them feloniously and maliciously set the fire would justify the conviction of both of the crime charged against them. In our judgment this criticism is warranted. The instruction states three essential things which must be shown before the 'defendants' (speaking of them jointly) can be found guilty, and of these essentials one is said to be that 'the defendants or one of them willfully, feloniously, and maliciously set said building on fire.' Counsel for the state attempted to justify the charge on the ground that the prosecution was based upon the theory that if any crime were committed it was accomplished by the co-operation of both defendants, and that the circumstances were such that of necessity both must be convicted or both must be acquitted. Such may have been the theory of the prosecutor, but it does not follow that he was entitled to have any such proposition submitted to the jury. It is too well established to justify argument that upon the

trial of two defendants jointly charged with crime (except where from the very nature of the offense charged it must have been jointly committed, if at all) it is not within the province of the court to say to the jury that both must be convicted or both acquitted. Wharton's criminal law 693; State v. McClintock, 8 Ia. 203; McClennan v. State, 53 Ala. 640. It is very possible that the circumstances of a given case may be such that a verdict of guilty as to one of two defendants and of not guilty as to the other would be grossly unreasonable, and yet, if the case is not for a directed verdict of acquittal as to one or both of the accused, the right of each to have the question of his individual guilt or innocence passed upon by the jury cannot rightfully be denied."

2—Burger et al. v. State, 34 Neb. 397, 51 N. W. 1027 (1028).

"It will be observed that the jury were instructed that, if they found the stacks were of some value, they will find said A. and B. guilty; and, in substance, if C. incited A. and B. to burn the same, they would be warranted in finding him guilty. To constitute the offense charged, the property burned must be of the value of \$35 or upwards. This element is entirely left out in the instructions."

(c) If the jury believe from the evidence that the value of the property as proven is less than the value alleged in the indictment, the jury must find the defendant not guilty.<sup>3</sup>

**§ 4798. Malice Is Presumed from the Deliberate, Intentional, Unlawful Burning.** (a) You are instructed that malice is a necessary ingredient in this case and that malice must have been in the mind of the defendant, and directed towards or against M.

(b) Malice means hatred, hostility, enmity or ill will, and in this case this malice must be believed beyond a reasonable doubt that it existed in the mind of the defendant against M.

(c) Malice is not necessarily implied from the fact that a man willfully set fire to or burned the dwelling house of another.<sup>4</sup>

**§ 4799. Lack of Motive as Evidence of Innocence—Silence when Accused of Crime.** (a) The court charges the jury that they can look to the evidence for a motive as to why the defendant would commit the crime charged in the case, and, if the evidence discloses no motive, the jury can look at this circumstance as indicating the innocence of the defendant.

(b) The court charges the jury that silence by a prisoner, when accused out of court with crime, is a circumstance to which the jury may look; and that such silence is often a circumstance, the meaning of which may be wholly misunderstood, and such silence ought, therefore, always to be questioned very carefully, if not distrustingly, by the jury.

(c) The court charges the jury that if they believe beyond a reasonable doubt, from the evidence, that defendant is guilty of burning the property, and to believe beyond a reasonable doubt that the store and its contents at the time was worth less than five hundred dollars, then they may find the defendant guilty of arson in the third degree.<sup>5</sup>

3—Cunningham v. State, 117 Ala. 59, 23 So. 693 (694).

"The statute makes the willful burning of a warehouse arson in the second degree, if the property be of the value of \$500 or more. If it be of less value than \$500, the offense is arson in the third degree. Code 1896, pars. 4337, 4340; James v. State, 104 Ala. 20, 16 So. 94. The bill of exceptions contains no testimony tending to show the value of the warehouse, the subject of the arson in this case, to have been of less value than \$500; hence charge numbered 1, requested by the defendant, was properly refused. Nor was the state required to prove the property to have been of the exact value alleged in the indictment. The testimony, without conflict, tending to show that the value of the warehouse alone was more than \$500, there was no variance between the allegation and the proof of value."

4—Morris v. State, 124 Ala. 44, 27 So. 336 (337).

"Arson in either one of the degrees, as defined by statute in this state, is that any person who 'willfully sets fire to,' or 'willfully burns,' the buildings mentioned, is guilty, etc. Code, pars. 4336-4341.

To constitute the offense, it has been held, that the burning must be willful and malicious, otherwise it is not a felony, but only a trespass; therefore no negligence or mischance amounts to it. "Though malice is a necessary ingredient, its presence need not be specifically proven; it will be presumed by the law from the willfulness of the act." The state is not bound to prove malice, or any facts or circumstances besides the unlawful burning. Malice will be presumed from the deliberation of the act. The burden is on the defendant to negative or destroy this presumption. 'Arson is not a crime involving any specific intent in addition to the act done. The intent to burn is the only intent required, and that is necessarily implied in the act, unless some excuse, such as accident appears.' 2 Am. & Eng. Enc. Law (2d Ed.) 918, and authorities there cited; 1 McClain, Cr. Law, par. 526; Luke v. State, 49 Ala. 30, 20 Am. Rep. 269; Lockett v. State, 63 Ala. 5; Stone v. State, 105 Ala. 61, 17 So. 114."

5—Granison v. State, 117 Ala. 22, 23 So. 146 (147).

The court held that charges 1 and

§ 4800. **Insanity as a Defense to Arson.** You are instructed that insanity which renders a person irresponsible for an act is such a diseased condition of the mind as renders the person incapable of understanding the nature of such act, and incapable of distinguishing between right and wrong with respect to such act. So in this case, if the evidence introduced tending to show that the defendant was at the time of the fire incapable of understanding and knowing what he was doing, and that at such time he could not distinguish between right and wrong, raises in your mind a reasonable doubt of the defendant's sanity at the time of such fire, then you should acquit him.<sup>6</sup>

# BRIBERY.

§ 4801. **Bribe Must Be Given for the Purpose of Influencing the Opinion or Action.** You are instructed that if you find from the evidence that the check of \$—— was given and used for the purpose of procuring a withdrawal of an ordinance from the common council, and not for the purpose of influencing the judgment, opinion or action of the defendant in his official capacity, then your verdict should be not guilty.<sup>7</sup>

2 requested by defendant were argumentative, and charge 3 was abstract.

6—*Knights v. State*, 58 Neb. 225, 78 N. W. 508 (509), 76 Am. St. 78.

This instruction was erroneous in that "the jury were plainly told that they might acquit the defendant on the ground of insanity, only in case (1) he was at the time of the fire incapable of understanding the nature of his act, and (2) that he was at the same time incapable of distinguishing between right and wrong with respect to that act. Such is not the law, and the giving of this instruction was an error fatal to the conviction. Ordinarily, insane persons comprehend the nature of their acts. When they take life or destroy property, they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view. The jury in this case may have believed that the defendant applied a lighted match to the property in question, understanding well that combustion would follow, and that the store building and its contents would be reduced to ashes; and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act. In the answer of the English judges to the questions propounded by the house of lords, as a result of the acquittal of McNaughton for the killing of Drummond (*McNaughton's case*, 10 Clark & F. 200), Tindal, C. J., speaking for himself and his associates, among other things, said that there is no criminal responsibility where, 'at the time of the committing of the act, the party accused was lab-

oring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong.' The rule thus announced has been since 1843 the unquestioned law in England; and it is now the generally accepted doctrine of the American courts. It was recognized by this court in *Wright v. People*, 4 Neb. 407, and has been since frequently approved. *Hawe v. State*, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; *Hart v. State*, 14 Neb. 572, 16 N. W. 905; *Thurman v. State*, 32 Neb. 224, 49 N. W. 338. In *Hawe v. State*, it was said: 'And, where an individual lacks the mental capacity to distinguish right from wrong in reference to the particular act complained of, the law will not hold him responsible.'

7—*State v. Dunn*, 125 Wis. 181, 102 N. W. 935 (939).

"It should be noted that the portion of the charge excepted to is part of the statement wherein the court properly defined the offense for which the accused was on trial; gave the necessary facts that must be found to exist, beyond reasonable doubt, as constituent elements of the offense, to warrant a conviction; and then added that if they found the facts embodied in this part of the instruction, and which embodied what the accused averred by way of specific defense of fact to the claims made by the state against him on the evidence, then they must acquit. When separated from its context, this phrase might be given a different signification from that which was evidently intended and conveyed to the jury when used in



§ 4802. **Promise of a Bribe Made with Intent to Influence a Juror—Drunkenness as a Defense to Criminal Intention.** The court charges the jury that the promise or offer made to S. by defendant must have been corruptly made, and made with the intent to bias the mind or influence the decision of S. as a juror in the case of the State v. W., charged with grand larceny; and if they believe from the evidence that defendant was drunk, or so intoxicated that he was incapable of forming or entertaining the intent essential to the commission of the offense of bribery, they must acquit him.<sup>8</sup>

### CONCEALED WEAPONS.

§ 4803. **Carrying Concealed Weapons—Apprehensive of Attack—Intent.** (a) I charge you, gentlemen of the jury, that if you believe from the evidence that the defendant had been informed from a reliable source that R. had made threats of personal violence on defendant, and defendant had good reason to apprehend an attack on his person from this source, then he had a right to carry a pistol concealed about his person.

(b) It is as much the duty of the jury to acquit the defendant if they believe from all the evidence he had good reason to apprehend an attack as it would be their duty to acquit the most respectable white man.

(c) Before the jury can convict the defendant they must be satisfied beyond a reasonable doubt that defendant knowingly and willingly carried a pistol concealed about his person within twelve months before the finding of the indictment and in Morgan county.

(d) If the jury believe from the evidence that defendant did not intend to conceal the pistol or pistols alleged to have been concealed, but intended to carry it or them so that they could be seen, then it is the duty of the jury to acquit him.<sup>9</sup>

the proper connection; but when elucidated by reference to what immediately preceded, then it is obvious it could in no way mislead the jury or prejudice the plaintiff."

<sup>8</sup>—White v. State, 103 Ala. 72, 16 So. 63 (65, 67).

"This should have read 'that defendant was so drunk or intoxicated that he was incapable,' etc.; and not, as written, 'that defendant was drunk or so intoxicated that he was incapable,' etc. The defendant may have been drunk, and yet capable of committing the offense. The drunkenness to excuse, must have been of the character and extent we have below indicated. If, as is said in Chatham v. State, 92 Ala. 47, 9 So. 607, the defendant was so intoxicated as that he was incapable of consciousness that he was committing a crime, incapable of discriminating between right and wrong, then he could not have entertained the corrupt intent essential to the completion of the offense. Under the evidence touching the defendant's

drunkenness, it was properly a question for the jury whether he actually entertained the necessary corrupt intent."

<sup>9</sup>—Barker v. State, 126 Ala. 83, 28 So. 589 (590).

The court said that charge (a) "requested by the defendant was erroneous in asserting that the defendant had the right, upon the facts postulated, to carry the pistol concealed. If he had the right to so carry it, the jury would have no discretion as to considering the fact in mitigation of punishment, but should acquit him. Charge (b) requested by the defendant is argumentative and was properly refused. It is not a question of intention, or that the defendant willfully and knowingly carried the pistol concealed about his person. An indifferent thoughtless or careless carrying of a weapon concealed about one's person would be a violation of the statute. Written charges (c) and (d) were misleading and no error was committed in their refusal."

§ 4804. **Carrying Concealed Weapons While in His Own House—Place Not Excepted.** (a) If the jury find that there was no evidence tending to show that defendant had left his house with the pistol on his person, although he had one concealed on his person within his bedroom at the time he was arrested, they must find him not guilty.

(b) If the jury believe from the evidence that the defendant was in his cabin alone at the time the sheriff arrested him, and there is no evidence tending to prove that he carried the pistol concealed about him on the outside of his cabin, it being his domicile, then he has not violated the statute, and they must find defendant not guilty.

(c) The statute against carrying a concealed pistol was intended to suppress a public evil, and consequently to guard the public safety; hence if the jury believe from all the evidence that the defendant, at no time covered by the testimony, had left his room, and there was no one present with him at the time of his arrest, in the absence of any evidence that any one had been with him, although he had the pistol concealed when arrested, the offense was incomplete, and they must find the defendant not guilty.<sup>10</sup>

§ 4805. **Manager of Picnic Grounds Carrying Concealed Weapon.** It is shown by the undisputed evidence that defendant was legally in possession and control of the premises at Y.'s Grove at the time of the difficulty in which T. was struck, and the jury are instructed that defendant had the right to carry a pistol on said premises, and the fact that he was in possession of a pistol at the time of the difficulty is not evidence of defendant's being guilty of an unlawful act.<sup>11</sup>

### GAME AND GAMBLING.

§ 4806. **Card Playing—Must Show Playing Was at Public House and That There Was Betting on the Game.** The court further charges

10—Dunston v. State, 124 Ala. 89, 27 So. 333, 82 Am. St. 152.

"Neither by the letter nor by the spirit of the statute prohibiting the carrying of weapons concealed about the person is any exception created in favor of place. One of the objects of the law is the avoidance of bad influence which the wearing of a concealed deadly weapon may exert upon the wearer himself, and which in that way, as well as by the weapon's convenience for use, may tend to the insecurity of other persons. Owen v. State, 31 Ala. 387; State v. Reid, 1 Ala. 612, 35 Am. Dec. 44. The mental suggestions which proceed from constant contact with weapons specially adapted to, and usually worn for the purpose of, inflicting bodily harm to persons, may come as well when the wearer is in his domicile as elsewhere. The only matter relied on to acquit the defendant is that he was in his home when carrying the pistol concealed upon his person, and that until the time of his arrest he was alone. This neither avoids the operation of the statute nor excuses

its violation. Harman v. State, 69 Ala. 248; Owen v. State, supra."

11—Monson v. State, 45 Tex. Cr. App. 426, 76 S. W. 570.

"The learned trial judge refused this charge, as he states upon the authority of Alexander v. State, 27 Tex. App. 533, 11 S. W. 628, where we held that under article 320 Pen. Code 1879, which defines the offense of going into a church, school-room or other place where people are assembled for amusement, etc., having a pistol upon his person, the persons exempted from the operation of this article by article 321 are peace officers only, and do not include the owner of the premises in which the people are assembled. We think this authority clearly supports the ruling of the court since the record before us shows that the people had assembled at this picnic ground for amusement, and appellant was not an officer. The record does not show that appellant was the owner of the premises, but was simply partly in control. But, even if he were the owner, we do not understand that he would have the right to carry a pistol under such circumstances."

the jury that there is no evidence as to what part of the day the playing was done, and if the jury believe beyond a reasonable doubt that the defendant lost at a game played with cards at B.'s house on the — of —, —, at any part of the day, and that it was in this county within twelve months before the beginning of this prosecution, then the defendant would be guilty.<sup>12</sup>

§ 4807. **Card Playing—Playing a Joke.** If you believe from the evidence that defendant was not engaged in the playing of a game of cards, but was helping H. in playing a trick or joke, you will find him not guilty.<sup>13</sup>

§ 4808. **Horse-racing—Betting Booth.** The court instructs the jury that the betting on a horse race is in law a game, and that, if you believe, from the evidence, beyond a reasonable doubt, that there was what is known as a betting ring on the grounds of the W. Club in a building or underneath a roof at the time alleged in the indictment, and that there was a betting booth therein occupied, and that such booth was used for the purpose of receiving or making bets upon a horse race, and that the defendant in any way assisted in the making or receiving of such bets at such booth in such building, then you should find the defendant guilty.<sup>14</sup>

## PHYSICIANS AND SURGEONS.

§ 4809. **Certificate of Qualification from State Medical Examiners and also a Diploma Not Required.** If you believe, from the evidence, beyond a reasonable doubt, that defendant did unlawfully practice, for pay, and as a regular practitioner of medicine in all its branches and departments, and as such practitioner did visit and prescribe for certain patients named in the indictment, without first having obtained a certificate of professional qualifications from any authorized board of medical examiners, and without having a diploma from some accredited medical college chartered by the legislature of the state, or its authority, then you should find the defendant guilty as charged.<sup>15</sup>

12—*Jackson v. State*, 117 Ala. 155, 23 So. 47 (48).

"The above charge requested by the state was erroneous. It withdrew from the jury the question for them to decide, whether or not, under the evidence, the house at which defendant is alleged to have played and bet a game of cards, was a public place or not. *Nickols v. State*, 11 Ala. 58, 60, 20 So. 564; *Johnson v. State*, 75 Ala. 7. Moreover, it does not appear from the evidence, that either the defendant or any one of the persons who played in the game of cards, which the evidence tends to show was played at said house for money, bet anything on the game. From aught appearing, parties engaged in the game may have done the betting."

13—*Toler v. State*, 41 Tex. Cr. App. 659, 56 S. W. 917.

"We do not think the court erred in refusing to give said charge, since appellant may have been playing a

trick or joke, and still be guilty, as the statute expressly inhibits the playing at a game with cards in a house for the retail of spiritous liquors."

14—*O'Leary v. People*, 88 Ill. App. 60 (67).

"The instruction ignores the charge in the indictment that defendant occupied a common gaming house in a certain building known as 'W. Club,' and the charge that in said building he permitted persons to play, etc. The instruction is erroneous, and should not have been given."

15—*Aldenhoven v. State*, 42 Tex. Cr. App. 4, 56 S. W. 914.

The court said that the defendant "is not required to have a certificate of qualification from authorized medical examiners, and also a diploma, in order to free him from a prosecution under this article; but if he has either he is not subject to prosecution."



§ 4810. **Practice of Dentistry Without a License—Receiving Pay for the Work an Element of the Crime—Work Done in Another's Name as a Defense.** If you believe, from the evidence, that this man practiced dentistry without obtaining license as the law directs, within twelve months before the finding of this indictment, you should find the defendant guilty, and assess his punishment at not less than \$10 nor more than \$100. If, upon the other hand, you believe the defendant was in there learning dentistry, and as working under Dr. M.'s directions and advice, it will be your duty to say, "We, the jury, find the defendant not guilty." If the defendant had set up as a regular practicing dentist, he would be guilty; but if he were there learning the business under Dr. M., and practicing under his directions and his advice, he is not guilty.<sup>16</sup>

### TRESPASS.

§ 4811. **Trespass Is a Joint and Several Offense—Possession of Stolen Goods.** (a) To authorize the conviction of any one of the accused on the second count of the indictment, it must be proved beyond a reasonable doubt that A., B., C. and D. actually and in person entered upon the land of S. and that they entered unlawfully and willfully. Neither of the four can be convicted of unlawfully entering on the lands unless it is proven beyond a reasonable doubt that they did enter on the lands.<sup>17</sup>

(b) Where defendants charged with the offense set forth in this information give a natural and reasonable explanation of their possession of the property alleged to be taken, it then devolves upon the state to prove beyond a reasonable doubt that such explanation is

16—State v. Reed, 68 Ark. 331, 58 S. W. 40.

These instructions, it will be observed, leave out the charging and receiving pay for the work as an element of the crime. The statute (Sand. & H. Dig.) defining the crime is in these words: 'Sec. 4973. It shall be unlawful for any person to practice dentistry, or dental surgery, in the state of Arkansas, without first having received a certificate from the board of dental examiners; provided, this shall not be construed as preventing any regular licensed physician from extracting teeth, nor to prevent any other person from extracting teeth, when no charge is made therefor by such persons.' From the language of the act under which this indictment was found, it is impossible to escape the conclusion that the performance of dental work, charging and receiving pay therefor, is practicing dentistry. The theory of the trial court seems to have been that, notwithstanding this, yet, as the defendant was, when he did this work under the direction of Dr. M., a licensed dentist, he was not answerable to the law on the subject. It must be noted, however (if this is any defense at all), that while this relation existed between the defendant and Dr. M. at the time, so far as the dental work was

concerned, yet the charge for the same was not made in the name of Dr. M., nor was the pay received for him. The charge was made by the defendant for himself, independent of Dr. M., and so was the pay received by him. The instruction given by the court was therefore erroneous, and, being excepted by the prosecuting attorney, a new trial should have been granted for that reason."

17—Long et al v. State, 42 Fla. 612, 28 So. 775 (778).

"This instruction is clearly erroneous in that it denies the right and duty of the jury to convict one or more of the four defendants named unless it was proven beyond a reasonable doubt that all of them actually and in person unlawfully and willfully entered upon the land alleged. The offense is not necessarily a joint one, but is joint and several; and any one or more of the defendants might be found guilty upon proper proof that he or they committed the acts alleged in the information, even though the others were not shown to have been connected in any way with the commission of the offense. This instruction may be objectionable on other grounds, but the one stated is sufficient to justify the ruling refusing it."

false; and if such explanation be not shown by the state to be false beyond a reasonable doubt, it is your duty to acquit the accused.<sup>18</sup>

**§ 4812. Identification of Property Taken by Trespasser Held Not Requisite—Value of Property Taken.** (a) The court instructs the jury that the fact that you believe from the evidence that some of the pineapple plants produced in evidence were taken from S.'s land is not sufficient. The identical pineapple plants taken from the land of S. as charged in the information must be proved beyond a reasonable doubt, and before you can convict of an offense punishable as grand larceny, enough of the pineapple plants taken from S.'s land must be identified and proved beyond a reasonable doubt as of the value of \$20 or over.<sup>19</sup>

(b) You cannot convict the accused on the information as it stands unless a sufficient number of the pineapple plants charged to have been taken from S.'s land are identified beyond a reasonable doubt to be of the value of \$20 or over.<sup>20</sup>

**§ 4813. Conversion of Part of the Realty to the Trespassers' Use With Intent to Benefit, Held Not Essential.** Before you can convict the accused of the severing, taking and carrying away of the pineapple plants charged in the information it must be proved beyond a reasonable doubt that they took them for the purpose of converting them to their own use. To constitute the offense charged, an intention upon the part of the defendants to benefit or gain by the taking is essential, and the accused cannot be convicted unless such intention is proved beyond a reasonable doubt.<sup>21</sup>

**§ 4814. Trespass Justified by a Valid Claim of Right, Honestly Relied Upon in Good Faith.** You are instructed that to excuse one in

18—Long et al. v. State, supra.

"This instruction is evidently borrowed from the law relating to the presumption of guilt permitted to be drawn from the fact of possession of property recently stolen, in larceny cases. We are not sure that this presumption is applicable to cases of trespass upon realty, but, assuming that it is, we are of opinion that the instruction was erroneous and therefore properly refused. In order to put the burden upon the state of showing that the explanation is false, the explanation must be credible. It is not sufficient that it be natural and reasonable. *Leslie v. State*, 35 Fla. 171, 17 So. 555; *Bellamy v. State*, 35 Fla. 242, 17 So. 560. There are other defects in this instruction which will readily occur by reading it in connection with the cases cited."

19—Long et al. v. State, supra.

"We are of opinion that it was properly refused because involved and misleading. If the jury believed beyond a reasonable doubt that some of the pineapple plants produced in evidence of some value were taken from the land of S. by the defendants, in the manner charged in the information, that was sufficient to found a verdict of guilty upon, even though there was no evidence upon which the jury could separate S's plants from the

others produced in evidence. This instruction was calculated and evidently intended to impress the jury with the view that in order to identify the property alleged to have been taken, it was necessary that witnesses or the jury should be able to separate from the general mass of plants produced in court those that belonged to S., and that a failure to do so required an acquittal. This is not the law, as we have shown in considering the assignments based upon the rulings refusing to strike S's testimony.

20—Long et al. v. State, supra.

"The instruction was properly refused because it in effect directed an absolute acquittal unless the value of the property was proven to amount to \$20 or more."

21—Long et al. v. State, supra.

"This instruction is erroneous because it requires as a necessary ingredient of the offense, a matter not found in the statute creating it. That statute does not undertake to confine the offense created to those who take or carry away property that is parcel of the realty for the purpose of converting it to their own use, or those who expect to gain or benefit by the taking. We see nothing in the language that will justify us in so interpreting it. The instruction was properly refused."

a prosecution for criminal trespass on the lands of another, where the defense is based on a claim of right or title, the defendants must have acted in good faith, and believed that said claim or title was a valid one, and must be based on such a state of facts as one acting as an ordinarily prudent man would assert under like conditions and circumstances; and if the defendants did not act in good faith of title, or if such a state of facts did not exist as to justify them in the honest belief of a valid claim, acting as prudent men, then they cannot justify the trespass on that ground.<sup>22</sup>

### MISCELLANEOUS PROSECUTIONS.

§ 4815. **Peddling Goods for a Livelihood and for a Profit Without a License—What Constitutes.** (a) The court instructs that unless the jury believe from the evidence beyond all reasonable doubt, that defendant made more than one sale of merchandise, then, under the evidence in this case, the jury must find the defendant not guilty.

(b) Before the jury can convict the defendant, they must be satisfied from the evidence, beyond all reasonable doubt, that the defendant, did, in S. county, within twelve months before the commencement of this prosecution, engage in, or carry on, the business of peddling merchandise for a livelihood and for a profit, without a license, and unless the jury are so satisfied from the evidence they must find the defendant not guilty.

(c) If the jury believe from the evidence that all that defendant did towards engaging in, or carrying on, the business of peddling without a license was to go along with G., the man who owned the goods, and that on one occasion he opened up a bundle of goods at the instance of said G., and priced, or even sold, an article or articles of said goods, then the defendant is not guilty, and the jury must acquit him.

(d) The court charges the jury that one sale of merchandise is not sufficient to constitute an offense of engaging in, or carrying on, the business of peddling without a license. It is only when there are repeated and continuous acts that it can be said the business has been carried on or engaged in; and unless the jury believe from the evidence, beyond all reasonable doubt, the defendant so engaged in or carried on said business, then the jury must find the defendant not guilty.

(e) Unless the jury are satisfied from the evidence to a moral certainty, and beyond all reasonable doubt, that defendant had some interest in the jewelry, eyeglasses, laces and other goods alleged to have been in the possession and sold by defendant and G. on one occasion mentioned by the state witnesses at the house of W., and that defendant engaged in or carried on the business of selling such merchandise for a livelihood and for a profit, then the jury must find the defendant not guilty.<sup>23</sup>

<sup>22</sup>—*Boykin v. State*, 40 Fla. 484  
<sup>24</sup> So. 141 (144).

"This charge was erroneous because of its requirement that the belief of right on the part of the trespasser, in order to excuse, must

be such as would actuate a 'prudent' man."

<sup>23</sup>—*Keller v. State*, 123 Ala. 94,  
26 So. 323 (324).

In comment the court said that the second charge "requested the



§ 4816. **Prosecution for Fraudulent Representations—Knowledge of the Falsity Is Material and It Is Error to Omit.** If you should come to the conclusion beyond a reasonable doubt that the seller represented the horse to be sound, a good farm work horse, work anywhere with him, he was all right, a good farm horse; that these representations proved to be false; that he gave fifty dollars by reason of the making of these representations by the seller; and the defects were such that an ordinarily prudent man could not have seen the defects himself, and the seller from all the circumstances should have known what the defects were,—it would be your duty to render a verdict of guilty against the defendant.<sup>24</sup>

§ 4817. **Election Judges Refusing to Receive Votes.** Before you will be justified in convicting the defendants of the offense charged, you must be satisfied beyond a reasonable doubt—First, that said S. had complied with all the requisites provided by law necessary to make it the duty of the defendants to receive his vote, or that he offered to comply therewith, and was prevented from so doing by the willful refusal on the part of the defendants to permit him to do so; or, second, that after the said S. had offered to comply with all the requisites prescribed by law to entitle him to vote, that the defendants willfully refused to receive his vote.<sup>25</sup>

court to instruct the jury that the defendant must have engaged in the business 'for a livelihood and a profit' without a license, before he would be guilty of a violation of the law. This was an incorrect statement of the law. If he engaged in the business without a license, for a livelihood or for profit, he would have been guilty. This charge was therefore properly refused. The remaining written charges requested by the defendant were opposed to the principles we have hereinabove expressed as to what is necessary to constitute the offense of engaging in, and carrying on, the business for which a license is required under the revenue law, and the court committed no error in refusing the same."

<sup>24</sup>—*Waterman v. State*, 114 Ga. 262, 40 S. E. 262 (263).

"This charge contains an erroneous proposition of law, which must have been hurtful to the defendant. In effect, the jury were instructed that, if the accused made the representations charged, and if they were false, and the defects in the horse were latent, and the prosecutor relying on them paid his money for the horse, and the seller should have known of such defects, he was guilty. The accused could not, under such circumstances, have been convicted, unless at the time he made the representations he knew them to be false. Since the deceitful means necessary to sustain a conviction in a case of this character involve knowledge of the

falsity of the representation by the seller, no action or proceeding can be maintained without proof of the scienter. Deceit is the foundation of the action, which cannot exist without knowledge of the falsity of the representations upon which the other party acted. Mr. Wharton is amply supported by authority when in his *Criminal Law*, in discussing this subject, he says (volume 2, par. 1185): 'The statement must be not only false in fact, but false to the knowledge of its utterer.' The knowledge that the representations were false must be proven to exist before the offense charged is made out."

<sup>25</sup>—*State v. Clark*, 102 Ia. 685, 72 N. W. 296 (297).

"The appellants contend that this portion of the charge was erroneous for several reasons, among which is this: that the jury could have found the defendants guilty without finding that they at any time refused to receive the vote of S. That seems to have been true for the jury was told, in effect, that it would be justified in convicting the defendants 'if S. had complied with all the requisites provided by law necessary to make it the duty of the defendants to receive his vote,' whether he offered it or not. That this was erroneous is clear, and that it may have been prejudicial is shown by the fact that there is much evidence which tends to show that the judges of election were not ready to receive votes when S. made the offer upon which he relies."

§ 4818. **Civil Rights—Extending Equal Privileges in Restaurants.** The court instructs the jury that the law of Illinois inflicts a penalty upon restaurant or eating house keepers or persons in their employ, who shall fail or refuse to extend the full and equal enjoyment of the accommodations, advantages, facilities and privileges usually extended to patrons to all persons alike, subject only to the conditions and limitations established by law and applicable alike to all citizens of every race and color and regardless of color and of race; and if the jury believe, from the evidence in this case that the defendant herein, failed or refused to serve the plaintiff herein, because of his color, then the defendant has been guilty of such violation of the law as will subject him to suffer a penalty therefor, and you should find him guilty accordingly, and assess such penalty as you may deem proper; in a sum not less than \$25 nor more than \$200.<sup>26</sup>

§ 4819. **Placing Obstruction On a Railroad—Reasonable Doubt.** If the obstruction, if any, upon the railroad, charged in the indictment, was placed there by any person other than the defendants; or if it was placed there by defendants, but it was not such as might endanger human life; or if such obstruction, if any, was not willfully done,—then you will acquit defendants.<sup>27</sup>

26—Grace v. Mosely, 112 Ill. App. 100.

"This instruction makes the liability of appellant greater than does the statute. . . . Under the statute it is incurred by 'denying to any citizen,' etc., or by 'aiding and inciting such denial.' To hold one liable who simply 'fails' to extend to any citizen the full enjoyment of any of such accommodations is to go beyond the statute."

27—Stanfield v. State, 43 Tex. Cr. App. 10, 62 S. W. 917 (918).

"This charge tends to place the burden upon defendants to prove their innocence. Johnson v. State, 29 Tex. App. 150, 15 S. W. 647.

"Unless defendants placed the obstruction upon the track, or there was a reasonable doubt of that fact, defendants were entitled to an acquittal. The state must prove these matters before a conviction can be asked, and the reasonable doubt must be overcome as well."





# INDEX.

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[References are to sections; e refers to Erroneous Instructions.]

## ABANDONING CONFLICT—

- self defense, aggressor must give deceased notice, e 4725.
- defendant in fault, gives right to plead, e 4724.

## ABANDONMENT—

- as affecting adverse possession, 447.
- homestead, by reason of fear of death, selling during temporary absence, e 4236.
- homestead, use for other purposes, e 4235.
- of purpose, assault with intent to commit rape, 2823.
- of rights under insurance policy, 1203.

## ABETTING—

- abortion, murder in first degree, 2786.
- assault and battery, presence of others, 2851.
- commission of homicide, manslaughter, e 4477.
- escape from prison, homicide committed, 2745.
- necessary, principal and accessory, 2739.
- principal and accessory, 2733.
- and accessories, conspiracy, e 4475.
- in second degree, 2736.

## ABDUCTION—

- of minor for purpose of prostitution, e 4505.
- previous chaste character presumed, 2783.
- proof of, 2782.

## ABIDING CONVICTION OF GUILT—

- must arise from evidence, not from lack of it, e 4461.

## ABILITY—

- to drink liquor without feeling its effects, no evidence that the liquor was not intoxicating, e 4769.
- to pay, reference to defendant's, measure of damages, civil assault, e 3606.

## ABORTION—

- aiding, advising or encouraging perpetration, e 4507.
- death from some drug or poison, e 4506.
- resulting, murder or manslaughter, intent, e 2785.
- definition, present, aiding and abetting murder, 2786.
- killing in attempt to procure, manslaughter, 3043.
- result of natural causes, 2784.

## ABSENCE—

- for seven years, presumption of death, life insurance, e 3684.
- from state, sufficient to constitute a residence, statute of limitations, visits not deducted, e 3707.
- when statute of limitations is suspended, 1251.
- of motive, with good character, may generate a reasonable doubt, e 4341.
- temporary, selling homestead during, abandonment, e 4236.

## ABSOLUTE KNOWLEDGE—

- that goods were stolen, not necessary to convict of receiving stolen property, e 4791.

## ABSTRACT—

- duty to acquit or convict, e 4501.
- instruction, as to force used in rape, e 4522.

[References are to sections; e refers to Erroneous Instructions.]

# ABSTRACT OF RECORD—

- additional abstracts, 318.
- amendments—when may be made, 318.
- cost of additional, 316.
- form prescribed by statutes, 316.
- must show objection to be considered, 318.
- purpose of, 317.
- rules for filing mandatory, 318.
- should be concise summary—not reprint, 316.
  - contain all that is necessary for court to understand errors, 316.
  - contain names of parties and nature of proceedings, 316.
  - not be a mere index, 316.
    - a mere transcript of testimony, 316.
    - too full, 316.
- taken as true, 319.
- time of filing extended, 319.
- what it should contain, 316.
- when may be stricken from files, 318.

# ABSTRACT PROPOSITION OF LAW—

- correctly stated sometimes error, e 4619.
- duty to employ medical assistance, measure of damages, personal injury, e 3582.
- should not be given jury, 178.

# ABUSE—

- carnal, definition of, 2827.
- of criminal process, negotiable instruments, duress, 2152.

# ABUSIVE LANGUAGE—

- amounting to cruelty, sufficient in some states, action for divorce, 1007.
- by passenger, right to eject, 1828-1829.
- not sufficient to constitute cruelty, bodily harm necessary, divorce, 1008.
- prior to assault—what may mitigate damages, 969.

# ACCELERATED—

- death, by acts or omissions of doctor, e 3724.

# ACCEPT—

- failure to, ready and willing to deliver, 2259.
- refusal to, sale, excuse for non-delivery, 2260.

# ACCEPTANCE—

- of dedication, 1146.
- draft, without bill of lading, 2142.
- guaranty, negotiable instruments, knowledge thereof, 2189.
- machine sold, waives implied warranty, 2273.
- of order to pay money, negotiable instruments, e 4199.
- rent, release of tenant by assignment of lease, e 3699.
- sales, more and different goods sent, 2269.

# ACCEPTING EVIDENCE—

- of either party, credibility, e 3315.

# ACCESSORY—

- accomplice cannot corroborate self, extraneous evidence necessary, seduction, 2753.
- actual of constructive presence will render one a principal, 2732.
- advising and encouraging not being present, 2740.
- aiding, abetting or consenting, 2733.
  - and abetting as principal in second degree, 2736.
  - may be by words or acts, 2735.
- and principal, aiding or encouraging, reasonable doubt, alibi, 2734.
  - co-defendant, chargeable with wrong done by other, participation required, 2730.
  - jointly indicted, 2729.
- assault with intent to kill, intent, 2747.
- assuming corroboration of testimony of accomplice sufficient to convict, e 4488.

[References are to sections; e refers to Erroneous Instructions.]

**ACCESSORY—Continued.**

- burglary, possession of stolen goods not alone sufficient to convict, e-4567.
- calling attention to difficulty of convicting without testimony of accomplice, e 4491.
- charging that it is unsafe to convict on testimony of accomplice, e 4490.
- common purpose and design, 2737.
- concert of action need not be by express agreement, 2738.
- conspiracy to rob or murder, former acquittal, testimony of conspirator, 2914.
- defendant indicted as, cannot be convicted as principal, e 4567.
- defined, 2726.
- distinction between principal and, abrogated, 2727.
- encouraging another to kill, 2743.
- expressing opinion as to what has been proved, e 4484.
- homicide committed while escaping from prison, all aiding or abetting are principals, 2745.
- house of ill fame, 2802.
- in homicide, aiding and abetting, e 4477.
- instrumental in communicating poison, e 4478.
- intent, consent to criminal act, soaking person with turpentine and burning, e 4480.
- may not be guilty of same crime as principal, e 4481.
- mere presence not sufficient, must have aided, counselled, abetted or encouraged, 2739.
- murder committed in robbery, guilty though not consenting, 2746.
- no greater weight to testimony of accomplice because corroborated, e 4487.
- participants after conspiracy formed, 2910.
- pouring gasoline and turpentine on person and igniting, commenting on evidence, e 4483.
- presence, actual or constructive, 2731.
  - conspiracy to rob, e 4476.
- present, aiding and abetting, conspiracy, e 4475.
  - but not aiding or assisting, 2741.
- proof required for conviction, 2727.
- Testimony of Accomplice,*
  - corroborated by confession, 2750.
  - must be corroborated, 2748, e 4485.
  - need not be corroborated, 2751.
  - should be received with caution, 2752.
  - sufficient where statute does not require corroboration, e 4486.
  - to be received with caution, omitting to define corroboration, e 4489.
  - what corroboration sufficient, 2749.
- testimony of wife of accomplice, e 4492.
- watching while another killed, 2744.
- without knowledge, connivance or assent of defendant, 2742.

**ACCIDENT—**

- and negligence combined—municipal corporations liable for, 1610.
- carrier does not insure the absolute safety of passengers, 1766c.
- conspiracy, not liable for crimes not within probable execution of conspiracy, e 4580.
- defined, discharging pistol, e 4538.
- injury the result of negligence and accident, 1341.
- insurance, proof of accidental death, 1204.
  - suicide, 1204.
- killing by, excusable, 2972.
- master not liable for, 1380.
- municipal corporation not liable for, 1609, 1613.
- must be the result of negligence, 1340.
- negligence, street railroads, injury, no recovery in case of mere accident, 2012, 2078.
- not actionable. 1339. e 3741.
- railroads, not liable for inevitable, 1749.



[References are to sections; e refers to Erroneous Instructions.]

**ACCIDENT—Continued.**

- scene of, view by jury as evidence of negligence, 1350.
- to passengers, railroads not an insurer of safety of passengers, 1747, 1748.
- not an insurer against, 1748.
- trespass, happening of, does not justify award of damages, e 4275.
- when inevitable, carrier not liable, 1760.

**ACCIDENTAL HOMICIDE—**

- burden of proof, e 4330, e 4613.
- in resisting assault, self defense, e 4716.
- of another than the one aimed at, 3167.
- of bystander as evidence of murder, e 4612.
- while preparing for self defense, e 4717.

**ACCOMMODATION PAPER—**

- negotiable instruments, 2161.

**ACCOMPLICE—**

- cannot corroborate self, extraneous evidence necessary, seduction, 2753.
- charging that it is unsafe to convict on testimony of, e 4490.
- expressing opinion as to what has been proved, e 4484.
- guilty as principal, 2728.
- in robbery, murder committed, guilty though not consenting, 2746.
- testimony of,*
  - assuming corroboration sufficient to convict, e 4488.
  - calling attention to difficulty of convicting without, e 4491.
  - corroborated by confession, 2750.
  - incest, meaning of accomplice not defined, e 4518.
  - must be corroborated, 2748, e 4485.
  - need not be corroborated, 2751.
  - omitting to define corroboration, e 4489.
  - should be received with caution, 2752, e 4489.
  - sufficient, where statute does not require corroboration, e 4486.
  - what corroboration sufficient, 2749.
- testimony of wife of, e 4492.
- trial of, name of principal should be given, e 4482.

**ACCORD AND SATISFACTION—**

- accepting and retaining less amount in case of disputed claim, 428, 675.
- definition, e 3401.

**ACCORD WITHOUT SATISFACTION, e 3402.**

**ACCOUNT—**

- action on, set-off, e 3487.
- balance on, negotiable instruments, credits, 2140.
- for possession of stolen goods, reasonable and credible, burglary, e 4570.
- of partnership, presenting, failure to object, settlement, e 4229.
- of possession, larceny, 3245.
- settlement of, interest on amount agreed, e 3400.

**ACCOUNT STATED—Chapter XXIV, 415-429, e Chapter CXII, 3398-3402.**

- account must be left with defendant, 416.
- received by mail and kept an unreasonable time, becomes, 417, 419.
- all items included, burden of proof, e 3399.
- amount due must be agreed upon, 418.
- cannot be questioned except for mistake or fraud, 417, 419.
- can only be opened up for fraud or mistake, 420.
- conclusive in absence of mistake or fraud, 421.
- error, mistake or fraud only ground for questioning, 417.
- if plaintiff conceals errors in account, does not become, 419.
- kept an unreasonable time and not objected to is admitted, 417.
- material mistake or fraud, proof required to defeat, 423.
- must be an express or implied agreement upon balance due, 418.
- left with defendant, not merely exhibited to him, 416.
- need not be agreed to in express terms, 418.
- person alleging fraud must prove by preponderance, 420.
- presumption of acquiescence from retention without objection, e 3398.

[References are to sections; e refers to Erroneous Instructions.]

**ACCOUNT STATED—Continued.**

- receipt may be contradicted by parol testimony, 426.
- prima facie correct in absence of fraud or mistake, 425.
- settlement and receipt obtained by duress, 424.
- of parties constitutes, 423.
- presumed to include all items, 426.
- statement rendered and no objections made becomes, 415.
- rendered and payments made thereon becomes, 415.
- void for error or want of consideration, 422.
- what may defeat, 423.
- when account rendered becomes, 415, 419.

**ACCOUNTING—**

- partnership, when may sue at law, 2216.

**ACCOUNTS—**

- mutual running, statute of limitations run from the last mutual item, 1250, 1253.
- running, when the right of action accrues, 1249, 1253.
- value of, when good and collectible, presumed to continue so, 2427.

**ACCREDITED SCHOOL—**

- diploma from, required for practice of medicine, 3286.

**ACCRETIONS—**

- real estate, riparian owner, rights defined, 2233.

**ACCUSATION—**

- information merely, no evidence of guilt, 2568.

**ACCUSED—**

- cannot claim jury of own race, 27.
- fabrication of evidence against defendant, 2563.
- identity of, 2446-2448.
- intoxicated by artifice of deceased, 2608.
- is attended by presumption of innocence throughout trial, e 4429.
- silence when, arson, evidence as to innocence, e 4799.

**ACKNOWLEDGMENT—**

- as to creditors, mortgage must be acknowledged, 1311.

**ACQUAINTANCE—**

- and opportunity, seduction, not sufficient proof, 2835.

**ACQUIESCENCE—**

- in acts may infer authority, 571.
- presumed from retention of account stated without objection, e 3398.

**ACQUIT—**

- character evidence not sufficient to, 2478.
- instruction to, defendant guilty of some offense, e 4545.
- self defense, error to omit duty to retreat, e 4747.
- matters which, stated conjunctively, insanity, e 4397.
- or convict, duty to, argumentative, e 4501.
- reasonable doubt sufficient to, alibi, 2444.

**ACQUITTAL—**

- alibi, where reasonable doubt exists, e 4320.
- assault with intent to kill, reasonable doubt, 2869.
- because defendant not conscious of nature of act, 2576-2577.
- reasonable doubt as to sanity, 2714.
- as to which of several did the killing, 2704.
- cannot be based on reasonable doubt arising from part of the evidence, e 4459.
- circumstantial evidence, criminative circumstances denied by defendant, e 4360.
- doubt must be reasonable, e 4433.
- as a defense, 2778.
- conspiracy to rob or murder, testimony of conspirator, 2914.
- from one inconsistent fact, circumstantial evidence, 2499.
- may be justified by evidence of previous good character, 2480.
- must be ordered if plea of self defense is made out, e 4752.
- not justified by failure to prove intent, assault with intent to kill, e 4550.

[References are to sections; e refers to Erroneous Instructions.]

**ACQUITTAL—Continued.**

- warranted by possibility of defendant's innocence, 2693.
- peacemaker, homicide, 2971.
- self defense, when evidence equally balanced, 3176.
- should not be based on reasonable doubt arising from argument of counsel, e 4463.
- where reasonable doubt of defendant's sanity, 2594.

**ACTING—**

- as agent, action of deceit, e 3423.
- on reasonable belief, self defense, of great bodily harm, 3107.
- under impulse, not enough to establish insanity, e 4401.
- upon appearance, self defense, danger need not be real, 3110.
- self defense, safe, though they turn out to be false, 3111.

**ACTION—**

- bribe must be given for purpose of influencing, to constitute bribery, e 4801.

**ACTIONABLE WORDS—**

- slander and libel, all the words need not be proved, 2280.
- malice and damage presumed from speaking, 2283.

**ACTIONS—**

- for causing death, damages,*
  - benefit of widow and next of kin, measure of, 973.
  - compensation for pecuniary damage sustained by widow and next of kin, 973.
  - elements that may be considered, 976-977, 986-988.
  - jury may consider probabilities of life—damages past and prospective, 987.
  - measure of, 970-991.
  - mental grief and suffering not an element of, 983.
  - of child, elements that may be considered in assessing damages, 983, 984.
  - coal-mine operator, words of statute as to damages, 990.
  - servant, 985.
  - only such damages allowed as to make good the actual pecuniary loss, 982.
  - what may not be considered, 975.
  - must be proven, 980.
  - where no pecuniary loss, nominal damages only, 981.
- for killing live stock, negligence, railroads, 1971-1987.
- on account, for money loaned, 429.

**ACTION FOR INJURIES CAUSING DEATH—**

- damages,*
  - elements that may be considered in assessing damages, 988.
  - instructions as to damages need not contain all elements necessary to recover, 988.
  - jury may be instructed that verdict shall not exceed stated amount, 989.
  - punitive damages not to be given, 991.
  - what not to be considered in assessing damages, 991.

**ACT OF GOD—**

- concurrent negligence of railroad, injury through, 1530.
- defined, 1660.
- extraordinary freshet, burden of proof on defendant to prove absence of negligence, 2362.
- inevitable accident, carrier's duty towards perishable goods when damaged by 1728.
- liability for loss from flow of surface water occasioned by, 1660.
- must use reasonable care to avoid injury by, 1709.
- not liable for delay caused by, 1724.
- or public enemy, will excuse common carriers from delivering goods, 1691.
- what is, as excusing non-performance of contract, 656.
- meant by, 1708.



[References are to sections; e refers to Erroneous Instructions.]

**ACTS—**

- aiding by, may constitute principal and accessory, 2735.
- inconsistent, construed according to presumption of innocence, e 4426.
- of one conspirator, act of all, 2907, e 4578.
- conspirator need not contribute to death of deceased, e 4581.
- partner without consent of co-partner, e 4226.
- or statements, of intoxicated person, value as evidence in action for sale of liquor, e 3690.
- overt, necessary to justify killing in self defense, what constitutes, 3147.
- self defense, threats not sufficient, 3146.
- self defense, indicating intention to carry out threats, 3148.
- surrounded in a degree of doubt, jury may convict nevertheless, e 4453.

**ACTUAL—**

- assault, not necessary to give right of self defense, e 4702.
- danger must seem, self defense, 3112.
- self defense, appearance and strength of deceased are immaterial, e 4707.
- killing, no charge on, assault with intent to kill, e 4556.
- presence, renders one a principal, 2731, 2732.
- reasonable doubt must be, 2683.

**ACTUALLY NECESSARY—**

- killing in defense of property, not limited to force actually necessary, e 4766.

**ADDED PUNISHMENT—**

- burglary, instruction for, though the former conviction not charged in indictment, e 4573.

**ADDING BUSINESS—**

- partnership, beyond original articles, liability to third persons, 2203.

**ADDITIONAL ABSTRACT—**

- cost may be allowed appellee, 316.
- when may be filed, 318.

**ADDITIONAL COMPENSATION—**

- changes made under contract to manufacture for sale, e 4248.

**ADEQUACY—**

- of provocation for homicide, jury to determine, 3093.

**ADEQUATE CAUSE—**

- assault and battery, insulting words, 2863.
- definition of, homicide, 3037.
- murder in second degree, sudden transport of passion, deadly weapon, leather belt, 3016.

**ADJACENT LANDS—**

- trespass by cattle, no division fence, 2320.

**ADJUSTER—**

- authority of, 1160, 1180.

**ADMINISTERING POISON—**

- intent to constitute murder, 3057.

**ADMINISTRATORS—**

- not required to give bond for supersedeas, 325.

**ADMISSIBILITY—**

- dying declarations, 3097.
- evidence of good character, purpose of, e 4346.
- of confession, for court, must be voluntary and free from influence of threats or promises, e 4368.
- confessions of guilt, 2513.
- evidence, ancestors' insanity, corroboration, 2601.
- statements of one defendant against co-defendants, 2527.
- threats of deceased, self defense, for what purpose, e 4733.
- uncommunicated threats, self defense, 3152.
- probabilities and speculations, credibility, e 3317.
- threats of deceased, self defense, e 4734.

[References are to sections; e refers to Erroneous Instructions.]

**ADMISSIONS, Chapter XXI, 381-390, e Chapter CIX, 3361-3371.**

- after beginning suit, e 3367.
- against interest of plaintiff, 382.
  - or in favor of interest of witness, 381.
- all parts not to be regarded with equal confidence, 381.
- assumed, reasonable doubt, self defense, 2717.
- by defendant at time of accident, 382.
  - silence when reply is called for, e 3365.
  - withdrawing the plea of the general issue, slander and libel, justification, e 4268.
- evidence of proposed settlement not considered, 676.
- failure to produce books and papers, e 3366.
- how to be regarded by jury, 381-2.
- in affidavit for continuance, 388.
  - claim of adverse possession, 461.
  - letters, e 3371.
- invasion of province of jury, weight of the evidence, e 3363.
- jury not required to give equal credence to every part, 381-b.
- made in effort to compromise, e 3370.
- negotiable instruments, acceptance of order to pay money, e 4199.
- not subject to mistakes as matter of law, e 3364.
- of competent evidence, relationship, incest, 2804.
  - counsel, cannot prejudice defendant, e 4374.
  - facts will not necessarily shut out legal evidence, 131.
  - guilt, how considered, must be voluntarily made, 2518.
  - husband or wife as affecting the other, 386.
  - inmates, as to character of disorderly house, e 4515.
  - legatee as to suppression of another will, e 4309.
  - matters set out in affidavit, e 3368.
- one not evidenced against other defendants to prove conspiracy, malicious prosecution, 1283.
- opponent need not be proven, 131.
- other crimes, Indiana, 2564.
- personal injury, negligence, street railroads, 2018.
- plaintiff, action against Street Railroad, e 4120.
- relationship, uncorroborated, incest, whether conviction warranted, argumentative, e 4517.
- servant that explosion was his fault, effect of, 1388.
- spectators, 63.
- offer to compromise, 389.
- on former civil suit, considered in criminal trial, 2517.
- opening statement of counsel not, e 3369.
- oral to be received with caution, 385.
- pleadings considered as, 119.
- to be taken as a whole, 381.
- verbal and written, weight of, e 3361.
  - to be received with great caution, 384, e 3362.

**ADOPTION OF INSTRUCTIONS—**

- by court, 2621.

**ADULTERATION—**

- concealing inferiority of food, 3293.

**ADULTERY—**

- agreement to live in, consummated elsewhere, intent not sufficient, e 4511.
  - cause for divorce, 1010-1012.
  - ground for divorce, must be proved, 1011.
- charge of, slander and libel, effect of retraction, 2293.
- condonation of, 1012.
- criminal, prosecution, 2787-2790.
  - disposition or inclination, 2787.
  - living in state of, not proved by occasional illicit acts, 2789.
  - must be at instance of either husband or wife, 2790.
  - occasional illicit acts do not constitute living in, intent to continue, house of ill fame, e 4508.
  - presumed from conduct and situation, nighttime defined, 2788.

[References are to sections; e refers to Erroneous Instructions.]

**ADULTERY—Continued.**

- presumption of habitual sexual intercourse when one act is proved and parties reside together, e 4509.
- proof of day when offense took place, e 4510.
- discovery of wife in, not sufficient provocation for homicide, e 4679.
- divorce, degree of proof required, e 3624.
- not presumed, preponderance of proof required, e 3623.
- measure of damages for charging in action for libel, 820.
- wife caught in, homicide, 2958, e 4678.

**ADULTEROUS DISPOSITION—**

- of defendant and prosecutrix, rape, how material, 2814.

**ADVANCES—**

- lien for, notice of, 1327.
- made by agent for principal, when statute of limitations begins to run, continuous agency, e 3706.

**ADVERSE POSSESSION, Chapter XXV, 430-461, e Chapter CXIII 3403-3410.**

- acquiescence in, 432, 437.
- actual, open and visible possession of land, 433.
  - possession defined, 441.
  - of part under deed carries constructive possession of all, 450.
  - question of law, e 3407.
- admission against title, 461.
  - of title by grantors, 448.
- assuming title of mesne grantor, 445.
- a statute of repose, 457.
- boundaries, 448.
- building on public highway, equitable estoppel, e 4233.
- burden of proof, 443, 444.
- color of title, 442.
  - defined, 438.
  - plaintiff entitled to use as against one who has no title, 438.
  - quit claim deed sufficient, 439.
- cutting timber while in possession, 439.
- deed not necessary to transfer possession, 455.
- defined, 430.
- effective notice by possession, 433.
- elements constituting, 434, 446.
- entering land under deed purporting to convey title, 458.
- entry under deed whether adverse or not question for jury, 459.
- exclusiveness, e 3406.
- extent occupied, 442.
  - possession not under color of title, 455.
- fences, agreement as to line, e 3462.
- for twenty years—grant presumed, 458.
- holding under claim for taxes paid, 440.
- homestead, 446.
- hostile in inception, presumption as to possession, e 3403.
- intent, 442.
  - to acquire title, mistakes as to boundary, e 3404.
- land covered by water, 446.
- limitation, abandonment, 447.
- must be clear, unequivocal and notorious—disclaimer of owner's title, 436.
  - established by preponderance of evidence, 444.
  - hostile in its inception, 435.
  - open, notorious, adverse hostile, peaceable and uninterrupted, 434.
  - proved by preponderance of the evidence, 430.
  - visible, open, notorious, exclusive and adverse, 431.
- necessary elements of, 434, 446.
- not secret but open, 442.
  - under color of title, 453.
- occasional use does not constitute, 437.
- of improved land within enclosure, 450.
- open and notorious, 432.



[References are to sections; e refers to Erroneous Instructions.]

**ADVERSE POSSESSION—Continued.**

- notorious for ten years, e 3405.
- ouster—what required, 460.
- paper title not necessary, 454.
- permissive possession not hostile, 435.
- person claiming must recover on strength of own title, 444.
- physical occupation not necessary, 437.
- presumed by long acceptance of boundary line, 586.
  - to be under legal title, 453.
- presumption that one in possession is under legal title, 453.
  - who enters without color of title is subservient to local owner, 452.
- proof required, 432.
- quit-claim deed sufficient—color of title, 439.
- school lands, actual settlers, e 3409.
- series, 437, 442.
- statute of limitations, 1255-1258.
- subservient to true owners, 436.
- surveys—land covered by water—Homestead, 446.
- tax deed, 440.
- tax sale, minors, e 3408.
- time for minor to bring suit, 461.
- title by prescription, 454.
- title traced to state, e 3410.
- under claim of title, 457.
  - color of title, 441.
  - parol contract of sale limited to actual possession, 451.
- what constitutes, 431.
  - possession, 437.
  - what necessary to constitute under oral contract, 452.
- when possession of part constitutes possession of whole, 449.
- where two tracts are conveyed in one deed, 450.
- without color of title, 454.

**ADVERTISE—**

- duty to, finder of stolen property, 3215.

**ADVICE—**

- legitimate, wills, 2405.
- of counsel, as a defense must be of licensed attorney, 548.
  - malicious prosecution, 1279, 1280, 1284.
- to jury to agree, e 3390.

**ADVISING—**

- aiding or encouraging abortion, e 4507.
- principal and accessory*,
  - may be by words or acts, 2735.
  - not being present, 2740.

**AFFECTION, ALIENATION OF—**

- consent of husband, e 3427.
- grounds, damages, e 3428.
- wife against husband's parents, e 3429.

**AFFIDAVIT FOR CONTINUANCE—**

- admission of matters in, 388, e 3368.
- may be contradicted, 388.

**AFFIRMATION—**

- form of, 115.

**AFFIRMATIVE TESTIMONY—**

- credibility, stronger than negative, 336, e 3303.

**AFFRAY—**

- self defense, provocation by defendant, 3126.
- sudden, assault, heat of passion, punishment, 2840.
  - or in sudden heat of passion, either sufficient to reduce killing to manslaughter, e 4647.

**AFORETHOUGHT MALICE—See MALICE AFORETHOUGHT.**

[References are to sections; e refers to Erroneous Instructions.]

#### AGAINST HIMSELF—

compelling defendant to testify, perjury, e 4795.

#### AGE—

of consent, prosecutrix under, rape, 2816.

person killed by negligence, measure of damages, earning capacity of deceased, e 3610.

prosecutrix, rape, how proven, 2817.

reasonable doubt as to, rape, 2818.

weakness or bodily infirmity, will not vitiate a deed, 614.

wills, affecting capacity to make, 2382.

#### AGENCY, Chapter XXVI, 462-494, e, Chapter CXIV, 3411-3426.

agent not disclosing, embezzlement, converting proceeds of sale, 2936.

of insurance company knowing insured is sick at time of delivery

of certificate, is waiver by company, 1197.

authority of agents to accept premiums for insurance, 1200.

continuous, when statute of limitations begins to run, advances made

by agent for principal, e 3706.

evidence establishing, e 3414.

of, conversion, demand made by agent, 2340.

fraudulent conveyance, 1060.

ignoring issue of ratification, e 3420.

knowledge of agent as to misrepresentation as to occupation, 1189.

knowledge of company, 1173.

liability of Municipal Corporations for negligence of agents, e 3919.

loaning money on mortgage security, ignoring defense of statute of limitation, e 3416.

money spent for different purpose than intended, e 3425.

no duty of agent to disclose to telegraph company, 2120.

presumed to continue until notice or lapse of time, 474.

principal not charged with knowledge of agent gained before employment, e 3418.

ratification by suit, 483.

of former acts may prove, 481.

tort, accepting benefit, e 3421.

relation between the district courts and the supreme court of fraternal societies one of, 1212.

#### AGENT—

assault by, negligence, railroads, person getting freight, 1942.

assuming he made contract, e 3419.

to act as, not liable for deceit, e 3423.

authority of, e 3412.

binds undisclosed principal, 489.

bound to act solely for his principal, 466.

broker cannot take commissions from both parties to a sale, e 3466.

cannot act for both buyer and seller, 602.

be both buyer and seller of property, 602.

maintain trover, 2329.

collecting bribe money from disreputable women, 3272.

commission merchant, care required, 603.

contract, ratification by accepting benefit, 482.

dealing with broker must disclose agency or be personally liable, e 3465.

with himself, e 3415.

demand made by, conversion, evidence of agency, 2340.

duty to inform principal of consideration of sale, 467.

embezzlement, right to retain commission, 2935.

false representations as to real estate, 492.

by, 1096.

fire insurance, implied authority, estoppel, e 3661.

general and special, definition of, 462.

authority insufficient to invest more than deposited, 493.

defined, 462, e 3411.

guilty, doubt whether it was defendant or another, e 4466.

implied contract of warranty, 471.

power to do all things necessary, proper and usual, 464.

[References are to sections; e refers to Erroneous Instructions.]

# AGENT—Continued.

- in sale of intoxicating liquor, 3192.
- investment of funds for another, 493.
- knowledge of agent's acts essential to ratification, 486.
  - life insurance, misrepresentation, e 3673.
- liability, when exceeding authority, 1098.
- making advances for principal, when statute of limitations begins to run, continuous agency, e 3706.
- married woman may employ husband as, 1024.
- master's liability for, 1370.
- must use good faith or lose commission, 602.
- negligence of, municipal corporations, liability of, 1621.
- not allowed to purchase the property of his principal, 602.
- notice*,
  - of limited authority of, e 3413.
  - to agent of two principals not notice to each, 477.
    - is notice to principal, 475.
    - usually notice to principal, 476.
  - to chairman not notice to board, 478.
- of physician, ordinary care by, 1294.
- two principals—notice to, not notice to each, 477.
- undisclosed principal liable for goods bought by sub-agent, 489.
- ordering intoxicating liquor, not a sale, 3207.
- parties dealing with, must take notice of scope of his authority, 465.
- paying debt of another without his consent, e 3424.
- perpetrating fraud not imputing principal, 494.
- presumed to continue, 474.
- principal bound by acts of, 470.
  - false representations, when, 492.
- warranty, when, 471.
- principal consents to usages of agent's market, 472.
  - liable for fraud of, e 3426.
  - may rely upon any representations, 469.
- proofs of loss may be made by, 1157.
- public officer acting as, 479.
- ratification by accepting benefits, 482.
  - of assumed agent's contract must be entire, 485.
  - of transactions of, must cover all or none, negotiable instruments, e 4197.
- receiving notice from one principal not presumed to be for other principal, 477.
- sale by—duty to inform principal of consideration, 467.
- secret profits of belong to principal, 468.
- special, defined, 462.
- statement of, as to location of disconnection of natural gas, 799.
- suing for commissions, insufficient hypothesis, e 3417.
  - out attachment, ratification, e 3445.
- suit to recover of, proceeds of sale, e 3422.
- telegraph company, negligence, knowledge of purpose of call, 2118.
- terms of contract affected by custom, 601.
- third parties bound to take notice of agent's authority, 465.
- unauthorized acts, principal failing to repudiate, 484.
  - ratification by principal, 480.
- warranty by, sale of machinery, ratification, 2272.
- what jury should consider in determining who is principal, 463.
- when liable for undisclosed principal, 489.
  - principal estopped from denying acts of, 473.
  - liable for torts, 488.
- where principal stands by and allows agent to act for him, authority will be inferred, 600.
  - purchaser accepts goods of agent only, 491.
- who buys his principal's property without disclosing fact guilty of constructive fraud, 466.

# AGGRAVATED ASSAULT—

- defined, 2852.
- embracing woman, intent to injure, 2853.



[References are to sections; e refers to Erroneous Instructions.]

**AGGRAVATED ASSAULT—Continued.**

homicidal intent, e 4547.  
slander and libel, justification, when not, 2291.

**AGGRESSOR—**

abandoning conflict, when may plead self defense, 3134.  
aiming at, self defense, killing another, 3167.  
assault with intent to kill, duty of retreat, e 4558.  
assumption that deceased was, must rest upon evidence, self defense, e 4722.  
bringing on difficulty for purpose of killing, e 4713.  
cannot plead self defense, 3126-3133, e 4710.  
defendant the, 3126.  
    manslaughter, when not barred from defense of sudden passion, e 4649.  
freedom from fault an essential element, e 4692.  
indicated by threats, 3149.  
must give deceased to understand he has abandoned the contest, e 4725.  
not necessarily person who strikes first blow, 3135.  
previously arming himself, not necessarily barred from pleading, e 4720.  
proof that defendant was, beyond reasonable doubt, not necessary, e 4756.  
several persons on each side, 3127.  
state must prove beyond reasonable doubt that defendant began fight, 3136.  
threats as indicating who was, 3150, e 4682.  
what acts constitute one, felonious intent not necessary, e 4711.  
    constitutes provoking the difficulty, e 4712.

**AGISTER'S LIEN—**

notice of, e 3732.

**AGREEMENT—**

as to line, fences, adverse possession, e 3462.  
    security, negotiable instruments, secret understanding, e 4205.  
boundary, estoppel, e 3459.  
by tenant, to stay if certain improvements are made, e 3692.  
contract proved must be the same as the one sued on, e 3480.  
express, principal and accessory, concert of action need not be by, 2738.  
implied, tenancy at will, e 3701.  
of jury advised, e 3390.  
    sale, consideration paid in installments, 2249.  
        when made transaction complete between parties, 2247.  
to buy back, sale by assignee, trust property, 2266.  
dismiss criminal prosecution void, 639.  
fight, by defendant, bars plea of self defense, 3132.  
live in adultery, consummated elsewhere, intent not sufficient, e 4511.  
sell, different from sale, when title passes, 2248.  
work done on premises by tenant under, claim of set-off, e 3703.

**AIDING—**

abetting or consenting, principal and accessory, 2733.  
advising or encouraging abortion, e 4507.  
and abetting, as principal in second degree, 2736.  
    principals and accessories, e 4475.  
assisting a lottery, 3278.  
commission of homicide, manslaughter, e 4477.  
in abortion, murder in first degree, 2786.  
    escape from prison, homicide committed, 2745.  
necessary, principal and accessory, 2739.  
or abetting, assault and battery, presence of others, 2851.  
    encouraging assault, 525.  
    encouraging, principal and accessory, reasonable doubt, alibi, 2734.

[References are to sections; e refers to Erroneous Instructions.]

**AIDING**—Continued.

principal and accessory, may be by words or acts, 2735.  
present without, 2741.

**AILMENTS**—See **ILLNESS**.

**AIMING**—

at aggressor, self defense, killing another, 3167.

**ALABAMA**—

definition of reasonable doubt, 2648.  
examination not compelled to be used as evidence, 151.  
murder defined, 2953.  
in second degree, killing must be malicious, reasonable doubt, 3009.  
*statute*,  
formed design not essential element of murder, e 4615.  
manslaughter, horse racing on public highway, e 4657.  
intent to take life not necessary, e 4644.  
relating to instructions, 153n.  
statutory plea of insanity, burden of proof, 2598.  
weighing defendant's testimony, 2533, e 4376.

**ALIBI**, Chapter LXXXVI, 2434-2445, e, Chapter CLXVII, 4316-22.

*burden of proof*,  
duty to acquit if reasonable doubt exists, e 4320.  
on state of whereabouts of defendant, 2442.  
reasonable doubt not raised unless established, 2443.  
characterized as being easily proven and hard to disprove, caution and care in examining evidence, 2440.  
completest defense that can be devised, 2435.  
defendant could not with ordinary exertion have reached place, when defense entitled to consideration, e 4318.  
not present when crime committed, 2434.  
should be given benefit of reasonable doubt, 2445.  
definition, necessary distance from place, e 4316.  
discrediting defense or evidence of, e 4321.  
established by reasonable doubt, 2713.  
evidence must account for whereabouts of defendant during the whole period, 2437.  
and should be subjected to rigid scrutiny, 2439.  
must show that defendant could not have been at the place of the crime at that time, 2436.  
principal and accessory, reasonable doubt, 2734.  
reasonable doubt raised by, sufficient to acquit, 2444.  
simulated, false and fraudulent, a discrediting circumstance, 2441.  
that defendant was at another place but not so far away but that he could with ordinary exertion have reached it may be considered, 2438.  
to be established by preponderance of evidence, but may raise reasonable doubt, e 4319.  
weight or sufficiency of testimony, singling out defense, e 4322.  
whether should cover whole period of transaction, need not be proved to jury's satisfaction, e 4317.

**ALIENATION OF AFFECTION**, Chapter XXVII, 495-501, e, Chapter CXV, 3427-3429.

contradictory defense, e 3427.  
defendant's acts must be controlling cause, 496.  
grounds, damages, e 3428.  
measure of damages, e 3502.  
of husband, 495.  
wife, e 3502.  
proximate cause, 496.  
what jury must find, 496.  
wife against husband's parents, e 3429.

**ALIGHTING**—

from train or car, 2040, 2041, 2044, 2046, 2047, e 3997, 4150, 4152-4154.  
failure to warn passenger of danger, 1787.

[References are to sections; e refers to Erroneous Instructions.]

**ALIGHTING**—Continued.

- passenger, encumbered by grips and valises, 1803.
- stumbling or falling, 1804.
- seeing another train approaching, 1814.

*from moving train*, 1783-1786, 1806, 1807, e 3993-3997, 4149-4151.

**ALLEGATIONS**—

- in declaration, measure of damages, personal injury, e 3603.
- of indictment only, need be proven beyond reasonable doubt, 2703.
- perjury, every material allegation must be proved, 3261.

**ALLEGED TESTIMONY**—

- perjury, must be proved, 3260.

**ALLEYS**—See **HIGHWAYS**.

**ALTERATION OF WRITTEN INSTRUMENTS**, Chapter XXVIII, 504-510, e Chapter CXVI, 3433-3434.

- adding additional name to note material, 507, e 3433.
- after execution and delivery, 504.
- changing rate of interest and time of payment, 504.
- filling in blank space*,
  - above signature of guarantor not material, 508.
  - material, 508.
  - when not material, 508.
- in agreement as to quality of material to be furnished, 510.
- leaving blanks, e 3434.
- liability for, 510.
- made by agent, 505.
- material change, what is, 508.
- measure of damages, 506.
- negotiable instruments, burden of proof, e 4220.
- notes signed in blank, when may be filled, 508.
- of note, bona fide purchaser, filling of blank, e 4219.
- procuring an additional maker, material, 507.
- what is material, 507.
- raised check, 506.
- what not a material alteration, 508.
- where two innocent persons must suffer, 509.
- while in possession of agent, 505.

**ALTERNATIVE**—

- statement of elements of burglary, e 4572.

**AMOUNT OF MONEY**—

- embezzled, e 4596.

**ANCESTORS**—

- insanity of, evidence admissible only in corroboration, 2601.

**ANCIENT WATERCOURSE**—

- no right to divert, 2352.

**ANGER**—

- slander and libel, no justification, when to be considered in mitigation, 2288.
- defendant in homicide, immaterial, 2977.

**ANIMALS**—

- frightening, negligence, street railroads, car not operated in ordinary manner, 2091.
- car operated in ordinary manner, 2090.
- injured, malicious mischief, malice against owner must be shown, 3281.
- larceny of estrays, 3230.
- trespass by, 2320-2325.
- where stealing is grand larceny cannot convict of petit larceny, 3235.
- VICIOUS**, 2346-2350, e 4277-4278.
  - cow*,
    - knowledge of vicious disposition, means to prevent injury, 2350.
    - measure of damages for injuries from vicious cow, 827.



[References are to sections; e refers to Erroneous Instructions.]

# ANIMALS—Continued.

## *dog,*

- knowledge of disposition of dog, 2347.
- measure of damages for injuries from, 827.
- necessary essentials to recover, 2346.
- reputation of not competent, 2348.

## *horse,*

- injuries by, must prove animal is vicious, e 4277.
- knowledge of party injured, master and servant, e 4278.

## *steer,*

- must prove due care, knowledge of disposition, 2349.

# ANIMUS—

- assault and battery, purpose and intent shown by writing valentine, 2860.

# ANNOYANCE—

- eminent domain, damages, conjectural, e 3558.

# ANOTHER—

- defense of, self defense, parent, 3179.
- killing of, than the one aimed at, self defense, 3167.
- saving life of, included in self defense, 3178.

# ANTECEDENT DEBT, 1081.

# ANTICIPATING—

- future payments, measure of damages, personal injury, e 3571.

# APPARATUS—

- failure to use most approved, negligence, railroads, to prevent escape of fire, 1999.
- negligence, railroads, prevent escape of fire, 1998.

# APPARENT DANGER—

- self defense, 3109.
- deceased shooting first, 3118.

# APARTMENTS—

- failure to heat, death of child, 1242.

# APPEALS AND WRITS OF ERROR, Chapter XV, 281-326.

# APPEALS—

- abstract of record must show, 318.
- alleged error must show objection and exception thereto, 323.
- amending bills of exception, 305.
- and writ of error, common remedies, special remedies, 292.
- may be brought at same time, 326.
- various methods in use, 282.
- appellant cannot complain of instructions given at his request, 314.
- bars subsequent proceedings, 326.
- beginning of second appeal will operate as dismissal of first, 326.
- cannot be brought up again for review after final determination of first appeal, 326.
- certification of questions, mode of, 285.
- co-appellant may dismiss, 326.
- consent of parties will not confer jurisdiction, 297.
- court considers only such errors as are assigned, 308.
- will dismiss when controversy has ceased, 326.
- default and satisfied judgments not appealable, 298.
- by reason of defective service may be appealable 298.
- dismissal of, 326.
- dissolution of injunction bond, attorney's fees, e 3452.
- does not of itself suspend or supersede judgment, 324.
- either party or both parties may prosecute appeal, 295.
- errors complained of should appear in record, 296.
- must be assigned for refusal to give instructions, 306.
- extending time,*
  - by agreement of parties, 294.
  - for bill of exceptions does not extend time for appeal. 294
  - for settling bill of exceptions, 304.

[References are to sections; e refers to Erroneous Instructions.]

# APPEALS—Continued.

- failing to find judge to sign bill of exceptions does not extend time for appeal, 294.
- failure of clerk to make out transcript in time will not excuse delay, 294.
- favorable instructions cannot be complained of, 314.
- general assignment of error will not be considered, 308.
- grounds for reversal of judgment, 299.
- Illinois, bars another appeal, 326.
- includes all proceedings whereby a suit is reviewed by higher tribunal, 283.
- in second appeal, only points not passed on in first, considered in new proceedings, 326.
- instruction must be prejudicial to be complained of, 313.
- jurisdiction, only final orders appealable, 297.
- mandamus will lie to compel judge to sign and settle bills of exceptions, 303.
- matters not final in the case are not appealable, 297.
  - that will be reviewed, 323.
- may be abandoned and recommenced, 326.
  - prayed for at any time during term, 294.
  - regulated by statute, 282.
- meaning of in various states, 291.
- merits of case must be involved, 297.
- motion to vacate verdict not appealable, 297.
- must be effected within time prescribed by statute, 294.
- negligence of counsel in not perfecting, no excuse, 294.
- notice of, 293.
- not necessary to take exception to reasons given by court for refusing instructions, 300.
  - perfected in time will be dismissed on motion, 294.
- objections will not be considered unless errors are assigned, 300.
- office and purpose of bill of exception, 302, 303.
  - signing and sealing bills of exceptions, 303.
- only allowed from final judgement, 326.
  - parties have the right, 295.
- origin in statute of Westminster II, 281.
- parties may waive, 297.
- party cannot complain where instructions are conflicting, 311.
  - make two appeals, 326.
  - split appeal into fragments, 326.
- party does not waive exceptions made to erroneous charges, by not making proper ones, 300.
  - complain of modified instructions if erroneous, 311.
  - dismiss or withdraw appeal, 326.
- party of record or aggrieved has the right, 295.
  - who accepts benefit judgment can not appeal, 298.
- preparation for, 296.
- presumption in favor of instructions, 310.
  - that omitted instruction of record cures erroneous one, 309.
- record should contain all the evidence, 307.
  - assignment of errors, 308.
- record should show objections and exceptions to ruling of court, 296.
- regulated by statute, 295.
- requested instructions cannot be complained of, 314.
- right of, purely statutory, 282.
- separate and distinct appeal*,
  - cannot be heard by agreement, 326.
  - when merged should be dismissed for duplicity, 326.
- separate and distinct cause of action cannot be brought up for review by one appeal, 326.
- separate and successive, 325.
- specific objection to instruction should be pointed out, 308.
- those affected by judgment may appeal, 295.
- time for*,

[References are to sections; e refers to Erroneous Instructions.]

#### APPEALS—Continued.

- cannot be extended by Court of Appeals, 294.
- Trial Court, 294.
- computed from date of judgment, 294.
- regulated by statute, 294.
- two cases though tried together cannot be heard on one appeal, 326.
- unknown at common law, 281.
- use of in modern practice, 283.
- what bills of exceptions must show, 301.
- what transcript or the record should contain, 307.
- when defective may be dismissed, 326.
- dismissed for want of prosecution does not bar subsequent appeals, 326.
- dismissed writ of error may be taken, 326.
- evidence will be reviewed, 323.
- inaccurate instructions will not reverse, 313.
- pleadings will be reviewed, 323.
- not be reviewed, 323.
- where court has no jurisdiction will be dismissed, 326.
- judgment is severable, a part may be appealed from, 298.
- new proceedings occur and appeal taken only new points will be passed upon, 326.
- who may, 295.

#### APPEALING TO INDIVIDUAL JURORS—

- reasonable doubt, 2689.

#### APPEARANCE—

- of danger, self defense, must seem actual, present and urgent, 3112.
- deceased, self defense, immaterial if danger is actual, e 4707.
- note irregular, bona fide purchaser, e 4219.
- witness, credibility, e 3307.

#### APPEARANCES—

- acting upon, self defense, ignoring doctrine of escape, e 4698.
- may act upon, self defense, danger need not be real, 3110.
- self defense, may act upon, though they turn out to be false, 3111.

#### APPLIANCES—

- and machinery, dangerous character of, 1416.
- used by master, not owned by him, 1408.
- arrangement of set screw, increasing danger, causing injury, e 3791.
- continuing in employment after promise of master to repair, e 3827.
- continuing work after insufficient repair of, e 3825.
- at dangerous machine, e 3834.
- dangerous machine, injurious to minor, e 3765.
- defective,*
  - axle causing injury to passenger, e 3979.
  - derrick, 1425.
  - ladder, 1423.
  - machinery, injury must have resulted from defect in, 1413.
  - must be the proximate cause of injury, 1413.
  - pulley, e 3793.
  - tire bender, 1424.
- duty of inspection, character of business to be considered, 1412.
- duty of master,*
  - to explain to minor dangerous character of, 1384, e 3766.
  - furnish reasonably safe, e 3769.
  - inspect at proper intervals, 1411-1412.
  - keep them in proper repair, 1406.
  - provide safe, 1437.
  - and suitable, 1406, e 3784.
  - and keep them in proper repair, e 3784.
  - provide suitable and reasonably safe tools and machinery, 1425.
- duty of railroads,*
  - to keep appliances in reasonably safe condition, 1522.
  - provide reasonably safe, e 3855, 3881.



[References are to sections; e refers to Erroneous Instructions.]

#### APPLIANCES—Continued.

- suitable and skillful workmanship in construction of its road and appurtenances, 1499.
- supply appliances reasonably necessary on rolling stock, 1509.
- use ordinary care in furnishing reasonably safe, e 3843.
- duty of servant to apprise himself of dangers of, 1452.
- to furnish, to prevent escape of cinders from engine, e 3978.
- provide safe appliances on engine to prevent the escape of sparks, e 4099-4100.
- failure to provide reasonably safe and suitable, as charged in the declaration, e 3785.
- flanges on car wheels being worn too thin, 1422.
- having none to stop car, railroads, 1845.
- injuries through defects in, 1417-1419.
- injury to grip-man on street car through defective brake, 1426.
- in other establishments not a test for fitness, 1425.
- inspection of by servants, e 3789.
- latent defects in lock of switch, e 3856.
- liability of master to furnish suitable, 1376.
- master does not insure absolute safety of, 1410-1411, e 3788.
- not bound to furnish absolutely safe, 1377, 1379.
- safest and best, 1414.
- material not an appliance, 1407.
- need not be the latest, newest, most improved, safest or the best, 1425.
- negligence, street railroads, letting running board extend over sidewalk, 2087.
- use of proper brakes, 2086.
- no liability for latent defects, e 3787.
- nut on shaft continually coming off, causing injury, e 3792.
- of railway companies, 1497-1499.
- placing of dynamite packed in sawdust in uncovered box on tender of engine, e 3798.
- proof of defective condition of, presumed to continue until rebutted, e 3786.
- railroads are bound to furnish ordinarily safe and appropriate appliances, 1497.
- malicious use by servants, 1844.
- must use ordinary care in selecting, not insurer of safety of, 1510.
- receiving injury while handling water pipe and sand bucket, omitting essential facts, e 3797.
- refusal of master to repair, e 3828.
- right of engineer to assume that engine is reasonably safe, e 3886.
- safe and suitable, 1406-1427, e 3784-3798.
- safety of, as to minors, 1482.
- servant may assume that appliances are reasonably safe, 1498.
- spike maul flying off handle, 1421, e 3794.
- street railroad, negligence, 2084.
- unsuitable belt on planer machine, 1420.
- using appliances and machinery for years before causing injury, e 3790.
- defective rope in shaft mine, e 3795.
- same kind as a specified number of other railroads, e 3844.
- various kinds of hitches on dirt dumpers whether negligence, e 3796.
- what are, 1415.

#### APPLICATION FOR INSURANCE—

- conditions in, amounting to warranty, 1188.
- is made a warranty, 1171.
- misrepresentations*,
  - as to occupation, knowledge of agent, 1189.
  - use of liquors in, 1206.
  - in as to disease in family, 1195.
  - value made in good faith, 1185.
  - in knowledge of company, 1173.
  - live stock, e 3679.

[References are to sections; e refers to Erroneous Instructions.]

# APPLICATION FOR INSURANCE—Continued.

questions and answers in do not concern disorders and ailments lasting only for brief periods, 1190.  
representations as to incendiarism, 1176.

# APPLICATION—

for reinstatement, 1191.  
of doctrine of reasonable doubt to subsidiary facts, e 4439.  
funds, negotiable instruments, purchaser in good faith not bound to see to, e 4217.  
payment, mortgage debt and unsecured debt, 1308.  
proceeds, 1078.

# APPREHENSION—

of attack, carrying concealed weapons, intent, e 4803.  
danger, self defense, must act upon honest belief, 3113.  
right does not depend on correctness of, e 4705.  
immediate personal injury, self defense, reasonable cause, 3104.  
personal injury, carrying concealed weapons, 3275.

# APPROACHES—

to railroad tracks, duty of public authorities, 1900.

# APPROPRIATION—

larceny, placing brand on live stock, 3233.  
under bill of sale, and possession, 3240.

# ARBITRATION—

settlement of disputed fence line, trespass, 23

# ARCHITECTS, Chapter XXIX, 511-517, e, Chapter CXVII, 3435-3437.

cannot without cause withdraw acceptance of work, 514.  
certificate of,  
condition precedent to recovery, 511.  
must be furnished and payment demanded before bringing suit, 511.  
furnished as condition for payment, 511.  
defective plans, damages caused thereby, e 3436.  
duty of examining work and giving certificate, e 3435.  
fraudulently refusing final certificate, 512.  
withholding certificate, waiver of, 513.  
implied guaranty of skill, 516.  
liability for negligence, materials, e 3437.  
liable for defective construction, 516.  
liable for negligence or want of skill, 516.  
may make reasonable charge for services, 515.  
proof for plans having been made, 517.  
refusal to issue certificate, 686.  
requisite in suit for value of services, 515.  
what must be proved to recover for services, 515.

# ARGUMENT OF COUNSEL, Chapter XII, 220-246.

allowing additional time for in discretion of court, 226.  
causing reasonable doubt, should not acquit, e 4463.  
cautioning jury against, e 3321.  
comment on parties and witnesses in argument proper, 231.  
consideration due to, 2758.  
counsel not to be limited in flight of fancy and arts of oratory, 232.  
should not assume character of a witness, 230.  
error to refer to corporate capacity of opponent, 239.  
freedom of speech allowed, 232.  
*improper remarks,*  
not cured by withdrawal, 242.  
of counsel as to poverty of client, 237.  
should be rebuked by court, 241.  
laying foundation for civil suit, 2757.  
limiting time consumed in, 225.  
matters of common knowledge may be referred to, 229.  
may be limited by the court, 222-227.  
objection to improper remarks, 244.  
personal opinions of counsel to be avoided, 230.

[References are to sections; e refers to Erroneous Instructions.]

**ARGUMENT OF COUNSEL—Continued.**

- privilege of attorney, 233.
- references to other crimes of accused, 235.
  - poverty and wealth, 236.
- refusal of court to listen to, 221.
- should be confined to the evidence, 228.
- time may be limited by court, 225.
- waiver of by attorney, 223.

**ARGUMENTATIVE INSTRUCTIONS—**

- admission after beginning suit, e 3367.
- and lengthy, e 3396.
- circumstantial evidence, e 4357.
  - no one else suspected, e 4356.
- duel, assuming facts, e 4623.
- duty to acquit or convict, e 4501.
- eminent domain, damages, benefits of drainage, e 3557.
  - conjectural, e 3558.
- flight from other reasonable motives than guilt, e 4328.
- homicide with revolver, e 4614.
- improper, 195.
- incest, whether admission of relationship uncorroborated, will warrant conviction, e 4517.
- measure of damages, personal injury, e 3602.
- motive, homicide, e 4669.
- negotiable instruments, financial standing, e 4202.
- not ground for reversal, 189.
- policy of the law to protect the innocent, e 4493.
- presumption of innocence, e 4421.
- reasonable doubt, e 4454.
  - wholly inconsistent with every other rational conclusion than guilt, e 4468.
- state failing to prove motive, homicide, e 4671.

**ARIZONA—**

- statute relating to instructions, 153, p 126.

**ARKANSAS—**

- reasonable doubt defined, 2649.
- statute relating to instructions, 153, p 127.
- weighing defendant's testimony, 2534.

**ARMING HIMSELF PREVIOUSLY—**

- being aggressor, does not necessarily bar plea of self defense, e 4720.
- self defense, whether evidence of malice, e 4719.

**ARMS—**

- procurement of, self defense, as affecting motive, e 4721.
- right to carry, homicide, e 4624.
- transporting, military expedition, 3291.

**ARREST—2449-2455, e 4323-4325.**

- attempted, violating ordinance, profane swearing, 2847.
- carrying concealed weapons, without warrant, 3274.
- deputy sheriff making, misdemeanor, can kill only in self defense, 2451.
- false imprisonment, defendant must have caused, e 3716.
- flight to avoid, prima facie evidence, homicide, 2458.
- for vagrancy, malicious prosecution, validity of ordinance, consistent with statute, e 3720.
- illegal, killing of policeman making, murder or manslaughter, e 4607.
  - may reduce unlawful homicide to manslaughter, e 4325.
- killing policeman who attempts to, self defense, e 4737.
- malicious prosecution, retaining under void warrant, e 3719.
  - upon suspicion, malice, probable cause, e 3718.
- officer making, shot by prisoner, self defense, 3156.
  - unjustifiable assault, e 3442.
- officer without warrant, private individual, 2449.
- policeman killing in making, not necessarily barred from pleading self defense, e 4738.



[References are to sections; e refers to Erroneous Instructions.]

**ARREST**—Continued.

making, not bound to retreat, self defense, e 4743.

killing by, manslaughter, e 4654.

resisting officer in execution of writ, personal animosity immaterial, 2455.

*right of officer to,*

make, shooting to escape, what constitutes an act of selling liquor, 2452.

self defense, believing conspiracy between union miners, e 4323.

without warrant, whether crime committed in presence of officer, e 4324.

right of sheriff to call posse, 2453.

statements of defendant at time of, 2529.

threat of, does not justify killing in self defense, 3154.

unnecessary violence in making, 2450.

when refusal to assist is justified, 2454.

without warrant, when wrongful constitutes assault, 531.

**ARSON**—Chapter CIII, 3268-3270, e Chapter CLXXXIV, 4796-4800.

confession voluntary, corroborated, 2532.

defined, 3268.

elements to be proved beyond reasonable doubt, 3269.

evidence of ownership essential, 3269.

insanity as a defense, 3270, e 4800.

lack of motive as evidence of innocence, silence when accused, e 4799.

malice is presumed from the deliberate, intentional, unlawful burning, e 4798.

value of property must be proved, e 4797.

what must be proved, joint defendants, e 4796

**ARTICLES OF PARTNERSHIP**—

third persons not bound by limitations in, without notice, e 4223.

**ARTIFICE**—

larceny, showing felonious intent, 3212.

negotiable instruments, signature obtained by, 2147.

of deceased, causing intoxication of person charged with crime, 2608.

**ARTIFICIAL LIGHT**—

liability for furnishing unsafe, 2125.

**ASPECT OF EVIDENCE**—

defendant not entitled to most favorable, e 4425.

**ASPORTATION**—

of property, larceny, necessary element, e 4776.

**ASSAILANT**—

killing on sight, not justified as self defense, e 4718.

self defense, defendant need not believe death of necessary, 3114.

**ASSAULT**—

CIVIL, Chapter XXX, 518-534, e Chapter CXVIII, 3438-3443.

accidental injury to trespasser, not, 523.

aiding or encouraging, 525.

amount of force that may be used in repelling, 526d.

assuming violence when controverted, e 3440.

by conductor, carrier liable, 1769.

carrier liable for the assault of passenger by servant, 1768.

damages, personal injuries, punitive may be allowed, 964.

social position sense of shame, humiliation, mental suffering

can be considered, 967-968.

defined, 518.

ejecting a trespasser, 528c.

person from store, may use necessary force, series, 534.

entry under legal process, 520.

excessive force in self defense, 526.

exemplary damages may be allowed when, 965-966.

expelling a disorderly person or trespasser, 528.

familiarity with female, what considered, e 3443.

force in retaking property, e 3439.

in actions for, when smart money may be added, 532.

[References are to sections; e refers to Erroneous Instructions.]

# ASSAULT—Continued.

- injury caused by accident, 521.
- plaintiff's fault, 521.
- joint liability of assailants, 524.
- justifiable defense, accident resulting therefrom, 527.
- justification in protecting property, 533.
- made while defending against assault of another, 534f.
- measure of damages, 963-969, e 3606-3608.
- reference to defendant's ability to pay, e 3606.
- mutually entered into, e 3438.
- officer making arrest, unjustifiable, e 3442
- on passenger, street car conductor, negligence, 2054.
- one not liable for, while acting in self defense, unless excessive force was used, 526.
- one who incites, advises and encourages an unlawful assault and battery, liable as principal, 525.
- parent, duty to discipline child would not be an assault, 529.
- using excessive force may be, 529.
- whipping child, 529.
- person may use necessary force to eject from premises, series, 534.
- may use the force that a usually careful man would have used under similar condition, 526.
- must take part in or assent to, 520.
- voluntarily engaging in fight, 522.
- personal rights of individuals, 518.
- pointing a revolver at another whether loaded or not, 518.
- presence at time of assault not alone sufficient, 519.
- self defense, 526.
- a right and a duty, 528.
- series, 534.
- upon person getting freight, negligence, railroad, 1942.
- voluntarily engaging in conflict, 522.
- fight, when may recover, 522.
- what may be considered in estimating damages, 967-968.
- justify, 526.
- when justified in defending against a trespasser, series, 534.
- in ejecting persons from store, 534.
- where several persons assail another, each liable for, 524.
- unite to wrong another, joint liability, 524.
- whether committed under legal process or not, 520.
- words of provocation mitigate damages, 532.
- wrongful arrest without warrant, 531.

# CRIMINAL,

- actual, self defense, not necessary, e 4702.
- aggravated, homicidal intent, e 4547.
- by deceased on defendant, murder in first degree, cooling time, 2992.
- self defense, malice immaterial, 3141.
- policeman, striking with hand or club, self defense, 2848.
- conspiracy, whether right of self defense lost, e 4582.
- counter, bringing on difficulty, self defense, 2849.
- defendant guilty of some offense, instruction to acquit, e 4545.
- discharging pistol, justification, accident defined, e 4538.
- inhabitants of town driving persons out of town, e 4541.
- mutual combat, both parties guilty, 2841.
- on daughter, shooting by father to protect, self defense, e 4758.
- one does not justify another, e 4540.
- provocation for homicide, referring to great provocation as slight, e 4679.
- slap with hand, when not sufficient, 3091.
- resisting, self defense, accidental killing, e 4716.
- school teacher using unreasonable force, e 4539.
- self defense,
- blow need not have been actually struck, attack with knife, 3124.

[References are to sections; e refers to Erroneous Instructions.]

# ASSAULT—Continued.

- by deceased with deadly weapon, 3116.
- deceased acting with others to commit, 3115.
- defendant attacking brother of deceased, 3130.
- killing in revenge after repelling, 3125.
- necessary element, 3120.
- no duty of retreat, when attacked with pistol, 3163.
- on defendant, need not have been felonious, interfering in combat, 3173.
- sudden affray, heat of passion, punishment, 2840.
- trespasser, self defense, instructions ignoring part of the evidence, e 4543.
- with billiard cues, fatally wounded, 3000.
  - deadly weapon, e 4544.
  - implied malice, 2867.
  - self defense, retreat, e 4739.
- with intent to commit rape,*
  - abandonment of purpose, 2823.
  - definition, 2828.
  - essential elements, 2822.
  - force necessary, feeling or sense of shame insufficient, e 4523.
- with intent to commit voluntary manslaughter, 2668.
- with intent to kill,*
  - accessory, intent, 2747.
  - circumstantial evidence, 2870.
  - deliberation not a necessary element, e 4552.
  - elements state must prove, misplacing burden of proof, e 4546.
  - if the crime would be manslaughter if death had ensued, e 4554.
  - included crimes, reasonable doubt acquits, 2869.
  - instruction should not include what constitutes murder, e 4556.
  - intent an essential element, e 4548.
  - malice and deliberation not necessary elements, 2866.
  - or murder, 2854-2871.
    - defined, 2854.
  - premeditated design, not necessary, e 4551.
  - reasonable doubt must be as to whole evidence, not only as to intent, e 4557.
  - reckless shooting, e 4559.
  - self defense, duty to retreat, bringing on difficulty, e 4558.
  - specific intent not necessary, e 4549.
  - using the word "shoot" instead of kill, e 4555.
- with intent to murder,*
  - form of verdict, 2871.
  - intent, how proven, 2857.
  - malice and deliberation, malice defined, 2865.
  - what lesser crimes included, 2855.

# ASSAULT AND BATTERY—

## CIVIL,

- bodily pain as affecting damages, 519.
  - by servant, liability of master for, 1372.
  - damages for personal injury, 963.
  - defined, 519.
  - degree of bodily pain and injury only important as affecting measure of damages, 519.
  - elements of damage, 963.
  - may be established by preponderance of the evidence, 352f.
  - proof necessary to maintain action of, 352f.
  - provocation, not for jury to decide, e 3441
- ## CRIMINAL, Chapter XCIII, 2838-2871, e Chapter CLXXIV, 4537-4559.
- adequate cause, insulting words, 2863.
  - aggravated assault, embracing a woman, intent to injure, 2853.
  - aggravated, defined, 2852.
  - animus, purpose and intent may be shown by writing of valentine, 2860.
  - defined, 2838, e 4537.
  - incapable of forming intent from drunkenness, 2861.



[References are to sections; e refers to Erroneous Instructions.]

**ASSAULT AND BATTERY—Continued.**

- insults as justification, 2845.
- intent, how proven, 2839.
- must be proven, 2856.
- justification,*
  - burden of proof, 2862.
  - ejecting trespasser, 2842.
  - keeping order in religious meeting, 2843.
- must be murder had death ensued, deliberation, 2864.
- presence of others at time of assault, aiding or abetting, 2851.
- prosecutrix visiting defendant, 2846.
- provoking difficulty, third party, e 4542.
- repelling seizure of dog, 2844.
- use of firearms, pointing gun, or discharging same, 2850.
- violating ordinance, profane swearing, 2847.
- what to be considered in determining intent, 2359.
- whether intent is proved, 2858.

**ASSENT—**

- accessory, act done without, 2742.
- embezzlement, without the assent of his employer, e 4600.
- to conspiracy, identity, 2918.

**ASSESSING—**

- damages without proof, measure of damages, civil assault, e 3607.
- values from view of jury, e 3379.

**ASSESSMENT—**

- of taxes on road by city, building on public highway, adverse possession, equitable estoppel, e 4233.
- special, railroad company restricted in use of right of way, 2230.
- special benefits, what considered, 2931.

**ASSIGNEE—**

- knowledge of assignor's false representation of financial standing made assignment void, fraud, e 3631.
- negotiable instruments,*
  - after maturity, 2166.
  - with notice from one without notice, 2170.
  - of suspicious facts, 2167.
- sale by, guaranty, trust property, agreement to buy back, 2266.

**ASSIGNMENT—**

- agreement and mortgage constituting, 1309.
- fraud upon creditors, 1054-1094.
- negotiable instruments, evidence necessary to overcome presumption of good faith, 2173.
- of contract, mechanic's lien, 1335.
- lease, release of tenant by, acceptance of rent, e 3699.
- life insurance policy, series, 1205.
- void, fraud against creditors, false representation of financial standing, knowledge of assignee, e 3631.

**ASSISTING—**

- a lottery, 3278.
- forgery, without doing writing, 2942.
- principal and accessory, present without, 2741.

**ASSUMING—**

- admitted facts, reasonable doubt, self defense, 2717.
- broker had exclusive sale of property, e 3464.
- by court that certain facts do not exist, 182.
- controverted point, agency, e 3419.
- damage of which there is no proof, personal injury, e 3598.
- fact of personal injury, negligence, street railroads, 2018.
- facts, duel, argumentative, e 4623.
- homicide with revolver, e 4614.
- in issue, measure of damages, personal injury, e 3608.
- warranty, instruction must be based on evidence, e 4256.
- facts to be proven, breach of contract, e 3482.
- liability, measure of damages, personal injury, e 3596.

[References are to sections; e refers to Erroneous Instructions.]

**ASSUMING—Continued.**

- ownership, embezzlement, ignoring fact that point was contested, e 4599.
- parties guilty of trick or evasion without evidence, e 4772.
- sales to be fraudulent, e 3652.
- that a revengeful and unlawful purpose existed without evidence to show it, e 4750.
- corroboration of testimony of accomplice is sufficient to convict, e 4488.
- danger existed, self defense, defendant's belief in danger, e 4694.
- deceased was aggressor must rest upon evidence, self defense, e 4722.
- there was delay in payment of negotiable instrument, giving undue prominence to it, e 4208.
- to act as agent, action of deceit, e 3423.
- violence, when controverted, error, e 3440.

**ASSUMPSIT—**

- action for money loaned, 429.
- for value of party wall, 2223.
- itemized account of indebtedness, 429.

**ASSUMPTION OF RISK—1444-1471, 1561-1583, e 3813-3828, 3881-3900.**

- as to cars received by railroads, e 3889.
- defective drawhead, e 3891.
- switchstand, e 3890.
- defects in handcar, e 3892.
- burden of proof as to, e 3814.
- by employees of street car company, 1459.
- engineer, top-heaviness of engine, e 3886.
- fireman, knowing of violation of rules by engineer, e 3887.
- minor, 1471.
- minor, doing work not in line of regular employment, e 3816.
- passenger, riding on freight or mixed train, e 3969.
- carelessness of employees, foreman assuming, 1389.
- carrying glass through passage-way knowing same to be obstructed, 1457.
- too heavy a piece of timber, 1464.
- caving in of bank, e 3819.
- circumstances to be considered whether risk was assumed, 1446, e 3815.
- continuing work,*
  - after bolt had come off many times, 1469.
  - insufficient repair of appliances, e 3825.
  - promise of master to repair, e 3827.
- at dangerous machine, e 3834.
- in dangerous places after notice of defect to master, 1467, e 3826.
- with knowledge of dangerous conditions, e 3898.
- without repairing defects after being warned of danger, 1480.
- custom of switching cars, knowledge of by injured person, e 3895.
- defect in driving box, prior knowledge of by employees, e 3888.
- track, promise to repair, e 3900.
- defective condition of track at crossing, causing injury to engineer, e 3885.
- machine, repairing it from time to time, 1469.
- track, risks assumed by engineer, e 3884.
- doing work in way other than ordered by master, 1479.
- duty of master to protect his servant, operating a furnace without a screen, e 3823.
- servant as to examination of grip-car, 1460.
- to apprise himself of dangers of machinery, 1452.
- look out for patent and obvious defects, 1453.
- employing insufficient help, 1464.
- engine running off track, e 3896.
- error to ignore, in instruction, e 3769.
- falling into excavation, 1456.
- fellow servants, 1376.
- grinding planer tool upon emery wheel, 1461.

[References are to sections; e refers to Erroneous Instructions.]

**ASSUMPTION OF RISK—Continued.**

in rolling engine wheels, e 3893.

*knowledge of,*

danger by servants, e 3817-3818.

dangerous roof in mines, 1486.

defective material in lever by servant if he had exercised ordinary care, e 3822.

defects by servants, e 3883-3884.

insecure scaffolding by servant, if he had exercised ordinary care, e 3821.

leaving cars uncoupled contrary to rules, e 3872.

no duty of servant to use ordinary care to discover increased danger, e 3820.

notice of defect to master, promise to repair, reliance upon promise, servants working after reasonable expiration of time, 1467.

oil-house near track, assuming risk of injury from, e 3894.

operating dangerous machine, after promise of master to supply device for lessening danger, 1463.

passenger riding on freight or mixed trains, series, 1750.

standing on platform, e 4146.

takes all risk necessarily incident to mode of conveyance, 1749, e 3967.

place not dangerous, employer negligently creating peril, servant does not assume such risk, 1447.

poles being too near track, 1459.

prior knowledge of condition of ditch by employe of municipal corporation, 1455.

promise to repair engine, e 3899.

railroads, of employes who know of dangerous conditions, 1575-1577.

servant assumes ordinary risks incident to employment, 1509.

servant does not assume risks arising from negligence of, 1509.

refusal of master to repair, e 3828.

removing ties on railroad tracks, 1545.

risk not ordinarily incident to employment, burden of proof, 1445.

***servant,***

assumes all risks ordinarily and naturally incident to particular service in which he is engaged, 1444, e 3813.

known dangers, 1463.

ordinary risks and hazards incident to the business, 1425.

risks necessarily incident to his employment, e 3881.

being directed to do work not in line of his regular employment, e 3816.

does not assume danger after promise to repair, right to remain a reasonable time, 1468.

of dangers not incident to the business, 1447.

extraordinary perils or risks, 1448.

employed outside of his regular employment, e 3893.

failing to use precautions against known danger, 1465.

injured by lowering of window, knowledge that window was of great weight, effect of, 1454.

knowing hazards, safer way of conducting business, no ground for recovery, 1466.

of one defect does not assume risk of another of which he has no knowledge, e 3892.

knowledge of facts which would make his own acts dangerous, 1451.

leg being over side of the car, e 3912.

notifying superintendent of defective machinery, superintendent assuring servant machine is all right, 1470.

slipping on floor and injuring hand in machinery, e 3818.

stepping into dangerous place when frightened by dog, e 3774.

struck by car deviated from its course after passing switch, e 3895.

tearing down bridge, e 3824.

uncovered electric wires, knowledge of servant, 1458.

unloading timbers, 1463.

using defective gas pipe as lever, 1462.



[References are to sections; e refers to Erroneous Instructions.]

**ASSUMPTION OF RISK—Continued.**

*voluntarily,*

- assuming duties not arising under employment, 1449.
- doing work in more dangerous way than necessary, 1478, e 3832.
- taking place he is not required to take, 1450.
- dangerous position in front of truck, e 3833.
- what is a risk ordinarily incident to the employment, e 3882.
- whether duty of employe to search for defect, e 3897.
- servant assumes negligence of other employes, e 3808.
- servant had been warned of the dangerous nature of work or place, 1446.
- working near dangerous lumber pile, 1483.
- with defective rope, e 3836.

**ASYLUM—**

- insane, confessions of inmate, e 4375.

**AT LARGE—**

- on highway, cattle with attendant, not at large, 2323.

**ATTACHMENT—Chapter XXXII, 535-546, e Chapter CXIX, 3444-3449.**

- absence from usual place of abode with intention of returning, 538.
- action on bond, e 3447.
- against partnership, not justified by partner's conveyance of own property, 544.
- Alabama code, 540.
- allegation that that debtor absconds or secretes himself not sustained by proof of temporary absence from home, 537.
- collusion between creditors and insolvent debtor, 540.
- debtor and creditor to secure prior lien, 540.
- conveyance made to hinder and delay creditors, 542.
- damage for suspension of business, proper element, 740.
- allowed for issuance of without statutory grounds, 741.
- debtor about to depart from state, burden of proof, 537.
- about to fraudulently dispose of property, burden of proof, 533.
- may sell or give away exempt property, 546.
- duty of officer to reduce levy after goods sold by debtor, 541.
- fraud, right of attaching creditor, 535.
- fraudulent intent must be proven, 536.
- garnishment, general and special deposit, 545.
- of bank, 545.
- instituting suit of, malicious prosecution, 1269.
- issuance of without statutory grounds, damages, 741.
- liability of justice of the peace for acts of special officer, e 3449.
- loss of credit an element in assessing damages, 743.
- maliciously sued out, punitive damages may be allowed, 742.
- measure of damages, 739-743, e 3503-3504.
- money extorted by threat of, e 3444.
- partner's conveyance of non-partnership property not chargeable to firm, 544.
- right of attaching creditor, 535.
- officer to seize property, e 3446.
- vendor's creditors to attach property in hands of vendee, 1094.
- sale of merchandise void by debtor without change of possession, 543.
- sued out by agent, ratification, e 3445.
- suspension of business—proper element of damages, 740.
- temporary absence from state not sufficient grounds for, 537.
- title, purchase and possession in good faith, e 3448.
- when wrongful, elements of damages, 739.
- where debtor is about to fraudulently dispose of or conceal his property, 542.
- fraud is alleged, must be proved by preponderance of the evidence, 536.
- wrongful, elements of damages, 739.

**ATTACK—**

- apprehensive of, carrying concealed weapons, intent, e 4803.
- defendant attacking brother of deceased, 3130.

[References are to sections; e refers to Erroneous Instructions.]

**ATTACK—Continued.**

- provoking, self defense, slandering family of deceased, e 4730.
- on defendant's character, not allowed in first instance, though rebuttal of evidence of good character is, e 4345.
- preventing, self defense, firing to scare, e 4736.
- with knife, self defense, blow need not have been actually struck, 3124.
- self defense, interfering in combat, 3173.
- with pistol, no duty of retreat, 3163.

**ATTACKED—**

- in dwelling, no duty of retreat, 3165, e 4746.
- right of defense, justifiable homicide, 3183.
- without fault on public highway, no duty of retreat, e 4744.

**ATTACKING—**

- another to protect a woman, may plead self defense, e 4761.
- credibility of prosecuting witness, larceny, tax schedules admissible, e 4780.

**ATTEMPT—**

- fraud, not sufficient, must succeed, e 3647.
- of burglary, co-operating with burglar, 2887.
- to arrest, killing policeman, self defense, e 4737.
- bribe juror, proof required, other attempts incompetent, 3271.
- to commit rape*,
  - definition, 2821.
  - murder committed, 2999.
  - self defense, 3158.
- to draw weapon, self defense, by deceased, 3117.
- to escape, flight* 2456-2464, e 4326-4328.
- failure to make, no evidence of innocence, 2463.
- flight not presumptive evidence of guilt, but tending to prove guilt, e 4326.
- guilt presumed from, 2457.
- how considered, 2456.
- inference to be drawn therefrom may be either strong or slight, terms explained, 2462.
- murder, 2998.
- releasing prisoners from jail by delivering tools, 2464.
- to avoid arrest, prima facie evidence, homicide, 2458.
- to procure abortion, killing in, manslaughter, 3043.
- utter forgery, presumption from, 2943.
- or pass forged note, for personal gain, must be proved, 2945.

**ATTENDANT—**

- for cattle, failure to furnish, trespass, 2324.
- with cattle on highway, not "at large," 2323.

**ATTENDANCE OF WITNESSES—**

- limit of process, taking testimony by commission, 2775.

**ATTENDING CIRCUMSTANCES—**

- provocation in manslaughter, e 4653.

**ATTORNEYS—Chapter XXXII, 547-553, e Chapter CXX, 3450-3453.**

- acquiring knowledge from one client not presumed to be knowledge of another client, 477.
- advice must be of licensed attorney, 547.
- of counsel as a defense, 547.
- after demand for value of services entitled to interest, 553.
- allowing additional time for argument, 226.
- and client, misrepresentation, e 3453.
- appeals to prejudice or passion in argument, 234.
- as witnesses in a case, 143.
- cannot practice in court where he is judge, 549.
- cautioning jury against argument of, e 3321.
- comments of counsel on withholding evidence, 239.
- conduct as evidence for the jury, 121.
- contract for contingent fees, measure of damages for breach of, 660f.

[References are to sections; e refers to Erroneous Instructions.]

# ATTORNEYS—Continued.

- dealing with their clients required to exercise highest order of good faith, 660e.
- degree of care and skill required, 547.
- disregarding statement of, e 3322.
- doubts of success expressed, compensation, e 3450.
- evidence given by attorneys as to value of services rendered, 552.
  - not conclusive, 552.
- fees included as damages, e 3524.
- for defendant may waive argument, the case then proceeds to the jury, 223.
  - plaintiff may waive opening argument, 223.
- freedom of speech allowed in argument, 232.
- have constitutional privilege to make comments on witnesses or parties, 231.
- interruptions of argument by opponent, 227.
- judge of probate court prohibited from acting as, 549.
- jury may be instructed relative to arguments, 203.
- lack of reasonable knowledge or skill, causing loss, 547.
- licensed, alone entitled to argue, 222.
- maliciously slandering a party, liable, 233.
- manner of addressing court or jury, effect of, 121.
- matter of common knowledge may be referred to in argument, 229.
- may recover for what services are reasonably worth, 552.
- must act toward his client with integrity and honesty, 547.
  - disclose to their clients all material information in their possession, 660e.
- not entitled to compensation when contract is broken, 551.
  - reversible error to fine attorney for contempt during, 97.
- officers of court, 221.
- only reasonable care and skill required, 547.
- practice of testifying in own case questionable, 143.
- privilege on account of words used, argument, 233.
- prosecuting, opinion as to guilt of defendant not to be considered by jury, 2755.
  - statements not based on evidence, 2754.
- reading instructions by, negligence, street railroads, prejudice against corporation, 2017.
- reasonable degree of care and skill required, 547.
- reasonableness of charges, how shown, e 3451.
- recovery for legal services, 550.
- reference of failure of opponent to testify improper, 238.
- relying upon value of services rather than contract, 552c.
- right to argue case, 220.
- should be respectful in addressing court, 89.
  - not administer oath to client, 115.
- special compensation for obtaining dissolution of injunction bond on appeal, e 3452.
- statement of, corrected in instruction, reference to Biblical laws, 2756.
  - unsupported by law or evidence should not be considered by jury, 405.
- talking to witness does not tend to discredit or impeach, 380.
- testimony of, subject to criticism, 372.
- time may be limited, 225.
- undue influence of, wills, 2411.
- use of profane and obscene language improper, 240.
- weight to be given testimony of, 372.
- when contingent contract may not be revoked, series, 660.

# AUCTIONEER—

- duty of to exercise due care as to safety of place in which sale is held, e 4188.

# AUDITA QUERELA—282.

# AUTHORITY—

- of agent, e 3412.
- of bartender to sell intoxicating liquor, no presumption of law either way, 3190.



[References are to sections; e refers to Erroneous Instructions.]

**AUTHORITY—Continued.**

- presumption only to make lawful sales, 3191.
- of officer administering oath, perjury, must be shown, 3265.
- partner, acts ratified by partnership, 2213.
- to bind firm, scope of business, 2209.
- of president of corporation, as to negotiable instruments, release of liability, e 4195.
- person having, obtaining confession by threat or promise, 2526.
- to act for principal may be inferred, 600.

**AUTHORIZING DOUBLE DAMAGES—**

- personal injury, e 3597.

**AUTOMOBILE—**

- negligence, running at greater speed than statutory rate, 1682.
- right to run on highway, e 3954.
- running into excavation in street, e 3925.

**AVENGE—**

- irresistible impulse to, no defense, 2580.

**AVERTING—**

- necessity of killing, self defense, must employ all reasonable means, 3119.

**AVOIDING INJURY—**

- possibility of, contributory negligence, railroad, 1958.
- to live stock after seeing their danger, negligence, railroads, 1973.

**BAD CHARACTER—See CHARACTER.**

**BAGGAGE—1832-1836.**

- carrier not bound to inquire as to the contents of, 1835.
- if trunk of special value, carrier should be notified, 1834, 1835.
- liability for, 1832.
- of carrier terminates, when, 1836.
- what it includes, 1832.
- does not include, 1833.

**BAILEE—**

- cannot commit embezzlement, 2927.
- conversion by, 2334.
- degree of care required of, hired horse, 555.
- embezzlement, original taking need not be felonious, gist of offense is conversion, 2928.
- larceny, opening trunk left in defendant's possession, 3239.
- liable for money converted to own use, 557.
- lien for storage, e 3730.
- right of, to change storage charges, 1326.
- who borrows property must return same, 554.

**BAILOR—**

- degree of care required when bailment for his sole benefit, 558.

**BAILMENTS AND WAREHOUSEMEN—Chapter XXXIII, 554-566.**

- bailee cannot deny bailor's title, 554.
- degree of care required, for sole benefit of bailor, 558.
- in trial of horse with option of purchase, 556.
- fraud against creditors, rights of creditor, e 3636.
- hired horse, degree of care required of bailee, 555.
- implied warranty of bailor that horse is fit for services required, 555.
- liability of bailee for money converted to his own use, 557.
- one who borrows property cannot retain same even though it had previously been stolen from him, 554n 1.
- reasonable expenses of storage, etc., deducted from amount of damages, e 3507.
- stolen property, 554.
- trial of hired horse with option of purchase, 556.

**BALANCE ON ACCOUNT—**

- negotiable instruments, credits, 2140.

**BANKRUPTCY—**

- fraudulent conveyance, 1083.

[References are to sections; e refers to Erroneous Instructions.]

**BANKS AND BANKING**—Chapter XXXIV, 567-576, e Chapter CXXI, 3454-3458.

**CIVIL,**

- appropriation of balance due depositor to note owing bank, 569.
- money received illegally to be paid for other sums embezzled, 570.
- authority of cashier may be inferred by acquiescence in his acts for long time, 571.
- certifying raised check, not bound by, 506.
- damages for dishonoring check, e 3457.
- deposit in bank to credit of another, 567.
- garnishment of deposit, 545.
- knowledge of insolvency of another bank, e 3454.
- liability of director for allowing improper loans, e 3455.
- must be diligent in repudiation of agreement, 572.
- not chargeable with wrongful acts of president appropriating funds deposited by him as executor, series, 494.
- officer of, who appropriates funds deposited by him as executor does not bind bank, 494.
- president of, who deposits funds as executor in bank does not charge principal with knowledge of his wrongful appropriation, 494.
- president or director liable for himself only, e 3456.
- receipt of deposit knowing it to be money of another, 568.
- when during series of years acts of cashier are acquiesced in, authority may be inferred, 571.

**CRIMINAL,**

- burden of proof of insolvency on state, 574.
- charge of insolvency must be proven beyond reasonable doubt, series, 576.
- deposit of bonds of exaggerated value among assets, 573, 574.
- deposit of check for collection, series, 575.
- knowledge of officer that bank was in failing circumstances, series, 576.
- embezzlement, Illinois statute, 2937.
- special or general deposit, 2933.
- whether wrongfully converted or drawn for benefit of, 2931.
- failure of, prima facie evidence of knowledge of insolvency, 574.
- fraud inferred, 573.
- insolvency, burden of in criminal prosecution, 574.
- intent to defraud, defined, 573.
- knowing bank was in failing circumstances, 576.
- receiving deposits while insolvent, 574, e 3458.
- series, 575, 576.
- whether or not check was deposited for collection, series, 575.
- wrongfully accepting deposits by bank in failing circumstances, 576.

**BANKS—**

- of watercourses, use of, floatage of logs down navigable stream, 2359.

**BAR TO PLEA OF SELF DEFENSE—**

- defendant aggressor, 3126-3133.
- agreeing to fight, 3132.
- at fault, 3131.
- insulting words not, 3139.
- killing through cowardice, 3137.
- previously formed design, 3138.
- previous threats not, 3153.

**BARB WIRE—**

- causing injury to horse, contributory negligence, 1688.

**BARN—**

- property found in, larceny, possession not with defendant, 3247.

**BARTENDER—**

- authority to sell intoxicating liquor, no presumption of law either way, 3190.
- presumption that he has authority to make only lawful sales, 3191.

[References are to sections; e refers to Erroneous Instructions.]

**BARTENDER**—Continued.

liquor dealer liable for acts of, even without knowledge and against orders, e 4771.

sale of intoxicating liquor by, liability of employer, 3192.

**BASEMENT**—

condition of, concealed fraudulently, liability of tenant for rent, 1236.

**BASTARDY**—2791-2795, e 4512, 4513.

credibility of complaining witness, 2794.

fact that child was born as tending to prove that defendant was father, e 4512.

only evidence that of prosecutrix, jury may disregard, 2795.

period of gestation should not be fixed by court, e 4513.

previous birth of another, not material, 2792.

question of paternity material, not character of complainant, 2791.

sexual intercourse with other men about the time child was begotten, 2793.

**BATTERY**—See ASSAULT AND BATTERY.

**BAWDY HOUSE**—See DISORDERLY HOUSE.

**BEAMS**—

raising of, in obviously dangerous ways, 1484.

**BEATING**—

mother, killing child, murder in second degree, 3019.

retreating adversary with deadly weapons, self defense, e 4726.

**BELIEF**—

as to ownership, larceny, color of title, e 4778.

beyond reasonable doubt, not the same as fully satisfied, e 4450.

conscientious, reasonable doubt, 2687.

fraud, false statements not mere matter of, e 3637.

honest, self defense, in danger of life or great bodily harm, 3120.

in conspiracy, right of officer to arrest, e 4323.

*in danger,*

defendant assuming that danger existed, e 4694.

must be honest, 3113.

reasonable, 3106.

as well as honest, e 4696.

that he is in imminent peril, necessary to right of self defense, e 4695.

of great bodily harm, acting on, 3107.

mere, not sufficient to convict, must be satisfaction beyond reasonable doubt, e 4447.

of guilt, conscientious, not sufficient to convict, e 4445.

jury must arise from the evidence, e 4632.

jury must be limited to evidence, e 4777.

ownership, larceny, intent, reasonable doubt, burden of proof, e 4779.

self defense, defendant need not believe death of assailant necessary, 3114.

**BELIEVING**—

as man what one doubts as juror, 2705, e 4446.

some witnesses and discarding others, e 3313.

statements to be true, no reasonable grounds for, swearing falsely, 3257.

theory of either side, singling out witness, e 3316.

**BELITTLE DEFENSE**—

intoxication, saying "there is some evidence," e 4419.

**BELL**—

*railroads,*

duty of person crossing track, 1882.

failure of driver of vehicle to heed, 1922.

to ring, not negligence per se, 1885.

when excused, 1884.

ordinance as to ringing, person may assume it will be obeyed, 1883.

ringing, negligence, burden of proof, 1985.

stock injured at crossing, neglect to ring, 1984.



[References are to sections; e refers to Erroneous Instructions.]

**BELL**—Continued.

*street railroads,*

negligence in sounding, 2085.

stranger ringing, and starting car, 2039.

ringing to go ahead while passenger is alighting, negligence, 2044.

**BELT**—

defective, 1419-1420.

leather, deadly weapon, murder in second degree, 3016.

**BENEFICIARY**—

misrepresentation by, in application for insurance, 1195.

will written by, e 4302.

**BENEFIT**—

accepting, ratification of tort of agent, e 3421.

presumption of innocence, defendant to be given, 2636.

reasonable doubt, depriving defendant of, intimating that burden of proof shifts, e 4465.

**BENEFIT SOCIETIES**—See **FRATERNAL AND BENEFIT SOCIETIES**.

**BENEFITS**—

allowance for, eminent domain, public utility expense of adjusting land after part taken, e 3553.

common, not considered, eminent domain, damages, e 3555.

eminent domain, damages to property not taken, e 3562.

of drainage, eminent domain, damages, e 3557.

special, special assessment, 2231.

to be considered, damages, eminent domain, e 3551.

**BENZINE**—

on premises insured against fire, clause in policy against it, amount sufficient to avoid, e 3666.

**BETTING**—

booth, horse racing, e 4808.

must be proved, under indictment for card playing, e 4806.

**BIBLE**—

entries in family Bible admissible as evidence of pedigree, 128.

**BIBLICAL LAWS**—

reference to, 2756.

**BICYCLIST**—

colliding with street car, contributory negligence, 2105.

crossing railroad track, negligence, 1915.

degree of care required of, 1672.

falling under fender of car, e 4173.

riding over defective walk not necessarily contributory negligence, 1672.

**BIGAMY**—2796-2798, e 4514.

acts and conduct tending to prove marriage, 2796.

criminal intent presumed, doing prohibited act, 2798.

prior common law marriage, what would constitute, e 4514.

marriage, persons exempt from charge, 2797.

**BILL OF LADING**—1696-1699.

acceptance of draft without, 2142.

as symbolical delivery, 1068.

held by, title to the goods, negotiable instruments, lien of surety, 2192.

not conclusive of condition of goods, 1699.

sale completed by transfer, 2252.

**BILLS AND NOTES**—See **NEGOTIABLE INSTRUMENTS**.

**BILL OF REVIEW**—282.

**BILL OF EXCEPTIONS**—301.

amending same, 305.

extending time for, does not extend time for appeal, 294.

for settling, 304.

form of not important, 303.

matters properly part of record need not be included, 302.

[References are to sections; e refers to Erroneous Instructions.]

**BILL OF EXCEPTIONS—Continued.**

- may be corrected by the court, 305.
- must be signed and sealed by the trial judge, 304.
- office and purpose of, 302.
- parties joining in, 306.
- power to sign cannot be delegated except by statute, 304.
- preparation, signing and sealing of, 303.
- should be included in abstract of record, 316.
  - contain certificate that contains all evidence, 307.
  - show what party objected to in instructions, 309.
- time for tendering, 303.
- unless signed or presented to the judge within time prescribed is a nullity, 304.
- what it must show, 301.

**BILL OF SALE—**

- is only evidence, e 4250.
- larceny, appropriation under, and possession, 3240.

**BILLIARD CUES—**

- fatally injured by striking with, 3000.
- killing with, presumption of murder in second degree, 3021.

**BIRTH—**

- of child, as evidence of seduction, e 4531.
  - as tending to prove that defendant in bastardy proceedings was father, e 4512.
- of previous bastard, not material in prosecution for bastardy, 2792.
- premature, whether proximate cause of accident, e 3742.

**BLANK—**

- endorsement, negotiable instruments, 2175.
- space left in written instrument, alteration, 508, 509, e 3434.

**BLINDNESS—**

- injured person being blind should be considered by jury, 1336.

**BLOOD—**

- heat of, homicide, provocation, cooling time, 3095.

**BLOW—**

- homicide, circumstances from which to determine whether death caused by, 3074.
- on head, insanity from, telling exaggerated stories, commenting on evidence, e 4408.
- self defense, need not have been actually struck, attack with knife, 3124.
  - person not necessarily aggressor because striking first, 3135.
  - what considered in determining, 3142.
- with fist, homicide, presumption as to intent, 3053.

**BOARD OF DIRECTORS—**

- notice to chairman not notice to board, 478.

**BOARD OF TRADE TRANSACTIONS—Chapter XXXVI, 605-610, e Chapter CXXIII, 3471-3475.**

- agreement of parties not material, e 3475.
- contracts legal, 605, 610.
- delivery of grain, measure of damages on failure of, 661.
- gambling, defense to promissory note, e 3473.
- intention of parties to transaction, e 3475.
- liability of minor on contract, e 3474.
- may be closed out by broker when customer refuses to furnish margin, 607.
- options, commissions, usages, e 3472.
  - settlement made on differences in price, 609.
- putting up margins illegal, 606.
- recovery of commissions, notice of rules and regulations, e 3471.
- series, 610.
- settlements, on differences, series, 610.
- usage and custom governs in absence of express agreement, 606.
- when defendant neglects or refuses to furnish margins, broker may close, 607.

[References are to sections; e refers to Erroneous Instructions.]

**BOARD OF TRADE TRANSACTIONS—Continued.**

held to be gambling contract, 608.

legal, 605.

not legal, 605.

privilege of buying or selling for future delivery held gambling, 608.

**BODILY HARM—See DANGER.**

**BODILY INJURIES—**

life insurance, inhalation of gas, e 3678.

**BODILY SUFFERING—**

measure of damages, personal injury, e 3572.

**BODY—**

absence of, murder, circumstantial evidence, 2509.

concealment of, homicide, does not conclusively prove intent, 3055.

murder, court drawing inference of fact, e 4652.

of deceased, putting in river, circumstantial evidence, e 4359.

injured, grief from contemplating, measure of damages, e 3574.

**BOILER—**

explosion of, manslaughter, negligence, 3045.

negligence, damage caused by overflow, 2127.

**BONA FIDE—**

purchase of stolen property, 3254.

settler in action of ejectment, when not an abandonment, 1043.

**BONA FIDE PURCHASER—**

altered note, e 4219.

genuineness of signature, 2144.

landlord's lien, notice, e 3734.

not affected by contract against public policy, 638.

note vitiated, 2169.

**BOND—**

action on, recoupment of damages, 2139.

attachment, action on, e 3447.

measure of damages in action on replevin bond, 809.

pledging in security for note, by treasurer, intent, 2932.

replevin, liability of officer for taking insufficient, e 4245.

upon issuing a supersedeas, when waived, 325.

**BOOKS—**

falsified, credibility of partners, e 3351.

**BOOTH—**

betting, horse racing, e 4808.

**BORROWING MONEY—**

no presumption of fraud, 1055.

**BOUNDARIES—Chapter XXXV, 577-589, e Chapter CXXII, 3459-3462.**

adverse possession, 448.

course laid down of plat less reliable than adjacent boundaries, 579.

deeds, disregarding monuments, survey, e 3461.

referring to plat becomes part thereof, 589.

division line agreed upon through mistake, 585.

entry upon land must be justified by deed covering, 588.

estoppel by agreement, e 3459.

fences, agreement as to line, adverse possession, e 3462.

field notes, discrepancy in, 587.

when to govern, 587.

government corners, exceptions to rule that monuments govern, e 3460.

grantor who adopts plat warrants land as described therein, 588.

inclosure of premises by natural objects, 578.

in locating, jury should consider description in deed, 584c.

is a question for fact for jury, 577.

jury not bound by particular rule of location, 580.

line fence agreed upon, 584.

long acceptance of boundary line, constitutes adverse possession, 586.

mistake as to, adverse possession, e 3404.

not a question for surveyor but for jury, 577.



[References are to sections; e refers to Erroneous Instructions.]

**BOUNDARIES—Continued.**

- object of rules of location, 581.
- on river or creek, rule as to accretions, 582b.
- watercourse, line extends perpendicular, 582.
- rule as to adjoining owners, 582.
- order of establishment to be adopted, 579c.
- original survey conclusive, 577.
- person claiming under color of title bound by description in deed, 588.
- rules of location, 579, 581.
- which usually govern must yield to intention of grantor as contained in deed, 580.
- visible monuments control courses and distances, 579.
- what jury should consider in determining, 584.
- when division fence not conclusive, 583.
- statute of limitation will not apply, 585.
- survey should be considered as evidence, 577.
- where division fence may be placed by agreement, 582.
- whether surveyed line or agreed line is correct, 582.

**BRAGGING—**

- not necessarily fraud, 1102.

**BRAKEMEN—**

- who are fellow servants, 1556.

**BRAKES—**

- defective, injury to gripman on street car, 1426.
- duty to set while couplings are being adjusted, 1539.
- street railroads, negligence in not using proper ones, 2086.
- using hand-car without one, 1540.

**BRAND—**

- live stock, placing on, larceny, appropriating, 3233.

**BREACH OF CONTRACT—See CONTRACTS, BREACH OF.**

**BREACH OF GUARANTY—**

- surgeon, action for fees, malpractice, burden of proof, e 3723.

**BREACH OF PROMISE—**

- boasting by defendant of his seduction of plaintiff an element of damage, 767.
- burden of proof, 693.
- defendant to show justifiable cause for non-performance, 699.
- character and habits may be shown in mitigation of damages, 756.
- common law marriage, 697.
- consideration, sexual intercourse, illegal, 697, 699.
- contracts of marriage proven same as any other contracts, 701.
- existing marriage no defense, when, 697.
- how contracts of marriage may be proved, 693, 700.
- illicit intercourse between man and woman not evidence of, 693.
- in action for, attack on plaintiff's character may be considered in aggravation of damages, 767.
- incapacity to contract, 697.
- made after knowledge that party is unchaste, no defense, 695.
- measure of damages, 765-767.
- mere attentions not sufficient to prove, 693.
- gallantry not evidence of, 693.
- no time set for marriage, to perform within reasonable time, 694.
- offer of defendant to marry must be made in good faith, 699.
- marriage by defendant in good faith, good defense, 699.
- prior unchastity no defense, 695.
- seduction as an element of damage, 699.
- may be shown in aggravation of, 767.
- seduction, series, 699.
- sexual intercourse of parties, not proof of, 693.
- subsequent illicit relations between parties no excuse, 696.
- unchastity no defense, 695.
- of woman ground for refusal to marry, 699.
- what constitutes, 694.
- may be shown in aggravation of, 767.
- woman's knowledge of man's prior marriage, 697.

[References are to sections; e refers to Erroneous Instructions.]

**BREACH OF THE PEACE—**

abusive language in presence of female, 3295.  
vile epithets on street, 3294.

**BREACH OF WARRANTY—**

of title, damages, e 3514.  
to furnish repairs, damages measured by cost of such needed repairs, e 3513.

**BREAKING—**

and entering, and stealing put in the alternative, e 4572.  
defined, trespass to real estate, 2304.  
must be proved beyond a reasonable doubt, e 4568.  
another's fence unlawfully, 3298.  
into car, burglary, 2879.  
chicken coop, burglary, 2880.  
what constitutes, 2878.

**BRIBERY—3271-3273, e 4801, 4802.**

attempt to bribe a juror, proof required, other attempts incompetent, 3271.  
disreputable women, collection by agent, 3272.  
must be for purpose of influencing opinion or action, e 4801.  
of delegates, conspiracy for, e 4586.  
juror, drunkenness as defense, intent essential, e 4802.  
public officers, what they are already obligated to do, intent essential, series, 3273.

**BRIDGES—**

and culverts, degree of care required by railroads, 1760.  
destroyed by cyclones or cloudbursts, 1760.  
defective, causing injury, 1665-1666.  
condition of at crossing, e 4114.  
duty of county commissioners to construct in workmanlike manner, 1664.  
municipal corporations to keep bridges in a reasonably safe condition, e 3917.  
liability of municipal corporations for defective bridges, e 3937.  
neglect of lighting, e 3938.  
negligence in constructing or maintaining, wreck of train on, 1527.  
no exact standard for height of, over railroads, 1528, e 3854.  
over farm crossing, negligence, duty of railroad to repair, 2011.  
road, municipality not required to provide for support of extraordinary or unreasonably heavy loads, 1663.  
railroad building, over watercourse, flooding lands, e 4282.  
not bound to anticipate extraordinary rainfalls or to build bridge that would resist such, 1527.  
furnish any particular kind or style of, 1527.

**BRIEFS—**

amendments may not be filed in federal court, 321.  
cannot be waived by agreement of parties, 320.  
effect of striking same from file, 322.  
errors argued in reply brief first time will be disregarded, 321.  
not specifically referred to, waived, 322.  
referred to in oral argument, not sufficient, 322.  
failing to file, 321.  
instructions complained of should be pointed out, 322.  
party has right to amend, 321.  
reply brief should not assign new errors, 321.  
requisite of, 320.  
should be filed within time prescribed, 307.  
contain all errors claimed, 321.  
the authorities cited, 320.  
not be disrespectful or abusive, 322.  
refer to refused instructions claimed as error, 322.  
what should be set forth in, 320.  
what they should contain, 320, 322.

**BRINGING ON DIFFICULTY—See AGGRESSOR.**

**BROKEN CONDITION—**

entry of landlord for, forfeiture of lease, 1239, e 3693.

[References are to sections; e refers to Erroneous Instructions.]

- BROKERS**—Chapter XXXVI, 590-610, e Chapter CXXIII, 3463-3475.  
 abandonment of effort to sell, 598.  
 action for compensation, series, 604.  
   when license not required, 604.  
 after introducing customer who abandons deal not entitled to commission if later customer makes it, 591.  
 agent dealing with, must disclose agency, e 3465.  
 agreement as to commission may be inferred, 600.  
 agreement as to commissions may be inferred from declarations and conduct of owner, 600.  
 amount of commission due broker when owner sells for a less sum, 594.  
 assuming he had exclusive sale of property, e 3464.  
 board of trade, notice of rules and regulations, e 3471.  
   transactions, 605-610.  
   when legal, 606.  
 bringing buyer and seller together, 594.  
 cannot be agent of both buyer and seller, e 3466.  
 commissions for finding purchaser, 597.  
   merchant, care required, 603.  
   must consummate sale or show was prevented by fraud or misconduct of principal, 592.  
   sales, diligence required, e 4249.  
 compensation earned when purchaser found, e 3468.  
 customary and usual commissions allowed, 598.  
 entitled to commissions for aiding owner to sell, 597.  
   commission when owner refuses to carry out the trade, 596.  
 failure to find purchaser or abandonment of effort, not entitled to commission, 598.  
   find purchaser, sale by owner, 598.  
 fault of owner cannot cut off commissions, e 3470.  
 licensed at time of sale, real estate, e 3463.  
 license required in order to claim commission, 590, 604.  
 must be efficient cause of deal to recover commissions, 591.  
   the procuring cause of sale to recover commissions, 593, e 3469.  
 must bring about consummation of sale to recover commission, 591.  
   use good faith or lose commission, 602.  
 not allowed to purchase the property of his principal, 602.  
 not entitled to commission when deal is abandoned, 592.  
 payment of commissions on order, 601.  
 real estate broker entitled to compensation either on quantum meruit or express contract, 604d.  
   introducing buyer to seller, e 3467.  
   when entitled to commission, 593.  
 rendering services resulting in sale, 593.  
 right to close out contracts on board of trade, when, 607.  
   compensation for bringing parties together, although sale not consummated, 595.  
 series, 593, 604, 610.  
 services resulting in sale, entitled to commissions, 593.  
 terms of contract affected by custom, 601.  
 to be entitled to commission must show they were instrumental in making sale, 592.  
 where sale was prevented by fraud or misconduct of principal, 592.  
 who abandons deal has no claim for commissions, 591.  
   introduced customer to principal and the latter afterward makes sale, entitled to commission, 592.
- BROTHER**—  
 of deceased, self defense, attacked by defendant, 3130.
- BUGGY**—  
 crossing railroad track, looking out only at back, 1917.
- BUILDING**—  
 on public highway, assessment of taxes by city, adverse possession, equitable estoppel, e 4233.  
 right of way, negligence, injury by fire, 2003.



[References are to sections; e refers to Erroneous Instructions.]

# **BUILDING—Continued.**

ownership of, necessary element of burglary, e 4561.  
when personal property, 2218.

# **BUILDING CONTRACTS—Chapter XXXVIII, 682-691, e Chapter CXXV, 3490-3494.**

architect cannot without cause withdraw acceptance of work, 514.  
broken by owner, measure of damages, e 3515.  
building according to specifications, literal compliance not required, 683.  
cannot recover quantum meruit on breach of special contract, e 3516.  
construction of building, reasonable time when no time is set, 686.  
contractor must be financially able as well as willing to perform, e 3491.  
refusing to sign written contract after award, 689.  
counter claim for defective work, 688.  
defective construction, measure of damages, 761.  
delay in finishing not justified by order of extra work, e 3492.  
express excludes implied, e 3490.  
extra work, must be ordered, e 3494.  
fulfillment prevented by defendant, 685.  
labor and materials must be furnished at defendant's request, e 3493.  
literal compliance with specifications not required, 683.  
owner to keep up necessary preceding work, 687.  
providing that architect's decision shall be binding is conclusive in the absence of fraud or mistake, 511.  
rule as to recovery, in action on, 684.  
substantial compliance, 684.  
unless willful departure from essential points, binding, 683.  
view of the premises by the jury, 690.  
when recovery can be had under common counts, 691.  
where architect withholds certificate, 513.  
which provides for architect's certificate, 511.

# **BULLET—**

assuming that it was contained in shell, homicide, argumentative, e 4614.

# **BURDEN OF PROOF—**

**CIVIL**, Chapter XVIII, 351-352, e Chapter CVI, 3332-3348.

absence of negligence, extraordinary freshet, act of God, 2362.  
accidental homicide, e 4611.  
action against railroad for injuries by fire, e 4109.  
adverse possession, when upon defendant claiming, 443.  
alienation of affection, e 3427.  
alteration of negotiable instrument, e 4220.  
assumption of risk, e 3814.  
attachment to establish grounds for, 537.  
breach of promise, 693.  
capacity to make wills, rule in Illinois, e 4292.  
common carriers, on defendant to show flaw in bill-of-lading, 1698.  
compliance with terms of contract, e 3481.  
contract, rescinded without cause, 660.  
*contributory negligence*, 1361-1362, 1477, 1509, 1675, 1961, e 3752, 3831, 3947.  
in not hearing train approach, e 4078.  
street railroads, as to children, 2102.  
intoxication, 2103.  
on defendant, 2101.  
conveyances between husband and wife, 1086.  
damages, slander and libel, function of jury, e 4258.  
debtor about to fraudulently dispose of property, 539.  
defendant must establish affirmative allegations by preponderance of evidence, 362.  
must establish his case by fair preponderance, when, 362.  
degree of care, personal injury, street railroads, 2022.  
eminent domain, damages, e 3566.

[References are to sections; e refers to Erroneous Instructions.]

**BURDEN OF PROOF—CIVIL—Continued.**

- execution and delivery of negotiable instrument, 2143.
- explained, 359.
- false representations, 1097.
- fencing track, e 4083.
- fire insurance, proof of loss, e 3671.
- forgery, negotiable instruments, e 4207.
- fraud, 1054, 1061, 1099, 1122.
- fraudulent sale to hinder creditors, e 3629.
- good faith, payment of proceeds of sheriff's sale to creditor after trustee appointed, 2424.
- guardian and ward, fiduciary relation, e 3626.
- imposing too great, on state, presumption of innocence, e 4420.
- in disputing color of title, 443.
- injury caused by fall of elevator, e 4009.
  - to passenger, e 3990.
- insanity, capacity to make will, on contestant where due execution proved, e 4291.
  - wills, due execution, 2369-2371.
- justification must be proved by defendant, e 3347.
  - trespass on personal property, on defendant, 2299.
- killing live stock, by railroad, e 4095.
- knowledge of contents of will by testatrix, e 4307.
  - defects by servants, e 3884.
- life insurance, dying of certain diseases within one year, e 3674.
  - suicide, e 3676.
  - malicious prosecution, 1282, 1284.
    - dismissal of case, prima facie evidence of want of probable cause, e 3710.
- malpractice, 1301.
  - death resulting from other causes, e 3725.
- mortgage given for fraudulent purpose, 1323.
- necessary to establish adverse possession, 444.
- negligence*,
  - in adjusting telephone wires, 1405.
  - injuring passenger, e 4007.
  - of passenger carrier, 1839-1841.
  - master and servant, defective scaffold, 2132.
  - railroads, animal injured on track, 1981.
    - place of injury to live stock, 1983.
    - ringing bell, 1985.
    - starting fire causing injury, 1991.
  - street railroads, slowing down car for passenger to board, 2035.
    - states holding it is on the plaintiff, contributory negligence, 2063.
- negotiable instruments*,
  - duress, preponderance, e 4213.
  - illegal consideration, intent, degree of proof, e 4215.
  - payment, 2162.
  - settlement, e 4211.
- not all items due included in account stated, e 3399.
- not on defendant, 360, e 3346.
- note given for options in grain, e 3473.
- on carrier to show that lost or damaged goods while in its custody rose from causes for which it was not responsible, 1721.
  - defendant charging plaintiff with destroying building, 1184.
    - to prove contributory negligence, 1303, 2064.
    - insanity or drunkenness as an excuse, e 4332.
  - on employe to show that contract was terminated by employer, 720.
  - insurance company to show forfeiture, 1212.
  - objectors, e 3348.

[References are to sections; e refers to Erroneous Instructions.]

**BURDEN OF PROOF—CIVIL—Continued.**

- on plaintiff*, 356, 360.
  - of showing waiver by insurance company, 1183.
  - to prove each element of damage, 941.
    - items of property destroyed by fire, 1183.
    - negligence, 1347, 1509.
    - of master, 1387.
  - to show negligence of street car company, e 4177, 4179.
- on railroads* to show cause of failure to run train according to schedule, 1770.
- partner giving note*, presumption, 2208.
- passenger injured by flying cinder*, e 4008.
  - stepping from car, sudden jerk of car, e 4135.
  - injuries to, 1839-1840.
- passengership relation*, e 4124.
- person attacking conveyance assumes*, 1056.
- plaintiff must establish the allegations of his complaint*, 360.
  - should establish case by fair preponderance, 357.
- plea of release*, 947.
- preponderance of evidence*, e 3332-3348.
- purchase of corporation stock, ownership*, 2420.
- question of illness in action for insurance*, 1193.
- railroads, negligence*, 1839-1841.
- replevin, detention*, 2243.
  - on plaintiff, 2242.
- rests upon the party alleging insanity*, 612.
- ringing of bell*, e 4035.
- risk not ordinarily incident to employment*, 1445.
- sales, warranty*, 2278.
- setoff, on person claiming*, 668.
- showing authority of adjuster to waive breaches of policy*, 1160.
- slander and libel, presumption of good reputation*, 2281.
- slight preponderance sufficient*, 358.
- specific contracts*, 644.
- that rate of wages changes with party claiming it*, 713.
- tickets, limitations of liability*, 1841.
- to avoid written contract by parol agreement*, 652.
- to establish case by a preponderance of the evidence*, 360.
- trespass to real estate, writ of sequestration*, 2315.
- trover and conversion*, 2344.
- undue influence*, e 4301-4302.
- wills, as to validity*, e 4286.
- undue influence*, 2394.

**CRIMINAL, Chapter LXXXVII, 2465-2475, e Chapter CIXVIII, 4329-4333.**

- Alabama statutory plea of insanity*, 2398.
- alibi, duty to acquit if reasonable doubt exists*, e 4320.
  - on state, 2442.
  - reasonable doubt not raised unless established, 2443.
- assault and battery, justification*, 2862.
- cast on state, when prisoner has created a reasonable doubt of his sanity*, 2595.
- defendant need not satisfactorily establish his defense*, e 4331.
- does not shift, presumption of sanity*, e 4395.
- duty of retreat, self defense*, 3166.
- establishing self defense beyond reasonable doubt*, e 4472.
- every essential element charged must be proved to satisfaction of every juror*, 2467.
- extenuating circumstances is on defendant*, 2472.
- homicide*, 2466.
  - accidental killing, e 4613.
- inability to retreat, on defendant*, e 4333.
- insanity caused by drugs, requisites*, 2590.
  - on defendant, 2473, e 4394.
  - presumption of sanity, 2569.



[References are to sections; e refers to Erroneous Instructions.]

**BURDEN OF PROOF—CRIMINAL—Continued.**

- intimation that it shifts from state to defendant, reasonable doubt, e 4465.
- larceny, intent, honest belief of ownership, reasonable doubt, e 4779.
- reasonable doubt, 3252.
- license, intoxicating liquor, 3187.
- manslaughter, misplacing, e 4650.
- misplacing, assault with intent to kill, e 4546.
- murder in second degree, presumption, 3020.
- never shifts, excuse and justification, 2468-2469.
- on defendant to show killing accidental or justifiable, e 4330.
- plaintiff, e 3343.
- state, presumption of innocence, 2465.
- possession of stock allowed to run at large, exception, 3246.
- presumption as to degree of murder, 2475.
- of innocence always with defendant, 574.
- intent, burden of disproving, 2471.
- quantum of evidence to be produced by defendant, 2474.
- rape, defendant need not prove consent, e 4520.
- self defense, 2470, 3175.
- state need not negative matter of defense, e 4329.
- written order, intoxicating liquor, 3197.

**BURGLARY—Chapter XCIV, 2872-2888, e Chapter CLXXV, 4560-4573.**

- attempted, co-operating with burglar, 2887.
- breaking and entering must be proved beyond a reasonable doubt, e 4568.
- into car, 2879.
- chicken coop, 2880.
- conspiracy to commit, instruction cannot ignore theory of conspiracy, e 4587.
- day time or night time, 2884.
- definition, 2872.
- elements, omitting value of property, ownership of building, property in building, e 4561.
- entry must be by force, threats or fraud, e 4571.
- failure to include all elements, e 4560.
- former conviction, not charged in indictment, added punishment instructed, e 4573.
- how intent manifested, sound mind and discretion, 2877.
- intent to steal necessary element, 2875.
- may find guilty of larceny, 2882.
- possession of stolen property*,
  - evidence for jury to determine guilt in connection with all other facts, e 4564.
  - explanation must be reasonable, 2886.
  - must be exclusive as well as recent to raise presumption of guilt, e 4566.
  - not alone sufficient to convict, principal and accessory, e 4567.
  - only raises presumption of larceny, e 4565.
  - reasonable and credible account, comment on weight of evidence, e 4570.
  - doubt, 2885.
  - from other facts, presumption and prima facie evidence, e 4569.
  - when of effect as evidence, e 4563.
- prima facie case, intent presumed, 2876.
- proof beyond reasonable doubt, 2888.
- proof of ownership, what sufficient, 2874.
- recent possession of goods, when of effect as evidence, e 4563.
- stealing and breaking and entering put in the alternative, e 4572.
- suggested by detective to entrap defendant, e 4562.
- time generally immaterial, may be material, 2883.
- what constitutes a housebreaking, 2878.
- an entry, 2881.
- what is necessary to constitute, 2873.

[References are to sections; e refers to Erroneous Instructions.]

**BUSINESS—**

agreement not to engage in, 623.  
 inattention to, callers, e 3498.  
 injured, rule of damages, elements involved, e 3537.  
 partnership, enlarged beyond original articles, liability to third persons, 2203.  
 use of homestead for, abandonment, e 4235.  
 words imputing dishonesty in, libel, e 4262.

**BUYER—**

introducing, broker, e 3467.

**BUYING—**

with knowledge that goods are stolen, not guilty of larceny, 3249.

**BYSTANDER—**

accidental shooting of, as evidence of murder, e 4612.

**CABLE—**

telegraph, negligence, care due while working above public street, 2121.

**CABOOSE—**

freight train employe sleeping therein, 1606.

**CALIFORNIA—**

murder in second degree, statute, elements to be considered, 3007.  
 reasonable doubt defined, 2650.  
 statute relating to instructions, 153.  
 weighing defendant's testimony, 2535.

**CANCELLATION—**

of deed, fraud, property sacrificed from pecuniary necessity, e 3653.  
 fire insurance policy, without return of premium, failure of consideration, e 3665.  
 of insurance policy upon return of premium, 1202.  
 of mortgage on record, penalty for failure of, 1307.

**CAPACITY—**

mental, reasonable doubt as to, raised by evidence of drunkenness, 2619.

*testamentary,*

appeal from probate court, 2391.  
 burden of proof in case of insanity, on contestant where due execution proved, e 4291.  
     rule in Illinois, e 4292.  
 contest in chancery, 2392.  
 delusion regarding property of wife or child, 2384.  
 expert testimony, 2389, e 4300.  
 failure of memory, e 4297.  
 insane delusions, groundless suspicion, 2383, e 4298.  
 insanity, e 4289-4300.  
     in general, e 4289.  
     issue to be tried, 2367.  
 intoxication, 2379.  
 jury must determine from whole evidence, 2388.  
 letters as evidence, 2375.  
 not necessarily affected by old age, 2382.  
 partial insanity, monomania, 2376, e 4294.  
 previously expressed purpose, 2386.  
 right of testator to dispose of property as he pleases, 2385, e 4299.  
 sanity presumed, 2368, e 4290.  
 settled insanity presumed to continue, 2378, e 4296.  
 sound and disposing mind and memory, 2372, e 4293.  
 test of, 2373-74.  
 time when unsoundness of mind must exist to defeat will, e 4295.  
 when lacking fraud not considered, 2390.  
 will as evidence of insanity, 2387.

to labor, diminished, method of computing damages, e 3568.

**CAPRICIOUSLY—**

accepting or rejecting part of confession, e 4367.

[References are to sections; e refers to Erroneous Instructions.]

# CARD PLAYING—

must show it was at a public house and that there was betting, e 4806.  
playing a trick or joke, e 4807.

# CARE—

at highway crossing, railroads, negligence, 1863.

*degree of,*

burden of proof, personal injury, street railroads, 2022.

due pedestrians from street car employes, 2077.

towards child on track, 1852.

negligence, street railroads, carriers of passengers, 2020.

required in driving logs, 2131.

operation of elevator by hotel keeper, toward servants, 1842.  
switching, 1899.

telephone lineman working near electric wires, 2122.

**due** by driver of vehicle crossing street car track, 2107.

from telegraph companies, while working with cable above public street, 2121.

infant trespasser from street car company, 2080.

persons in vehicles along track from street railroad company, 2079.

presumption of, negligence, railroads, no eye witness to killing, 1936.

to avoid collision, railroad servants, 1855.

for cattle taken up, trespass, duty of party taking, 2325.

in examining evidence of alibi, 2440.

operation of railroad train, negligence, stock killed, 1971.

weighing testimony of police officers and detectives, 2768.

less required at farm crossings, negligence, railroads, 2009.

of party injured on railroad, negligence, eye witness not essential, 1949.

plaintiff, vicious steer, knowledge of disposition, 2349.

*ordinary,*

contributory negligence, railroads, 1945.

measure of damages, personal injury, of plaintiff, not limited to time of accident, e 3595.

omitting element of, diverting course of water, preventing natural flow of water, e 4280.

traveller must use, no gate-keeper provided by railroad, 1904.

plaintiff not bound to highest degree of, negligence, railroads, 1946.  
*reasonable,*

failure of driver of vehicle near street car track to use, 2106.

negligence, breach in railroad fence, 1964.

railroad company must exercise, track, 1963.

horse injured on track, 1977.

required of engineer and fireman at highway crossings, 1871.

plaintiff must exercise, negligence, railroad, 1947.

required of railroads to prevent spread of fire, 1997.

to avoid imposition, negotiable instruments, 2148.

injury persons on railroad track, 1851.

stock, railroads, 1886.

required of owner of land adjoining railroad, injury by fire, negligence, 2002.

travellers on railroad, 1902.

requisite to defeat charge of malpractice, e 3721.

should be exercised in examining defense of insanity, 2571.

to be exercised toward watchman at crossing by railroad, 1897.

to prevent injury, vicious cow, knowledge of disposition, 2350.

traveller not excused from using, by railroad's failure to give signals, 1905.

want of, high rate of speed, railroads, 1903.

# CARELESS DRIVING—

across railroad track, contributory negligence, 1955.

# CARNAL ABUSE—

definition of, 2827.



[References are to sections; e refers to Erroneous Instructions.]

CARRIERS—See COMMON CARRIERS.

CARRYING ARMS—

right of, homicide, e 4624.

CARRYING AWAY—

larceny, what constitutes, 3220.

CARRYING CONCEALED WEAPONS—

apprehensive of attack, intent, e 4803.

personal injury, 3275.

in his own house, place not excepted, e 4804.

manager of picnic grounds, e 4805.

right to arrest without warrant, 3274.

CARS—

alighting passenger, struck by car from opposite direction, 2047.

backing, after gate opened, 1894.

breaking into, burglary, 2879.

coal, riding on, without consent, contributory, 1957.

colliding with another street car, negligence, 2096.

bicyclist, 2105.

person, 2097.

collision of, 2027.

conductor must see that no passenger is in act of alighting, 2043.

degree of care required of railroad in furnishing, 1762.

derailed, presumption of negligence, 2031.

duty of motor men on approaching cars, 2048.

toward shipper loading, 1939.

expelling person from, 1944.

failure to check reckless speed of approaching car, 2049.

frightening animals, operated in ordinary manner, 2090.

getting off moving car, 2072.

on moving car, 2071.

injury to consignee while unloading, 1940.

jumping from moving car at command of conductor, 2073.

"kicking," when willful negligence, 1895.

management of, 1770-1798.

men in charge responsible for movement, 2042.

negligence in appliances, 2084.

of railroads in furnishing appliances, 1762-1767.

failing to properly heat car, 1763.

not operated in ordinary manner, animals frightened, 2091.

obstructing highway with, negligence, railroads, 2005.

view of track at crossing, 1878.

overcrowded, passenger standing on platform injured, 2053, 2066, 2067.

passenger carriers, negligence, 1762-1767.

injured through panic produced by explosion on car, 2033.

raising umbrella while alighting, 2050.

posted warnings in, 2057.

railroad liable where appliance defective, 1762.

ringing bell to go ahead while passenger is alighting, 2044.

running over child, 2098.

slowing down for passenger to board, starting car suddenly, 2034.

up and starting suddenly while passenger alighting, 2041.

standing on platform when overcrowded, 2066, 2067.

starting while passenger is alighting, 2040.

without appliance to stop, 1845.

stranger ringing bell and starting car, 2039.

use of more force than necessary in ejecting passenger, 2056.

CASE—

importance of, homicide, e 4626.

CASHIER—

of bank, authority may be inferred by long acquiescence in his acts, 571.

CASUALTY COMPANY—

juror may be asked on examination as to interest in, 57.

[References are to sections; e refers to Erroneous Instructions.]

**CATTLE—**

- agister's lien, notice of, e 3732.
- damages for injury to, including too much law in one instruction, e 3530.
- entering at point where railroad not required to fence, e 4084.
- getting on track from failure to lock gate in fence, e 4085.
- injury to, presumption of negligence of last connecting carrier, e 3957.
- killed from failure to fence railroad track, e 4082.
- larceny, of different owners, at same time, one offense, 3232.
- turning loose, no defense, 3234.
- pasturing on uninclosed lands, trespass, e 4274.
- placing brand on, larceny, appropriating same, 3233.
- trespass by*,
  - adjacent lands, no division fence, 2320.
  - defects in division fence, 2321.
  - grazing on government land, 2322.
  - failure to furnish attendant, 2324.
  - on highway with attendant, not "at large," 2323.
  - party taking up must care for, 2325.
- pasturing on uninclosed lands, e 4274.
- unloading of, injury to servant, contributory negligence, 1489.

**CATTLE GUARDS—**

- negligence, railroads, 1967, e 4086.
- unsuitable, e 4094.

**CAUSE—**

- adequate, assault and battery, insulting words, 2863.
- definition of, homicide, 3037.
- death from other, homicide, defense, 2975.
- resulting from other, malpractice, burden of proof, e 3725.
- natural, producing abortion, 2784.
- of injury, intoxication need not be sole, must contribute, e 3689.
- probable*,
  - defendant must have caused arrest, e 3716.
  - arrest upon suspicion, malice, e 3718.
  - dismissal of case, prima facie evidence of want of, e 3710.
  - justification for beginning criminal proceedings, e 3712.
  - omitting malice in instruction, e 3712.
  - prosecution undertaken for public purpose, e 3711.
- procuring, broker must be, to recover for sale, e 3469.

**CAUSE REASONABLE—See REASONABLE CAUSE.**

**CAUTION—**

- against conviction from prejudice, reasonable doubt, 2688.
- argument of counsel, cautioning jury against, e 3321.
- as to plea of self defense, 3174.
- confessions to be received with, 2524, e 4362.
- dying declarations received with, 3100, 4686.
- great, instructing that verbal admissions ought to be received with, e 4364.
- necessary in accepting confession unless supported by other proof, 2524, e 4362.
- should be exercised in accepting testimony of accomplice, 2752, e 4489.
- where highway crossing much used, greater required, 1864.

**CAVEAT EMPTOR—**

- as applied in case of agister's lien, e 3732.
- when applied to contracts, 627.

**CEMETERY—**

- cutting trees in, 3299.
- reasonably, future suffering, measure of damages, e 3576.

**CERTAINTY—**

- absolute, not required for conviction, reasonable doubt, 2680.
- moral, abiding conviction to, reasonable doubt, 2682.
- moral, defined, e 4464.
- required in circumstantial evidence, 2501.

[References are to sections; e refers to Erroneous Instructions.]

**CERTIFICATE—**

- duty of giving, architect, e 3435.
- from state medical examiners and also diploma not required to entitle to practice, e 4809.
- of importance,*
  - from appellate to supreme court, 285.
  - in the federal courts to supreme courts, 285.
  - must involve questions of law, 285.
  - states where same are in use, 285.
- of notary public, deeds, presumption as to truth of contents, e 3621.
- practicing medicine without, reasonable doubt, 3285.

**CERTIFICATION—**

- of questions, 285.

**CERTIORARI—**

- and Writ of Error distinguished, 289.
- not granted as a matter of course, 268.
  - substitute for appeal, 286-7.
- or right of review, 292.
- practice in Texas, on appeal, 288.
- when writ of, will be granted, 288.
- writ of, 286, 7.
  - at common law, 286, 7.
  - granted when substantial justice requires, 288.
  - in various states, 288.
  - may be issued to correct record, 288.

**CHAIN—**

- circumstantial evidence not a, e 4356.
- links in circumstantial evidence, presumption of innocence, reasonable doubt, 2676.

**CHALLENGE—**

- alienage as ground for challenge, 40.
- bad moral character, 40.
- consanguinity or affinity, 41.
- court sole judge of the law and the facts, 35.
- error of court in ruling may be excepted to, 35.
  - on without prejudice when case taken from the jury, 36.
- evidence and support of, 36.
- for cause, 38-56.
  - cannot be taken away except by statute, 30.
  - grounds of, 30.
  - must state ground upon which it is based, 35.
  - prior service as juror, 39.
- form and manner of stating, 28.
- friendly relations with the opponent or his family, 44.
- having formed or expressed an opinion, 54.
- ignorance of English language, 42.
- intimate knowledge of material issues, 43.
- members of shareholders in corporations, taxpayer, 48.
- mental unsoundness, 40.
- not being qualified elector, 40.
- opinions formed from rumor or hearsay, 56.
- prejudice against circumstantial evidence, 51.
  - class of litigants, 51.
  - plea of insanity or limitation, 50.
  - subject matter, 49.
  - partiality or bias, 48.
- prejudicial error to overrule challenges, when, 36.
- previous conversation with one of the parties, 53.
- principal challenge and challenge to the favor, 29.
- relationship of duty or obligation, 45.
- scruples against capital punishment, 52.
- to the array,*
  - grounds of, 22.
  - how made, 23.
  - not proper method of questioning individual jurors, 28.



[References are to sections; e refers to Erroneous Instructions.]

**CHALLENGE**—Continued.

what is, 21.  
when made, 23.  
when too late, 23.

*to the polls*, 29.

when erroneous ruling on, is prejudicial, 36.  
opinions formed from reading newspapers not ground for, 55.

**CHANGING**—

condition of property, fire insurance, temporarily, e 3662.  
watercourse, flooding land, 2361.

**CHARACTER**—

chaste, erroneously presumed, seduction under promise of marriage, 2832, 2833.

necessary to prove seduction, e 4530.

presumed, abduction, 2783.

of complainant, bastardy, not material, 2791.

deceased, self defense, overt acts, e 4731.

disorderly house, admissions of inmates as to, e 4515.

officer, killing in ignorance of, self defense available, 3157.

**CHARACTER EVIDENCE**—2476-2490, e 4334-48.

and absence of motive, may generate a reasonable doubt, e 4341.

as against positive facts showing guilt, 2483.

to defendant, 2477.

court should not give reasons for, e 4343.

defendant's previous disposition toward children, infanticide, 2487.

disparaging, purpose of admissibility, e 4346.

good, may create reasonable doubt, 2698.

requires stronger proof of malice, 2482.

jury may take into consideration, 2476.

may be considered with all other evidence, reasonable doubt thereby

raised, duty to acquit, e 4334.

justify acquittal, 2480.

overcome positive evidence of guilt, 2481.

moral, of prosecutrix, rape, 2807.

not sufficient to acquit, 2478.

of prosecutrix, rape, affecting credibility, e 4524.

other crimes, legitimate object, e 4344.

penitentiary sentence as affecting reputation as a good citizen, e 4348.

previous bad character of defendant, 2488.

reputation for honesty, 2486.

for peace and quietude, homicide, 2484.

proving morality and virtue, e 4337.

prosecution may rebut, though not allowed to attack defendant's character in first instance, e 4345.

relative weight where positive or circumstantial evidence is relied on, 2485.

reputation for peace and quietude, e 4336.

limiting its scope and effect, e 4347.

of deceased for violence immaterial when killing unlawful and premeditated, 2489.

reputation of defendant, no presumption that it is good, e 4338

drunkard, credibility of witnesses testifying to, e 4342.

same offense to kill bad person as to kill a good one, 2490.

should be considered with all the other evidence, e 4340.

to what extent considered in raising reasonable doubt, e 4339.

weight of, whether depending on strength of other evidence, e 4335.

when jury should convict notwithstanding, 2479.

witness may be cross-examined as a source of information, 139.

**CHARGE**—

caused by hallucinations, reasonable doubt, 2715.

defendant charged with killing of one person, evidence of killing of another not to be considered, 2967.

of fornication, slander and libel, e 4261.

of burglary, guilty of larceny, 2882.

suggestive interrogatories in, e 4502.

[References are to sections; e refers to Erroneous Instructions.]

**CHARGING—**

person with dishonesty, slander and libel, 2294.

**CHASTITY—**

erroneously presumed, seduction under promise of marriage, 2832.  
 necessary to prove seduction, e 4530.  
 of complainant, bastardy, not material, 2792.  
 presumed, abduction, 2783.  
 presumption of, seduction, several acts, under promise of marriage,  
 weakened or destroyed, e 4532.  
 reputation for, character of prosecutrix, rape, 2807.

**CHATTEL MORTGAGE—See MORTGAGES.****CHEAT—**

intent to, false pretenses, necessary element, e 4603.

**CHECKS—See NEGOTIABLE INSTRUMENTS.**

deposit of, for collection, series, 575.  
 dishonoring, damages for, e 3457.  
 failure to pay, not fraud per se, e 3641.  
 given in payment of note, verdict based on single fact, statute of  
 limitations, e 4200.  
 is not money, embezzlement, 2930.  
 when amount therein raised, 506.

**CHICKEN COOP—**

breaking into, burglary, 2880.

**CHILDREN—**

accident to child through inattention of driver, e 3757.  
 action for death of, elements that may be considered in assessing  
 damages, 984.  
 birth of, as evidence of seduction, e 4531.  
     tends to prove that defendant in bastardy case was father, e 4512.  
 causing death of, murder, by beating its mother before its birth, 3019,  
 e 4609.  
 city's duty to maintain streets so that children may be upon them in  
 safety, 1617.  
 contributory negligence of, rule as to, 1354, 1355, 1948.  
     street railroads, burden of proof, 2102.  
 duty of parent to protect, imputed negligence, e 4079.  
     street railroad to afford reasonable opportunity of taking small  
     children from car, e 4134.  
 imputable negligence, 1931, 2113.  
 injury to, on defective sidewalk while at play, 1650.  
 killing, by beating mother, murder in second degree, 3019, 4609.  
     by cruel treatment, 2960.  
     in defense of, self defense, 3180.  
 measure of damages, personal injury, e 3592.  
 money of, used by father to purchase real estate, title, 2226.  
 negligence as regards, 1364.  
     imputed, railroads, 1931.  
     imputed, street railroads, 2113.  
     of railroads, fencing track, 1970.  
 on railroad track, degree of care due towards, 1852, e 4014.  
 playing on sidewalk, traveller, 1650.  
 poisoned, by mother of suicidal tendency, 2604.  
 rescue of child on track, e 4063.  
 riding on rear step of bus, duty of driver, e 3952.  
 run over by street car, 2098.  
 seduction of, liability for, e 3432.  
 services in family, e 3500.  
 turntable, attraction for, negligence, 1847.  
 weight to be given testimony, 369.  
 wills, undue influence, 2407.

**CHOOSE—**

no power to choose between right and wrong, although able to dis-  
 tinguish, insanity, e 4404.

[References are to sections; e refers to Erroneous Instructions.]

# CHURCH PROPERTY—

damaged by nuisance, railroad shops established in neighborhood, 2197.

# CINDERS—

unloading, railroads frightening horses, 1876.

# CIRCUMSTANCES—

attendant, contributory negligence, railroads, unconscious person, 1959.

attending high rate of speed, negligence, street railroads, 2025.

extenuating, conviction on circumstantial evidence, homicide, 2504.

homicide, from which to determine whether or not blow caused death, 3074.

inculpating, to show guilt when, 3243.

independent, establishing defendant's identity, reasonable doubt, 2699.

insufficient to induce reasonable belief of danger, self defense, guilty of murder, 3108.

mitigating, need not be proved beyond reasonable doubt, e 4470.

not necessary that all should be in evidence, e 4471.

provocation in manslaughter, preceding as well as attending, e 4653.

showing undue influence, wills, 2398.

surrounding dying declarations, should be considered, 3100.

negligence, railroads, 1930.

used instead of facts and circumstances, sale of real estate, e 4231.

# CIRCUMSTANTIAL EVIDENCE—Chapter LXXXVII, 2491-2512, e Chapter CLXVIII, 4349-4361.

application of brake, injury to brakeman, e 3861.

argumentative, e 4357.

assault with intent to kill, 2870.

certainty required, 2501.

competent, 2493.

conspiracy, necessary proof, 2905.

conviction on, homicide, extenuating circumstances, 2504.

credibility of, 2508.

criminative circumstances denied by defendant, e 4360.

defined, 517, 2491.

degree of proof required, e 4351.

directing jury to consider all surrounding circumstances, e 4358.

distinguished from positive, 2495.

each link must be proved beyond a reasonable doubt to convict, 2678.

elements necessary for conviction, 2496.

facts and circumstances should be considered in determining contributory negligence, 1475.

must all be consistent with guilt and inconsistent with innocence, 2497.

fraud, e 3654.

guilt must be proved beyond reasonable doubt, but not each circumstance, e 4353.

inference of fact, 2512.

instructing that evidence of conspiracy is usually circumstantial, e 4585.

instruction when testimony is largely circumstantial, 2511.

is legal, compared to direct evidence, e 4349.

is of equal dignity with direct, e 4350.

legal and competent, excluding every reasonable hypothesis, 2494.

murder, absence of body, 2509.

failure to use deadly weapon at hand, 2510.

must be consistent and exclude every reasonable hypothesis of innocence, 2500.

inconsistent with any other conclusion, 1346.

need not be conclusive, degree of proof, 2502.

proved beyond reasonable doubt, though guilt must be, e 4353.

negligence may be inferred from facts and circumstances, malpractice, 1303.

no one else suspected, e 4356.

no reasonable theory of innocence must be possible, 2498.



[References are to sections; e refers to Erroneous Instructions.]

**CIRCUMSTANTIAL EVIDENCE**—Continued.

- not a chain composed of links, e 4354.
- only inferences or presumptions necessarily arising from proved circumstances should be considered, 2503.
- presumption of innocence, reasonable doubt, links in chain of circumstances, 2676.
- putting body of deceased in river, e 4359.
- reasonable doubt of each link not necessary, e 4437.
- presumption of innocence, 2677.
- should exclude every reasonable hypothesis of innocence, e 4436.
- seduction, sufficient to corroborate, 2835.
- single inconsistent fact acquits, 2499.
- so strong that it is incompatible with any reasonable hypothesis of innocence, e 4352.
- summed up by court, rape, 2815.
- sufficient to convict, rule when direct evidence obtainable, e 4355.
- theft proved by, e 4361.
- weight of, as conclusive as direct, 2507.
- compared with character evidence, 2485.
- how to be considered by jury, 2506.
- what is meant by, 2492.
- what must be proved to convict on, 2505.

**CITIES**—

- speed of railroad trains through, negligence, limited by ordinance, 1987.
- vesting jurisdiction over highway in, negligence, street railroads, 2014.

**CITIZEN**—

- killing by policeman, when not justifiable, 2960a.
- reputation as a good, penitentiary sentence as affecting, e 4348.

**CIVIL ASSAULT**—See ASSAULT, CIVIL.

**CIVIL RIGHTS**—

- extending equal privileges in restaurants, e 4818.

**CIVIL SUIT**—

- admissions in, considered in criminal trial, 2517.

**CLAIM**—

- for many things, one mechanic's lien, e 3735.
- marking mining contract for sale, condition precedent, 2267.
- of right, larceny, taking under, mistakes, 3229.
- valid, honestly relied upon in good faith, trespass justified, e 4814.
- of set-off, by tenant, for work done on premises under agreement, e 3703.
- possession without, larceny, conversion, 3250.
- quartz mining, what constitutes, 2430.
- under forged deed, strong evidence of guilt, 2948.

**CLEAR**—

- preponderance, not required, e 3335, 4264.

**"CLEARLY PROVED"**—

- insanity or idiocy must be, requisites of defense, 2591.

**CLERK**—

- of court, what constitutes filing papers, 2429.
- in place for sale of intoxicating liquor, 3193.

**CLIENT**—

- misrepresentation to, by attorney, e 3453.

**CLOVER MACHINE**—

- owner of liable for defects wherein grain is lost, 727.

**CLUB HOUSE**—

- keeping intoxicating liquors for sale without license, 3205.

**COAL MINES**—See MINES.

**COAL REFUSE**—

- nuisance, polluting stream, 2198.

[References are to sections; e refers to Erroneous Instructions.]

**CO-DEFENDANTS—**

case of each to be considered separately, robbery, 2902.  
chargeable with wrong done by other, participation required, 2730.

**CODE—**

New York, order in which issues considered, murder in first degree, 2991.

**COERCION—**

used in defining reasonable doubt, e 4464.

**COHABITATION—**

illicit, presumed from one act of sexual intercourse and residing together, e 4509.  
unlawful, wills, undue influence, 2410.  
when presumptive evidence of marriage, 702.

**COIN—**

payment of street car fare in genuine, contributory negligence, 2076.

**COLLECTIBLE ACCOUNTS—**

presumed to continue so, 2427.

**COLLECTION—**

of bribe money by agent, disreputable women, 3272.

**COLLISION—**

at crossing with train of another railroad, e 3989.  
between bicyclist and street car, contributory negligence, 2105.  
passenger train and a loose car, 1530, 1537.  
street car and fire engine, e 4130.  
vehicles, e 4130.  
passing along track, e 4182.  
wagon, injury to passenger, e 4148.  
of different companies, negligence, 2096.  
care due to avoid, railroad servants, 1855.  
cars of same street railroad company, negligence, 2027.  
causing injury to passenger in caboose, e 3974.  
standing on platform, e 4146.  
driving across tracks at street car crossing, e 4177.  
engine colliding with other cars, 1605.  
failure to give signals, e 3860.  
injury to passenger, 1795-1796.  
presumption of negligence, e 4132.  
jumping from train in expectation of, 1814.  
negligence, street car with another vehicle, right of way of car over other vehicles, 2092.  
railroads, vehicle of fire department, 2028, e 4130.  
of ships, e 4192.  
of street car with person, 2097.  
caused by wet or slippery rails, e 4128.  
with person on or near track, e 4172.  
of train, through failure of engineer to give signal, 1536.  
on highway, duty of driver, e 3951.  
overcrowding cars, e 3988.  
resulting from defective or dangerous railway crossing, e 4029.  
right of way of street cars over other vehicles, e 4169.  
street car colliding with vehicle, e 4163-4164.  
street railroad, negligence, passenger injured, presumption of liability, 2032.  
vehicle crossing track collided with street car, e 4171.

**COLOR—**

citizens qualified for jury service irrespective of color, 27.  
extending equal privileges in restaurants to persons, e 4818.  
passengers, negligence, street railroads, separation from white passengers, 2058.

**COLOR OF TITLE—**

adverse possession—fraud, 442.  
burden of proof on party disputing title of one who holds, 443.  
defined, 438.

[References are to sections; e refers to Erroneous Instructions.]

**COLOR OF TITLE—Continued.**

- extent of possession when adverse possession claimed, 455.
- larceny, belief as to ownership, e 4778.
- not necessary to constitute adverse possession, 454.
- person claiming under confined to identical land described, 588.
- plaintiff entitled to use as against one who has no title, 438.
- possession under, 441.
- quit-claim deed sufficient, 439.
- what constitutes, 438.
  - must be proven, 443.
  - would justify cutting and removing of timber, 588.

**COLORADO—**

- statute relating to instructions, 153.
- weighing defendant's testimony, 2536, e 4377.

**COMBAT—**

- interfering in, self defense, assault on defendant need not have been felonious, 3173.
- mutual, see **MUTUAL COMBAT**.

**COMMENTING ON EVIDENCE—**

- criminal conversation, e 3431.
- insanity from blow on head, telling exaggerated stories, e 4408.
- pouring gasoline and turpentine on person and igniting, e 4483.
- reasonable doubt, e 4454.
- to be disregarded, 2759.

**COMMENTING ON WEIGHT OF EVIDENCE—e 3318.**

- burglary, reasonable and credible account for possession of stolen goods, e 4570.
- embezzlement, proof of other embezzlements as showing intent, e 4593.
- robbery, considering condition of prosecuting witness, e 4575.
- usury, e 4204.

**COMMISSION—**

- of crime, imputing, libel, whether malice implied privileged communications, e 4265.
- of embezzlement, statute of limitations runs from, e 4602.
- of other crimes, evidence of, should be limited to its legitimate object, e 4344.
- taking testimony by, limit of process, 2775.

**COMMISSION MERCHANT—**

- making false representations to commercial agency, fraudulent intent presumed, e 3644.
- ordinary care in selling property required, 603.

**COMMISSIONS—**

- action for, series, 604.
- agent must use good faith or lose, 602.
  - suing for, e 3417.
- amount due broker when owner sells for less sum, 594.
- board of trade, options, usages, e 3472.
- bringing buyer and seller together entitles broker to, 594.
- broker*,
  - cannot receive, from both parties to a sale, e 3466.
  - entitled to commission when owner refuses to carry out trade, 596.
    - for finding purchaser, 597.
  - license a requisite to recovery, 590.
  - may recover despite fault of owner, e 3470.
  - from agent unless he discloses his agency, e 3465.
  - must be the procuring cause of sale, 593.
  - not entitled to where he fails to find purchaser, 598.
  - sales, diligence required, e 4249.
- customary and usual, 598.
- payment of, may be inferred from conduct and declarations of owner, 600.
- payment of on orders, custom, 601.



[References are to sections; e refers to Erroneous Instructions.]

**COMMISSIONS—Continued.**

recovery of, board of trade, notice of rules and regulations, e 3471.  
right of agent to retain, embezzlement, 2935.  
terms of broker's contract affected by custom, 601.  
when broker entitled to commission for bringing parties together, 595.

**COMMERCIAL PAPER—See NEGOTIABLE INSTRUMENTS.**

**COMMERCIAL AGENCY—**

false representations to, fraudulent intent presumed, commission merchant, e 3644.  
furnishing fraudulent reports to, for purpose of obtaining credit, 1098.

**COMMON CARRIERS—**

OF Goods, Chapter LXVII, 1690-1746, e Chapter CL, 3956-3964.  
acceptance of goods by carrier knowing they cannot be delivered in time, e 3956.  
receipt, limiting liability with knowledge of conditions, rule in Illinois, 1715.  
with full understanding of conditions, rule in Illinois, 1715.  
are insurers of the safe delivery of property intrusted to them, 1691.  
bill of lading, 1696-1699.  
implies what, contract, 1696.  
or receipt prima facie evidence of good order of goods, 1696.  
burden of proof on carrier to show exemptions from loss, 1721.  
negligence where injury shown to have occurred on its line, 1703.  
defendant to show flaw in bill-of-lading, 1698.  
can only restrict their common law liability by special contract, 1712.  
cannot restrict liability arising for own negligence, 1720.  
care required in loading live stock, 1734.  
of carriers of hogs, 1736.  
of live stock, 1731.  
claim for damages must be presented within exemption in receipt, 1718.  
conditions in receipt given, rule in Illinois, 1714-1715.  
requiring claim for damages presented within specified time, 1717.  
connecting carrier, 1700-1705.  
degree of care to avoid delay in shipment of live stock, 1738.  
delay in shipment, facts to be considered by jury, e 3961.  
of live stock poor condition of cattle as excuse, e 3964.  
delivery by, 1738-1745.  
of goods to carrier, without directions beyond own line, 1700.  
to carrier, 1692-1695.  
carrier can be from owner or from another carrier, 1692.  
duties and liabilities in transportation of live stock, 1729.  
of shipper of live stock, 1730-1738.  
duty and liability of express company, 1743.  
as to transportation of goods, 1722-1738.  
transporting goods promptly, e 3959.  
essential elements for recovery of damages, 1732.  
for injury or damage to live stock, 1732.  
failure of shipper to care properly for live stock, 1737.  
to deliver goods on demand, liability of last carrier, e 3958.  
goods must be stored if not delivered to consignee, 1742.  
injury to cattle, presumption of negligence of last connecting carrier, e 3957.  
horses while being transported, measure of damages, 785.  
live stock while being transported, measure of damages, 784.  
legal duty of carriers imposed by law, 1710.  
liability and exceptions thereto, 1706-1709.  
not limited by notice, 1711.  
liable for all losses except by act of God and public enemy, 1707.

[References are to sections; e refers to Erroneous Instructions.]

# **COMMON CARRIERS—OF GOODS—Continued.**

- limitations as to filing claims for damages, e 3961.
    - of carrier's liability by contract, 1710-1721.
  - live stock, carrier not liable for injuries due to natural propensities of vice of animals, 1735.
    - essential elements for recovery against carrier for injury to live stock, 1732.
  - may store freight in suitable warehouse, 1739.
  - measure of damages for goods lost, 800.
    - injury to live stock by collision of train, series, 784.
  - to be considered for injuries to live stock, 782-784.
  - must deliver goods within a reasonable time, 1722.
    - exercise reasonable care to prevent loss within exemption contained in receipt, 1719.
    - use reasonable care to avoid injury by act of God, 1709.
  - not an insurer as to time of transportation, 1723.
    - liable for delay caused by inevitable accident or act of God, 1724.
  - notice, not limited by, 1711.
  - only excuse for non-delivery when prevented by act of God or public enemy, 1691.
  - ordinarily liable only for losses occurring on own line, 1701.
  - ordinary diligence and care defined, 1745.
  - overloading cars with live stock, measure of damages, 782, 783.
  - receipt containing exemption from liability, 1718.
  - rights of, 1746.
  - rule in Illinois as to losses occurring on connecting line, 1702.
  - shipper not bound by notice printed on receipt, 1716.
    - will be presumed to agree to exemption clause, when, 1713.
  - shipping perishable property, 1726-1727.
  - shrinkage of weight of cattle, while stopping for feed and water, e 3963.
  - suit by for freight and charges, 1746.
  - transportation of live stock, duties and liability of carrier, e 3962.
    - what constitutes through contract of carriage, 1695.
      - meant by act of God, 1708.
      - ordinary diligence and care, 1745.
  - what will excuse for injuries or lack of readiness to deliver live stock, 1730.
  - when the liability of the carrier commences, 1692.
  - who is a common carrier, 1690-1691.
  - written receipt not required, 1694.
- OF PASSENGERS, Chapter LXVIII, 1747-1842, e Chapter CLI, 3965-4009.**
- condition of roadbed and track, 1759.
  - conductor pulling passenger from moving train, 1785.
  - degree of care due trespassers, 1752.
    - of both carrier and passenger, 1747, 1748.
    - required, varying statement of different courts, 1747, 2020.
    - while passengers are alighting, 1781.
  - derailment of train through embankment giving away, 1760.
    - give notice of arrival at stations, 1776.
    - run trains according to schedule, 1770.
    - stop reasonable time, 1779.
  - effect of, usage as to stopping trains, 1775.
  - failure to warn passengers of danger in alighting, 1787.
  - fall of passenger while alighting must be due to negligence of carrier, 1782.
  - freight trains not required to stop at platforms, 1772.
  - furnishing passengers safe means of alighting, 1789.
  - getting off moving train, 1783.
  - helping passengers to alight, 1790.
  - injury to passenger by having dress stepped on while alighting, 1791.
    - through obstruction near or on track, 1761.

[References are to sections; e refers to Erroneous Instructions.]

**COMMON CARRIERS—OF PASSENGERS—Continued.**

- liability for defective coupling, 1766.
  - of connecting lines, 1751.
- liable for assault by conductor, 1769.
  - defective cars and appliances, 1762.
- must protect passenger from improper conduct of servants, 1768.
  - safely carry and deliver passenger at destination, 1747.
    - use all that human care, vigilance and foresight can reasonably do, 1747b.
      - highest degree of care and caution, 1747.
        - diligence which is reasonably practicable, 1747.
    - reasonable care and caution to avoid injury, 1747.
  - need not exercise highest degree of care which human mind is capable of inventing, 1747.
  - neglect of passenger to hear announcement of stations, 1777.
  - negligence defined, 1747.
    - in failing to properly heat car, 1762.
  - negligently starting train while passenger is getting on, 1773.
    - no obligation to stop after train starts, 1774.
  - not insurers of safety, 1747, 1748, 2021.
  - obeying directions of conductor in alighting from train, 1784.
  - owes due care to persons rightfully on platform, 1753.
  - passenger alighting from train by agreement with conductor to check speed, 1786.
    - expelled for refusal to pay excess fare on train—measure of damages, 839.
    - injured by fall of elevator, 1842.
      - takes all risks of mode of conveyance, 1749.
  - refreshments, not stopping train reasonable time for, 1792.
  - relation ends when passenger had opportunity to safely alight from car, 1756a.
  - responsible for negligence of servants, 1768.
    - or wrongful conduct of servants, 1768.
  - riding on freight or mixed trains, 1750.
    - loaded freight cars belonging to another carrier, 1765.
  - risks assumed, passenger, 1747.
  - rule in Texas as to measure of damages for use of filthy or unfit cars, 1764.
  - starting train while passenger is in act of alighting, 1781.
  - stopping at suitable place for passengers to alight, 1788.
  - use of spark arrester on engines, 1767.
  - using stock trains, duty of, 1793.
    - unsafe or dilapidated platform, 1758.
  - when duty to passenger ceases, movement after alighting, 2051.
    - not liable for accidents, 1748.
      - injuries to passengers, 1748.
        - in leaving train, 1756.
    - when relation ends, 1756.

**COMMON COUNTS—**

- when recovery may be had under building contract, 691.

**COMMON DESIGN—**

- conspiracy, sufficient proof, 2906.

**COMMON ENTERPRISE—**

- robbery, case of each co-defendant to be considered separately, 2902.

**COMMON LAW—**

- doctrine of retreat, qualified by modern cases, e 4740.
- marriage,
  - as affecting promise to marry, 697.
  - bigamy, what would constitute, e 4514.
  - defined, 704, e 4307.
  - incapacity to contract other marriage, e 3496.
  - proof required, 705.
  - undue influence, e 4307.
- right of appeal unknown, 281.
- writs of error, 281.



[References are to sections; e refers to Erroneous Instructions.]

**COMMON SENSE—**

and experience not sufficient rules to guide jury, e 3386.  
of jury, e 3969.  
estimating damages to minor for personal injuries, 957.

**COMMON PURPOSE—**

or design, principal and accessory, 2737.

**COMMUNICATING POISON—**

accessory, e 4478.

**COMMUNICATIONS—**

privileged, libel, whether malice implied from publication, e 4265.  
slander and libel, 2295.  
general issue, e 4269.

**COMPARATIVE NEGLIGENCE—**e 3753, 3837, 4080.

getting off moving car, e 4151.

**COMPARISON—**

between direct and circumstantial evidence, e 4349.  
conviction of larceny by, with another's guilt, failure to prove intent or knowledge of crime, e 4790.  
of reasonable doubt to conduct in important affairs of life, 2686.

**COMPELLING—**

defendant to testify against himself, perjury, e 4795.

**COMPENSATION—**

additional, changes made under contract to manufacture for sale, e 4248.

*attorneys,*

dissolution of injunction bond, e 3452.  
not affected by expression of doubts of success, e 3450.  
reasonableness, proof of, e 3451.

*broker,*

earned when purchaser found, e 3468.  
fault of owner cannot cut off, e 3470.  
must be procuring cause to recover, e 3469.

**COMPENSATORY DAMAGES—**

measure of, personal injury, contributory negligence, e 3594.  
only, allowed, 911.  
personal injuries, 941, 951.

**COMPETENCY OF EVIDENCE—**

referring to jury, dying declaration, e 4638.

**COMPETENT—**

circumstantial evidence, 2493.  
excluding every reasonable hypothesis, 2494.  
evidence, relationship, incest, 2804.  
witness, defendant, 2553.  
witnesses, defendant and his wife, weighing their testimony, Missouri, 2554.

**COMPETITION—**

contract providing against, 755.

**COMPLAINING WITNESS—**

bastardy proceedings, credibility, 2794.  
character of, bastardy, not material, 2791.  
chastity of, bastardy, not material, 2792.  
contradictory evidence of, seduction, reasonable doubt, 2836.

**COMPLAINT—**

failure of prosecutrix to make, rape, 2811, e 4526.  
prompt, by prosecutrix, rape, 2810.  
rape, whether statement of prosecutrix complaint or confession, for jury, e 4525.

**COMPLETION—**

of crime of larceny, 3237.  
of sale, delivery to third person, price to be ascertained by measurement, existing debt, consideration, 2251.  
transfer of bill of lading, 2252.

[References are to sections; e refers to Erroneous Instructions.]

**COMPOSITION AGREEMENT—**

procured by misrepresentation, 677.  
signature obtained by false representations, 677.  
when signature obtained by fraud, 677.

**COMPRESSED AIR—**

negligent use of, injury to servants, 1427.

**COMPROMISE—**

and settlement, plea of, action for personal injury, 947.  
admissions made in attempt to, e 3370.  
cannot bar prosecution, presumption of innocence, 2837.  
when party not bound by offer, 389.

**COMPUTATION—**

acquisition of highway by prescription, 1150.  
present worth of future earnings, measure of damages, personal injury, e 3581.  
statute of limitations, 1258.

**CONCEALED WEAPONS—Chapter CHII, 3274-3275, e Chapter CLXXXIV, 4803-4805.**

apprehension of personal injury, 3275.  
carrying, apprehensive of attack, intent, e 4803.  
in his own house, place not excepted, e 4804.  
right to arrest without warrant, 3274.  
manager of picnic grounds carrying, e 4805.  
right to carry, e 4624.

**CONCEALING—**

inferiority of food, adulteration, 3293.  
fact of finding lost property, intent to convert, 3216.

**CONCEALMENT—**

of body, homicide, does not conclusively prove intent, 3055.  
murder, court drawing inference of fact, e 4652.  
of facts, whether fraud, 1104.

**CONCERT OF ACTION—**

principal and accessory, need not be by express agreement, 2738.  
to inflict injury, trespass, e 4276.

**CONCLUSION—**

erroneous, distinguished from insane delusion, 2588.  
of guilt, evidence necessarily leading to, not sufficient to convict, e 4451.  
wholly inconsistent with every other rational conclusion, e 4468.

**CONCLUSIVE EVIDENCE—**

circumstantial compared with direct, 2507.  
evidence need not be, degree of proof, 2502.

**CONCLUSIVE PRESUMPTION—**

embezzlement, fraudulent intent, from act, e 4594.  
that male under fourteen years cannot commit rape, e 4529.

**CONCLUSIVE PROOF—**

of conviction, records prima facie, e 4503.  
intent, homicide, concealment of body not, 3055.

**CONCURRENCE—**

provocation and passion, necessary, manslaughter, 3039.

**CONDEMNATION—See EMINENT DOMAIN.**

**CONDEMNATION OF HIGHWAYS—See HIGHWAYS.**

**CONDITION—**

broken, entry of landlord for, forfeiture of lease, e 3693.  
in policy of fire insurance, not waived by oral understanding, e 3667.  
of forfeiture, fire insurance policy, not favored in law, e 3663.  
prosecuting witness, robbery, not to be considered, commenting on evidence, e 4575.  
precedent, contract for sale, mining claims, marking claim, 2267.  
sale upon, price to be paid in full, 2250.  
specific, sales fulfillment of, before title passes, e 4247.

[References are to sections; e refers to Erroneous Instructions.]

**CONDITIONAL—**

tender, trover and conversion, not good, 2342.

**CONDONATION—**

defeats divorce, 1012.

in action for divorce, 1012.

no defense, criminal conversation, e 3430.

of wife's offense may lessen damages in action for criminal conversation, 500.

what constitutes, effect of, divorce, 1012.

**CONDUCT—**

adultery presumed from, 2788.

creating partnership liability, e 4221.

insulting, provocation for homicide, e 4683.

of deceased in past, evidence of provocation for homicide, 3092.

defendant, 2565.

statements made in explanation, should not be termed confessions, e 4371.

plaintiff suspicious, slander, mitigation of damages, e 4269.

witness on stand, credibility, e 3312.

tending to prove marriage, bigamy, 2796.

**CONDUCTOR—**

contributory negligence, commanding passenger to jump from car, 2073.

failing to see intending passenger, 2038.

failure to warn of danger unknown to passenger, 2045.

injury to, defective rail, 1404.

motorman of street car failing to reduce speed at dangerous places, 1438.

misinforming passenger as to transfer, 2061.

must see that no passenger is in act of alighting, 2043.

risks assumed by, 1571.

starting car suddenly while passenger is boarding, 2037.

whether fellow servant of flagman, e 3877.

**CONFESSIONS—Chapter LXXXVIII, 2513-2532, e Chapter CLXIX, 4362-4375.**

admission of other crimes, Indiana, 2564.

by inmate of insane asylum, e 4375.

casual statements by defendant to third party weak as evidence, 2521.

contradictory and inconsistent statements, 2530.

corroborating testimony of accomplice, 2750.

defendant not prejudiced by admissions of his counsel, e 4374.

entitled to great weight when spontaneous, voluntary and corroborated, 2520.

evidence of declarations by defendant, e 4372.

freely and voluntarily made, among the best evidence known to law, e 4365.

illustrating satisfactory character and very weakest kind, e 4363.

induced by threat or promise by one in authority, 2526.

made under influence of hope and fear, credibility, e 4370.

promise of immunity, e 4369.

must be considered as a whole, with other evidence, 2515-2516.

corroborated, 2523 e 4373.

treated like other evidence, 2514.

voluntarily made, 2518.

not considered as any other testimony, e 4362.

of guilt, when admissible, value as evidence, jury judges of degree of credit to be given, 2513.

of judgment, may be appealed from by another interested party, 298.

one defendant, when admissible against co-defendants, 2527.

not evidence against other defendants to prove conspiracy. malicious prosecution, 1283.

received with caution unless supported by other proof, 2524.

satisfactory as evidence, 2519.



[References are to sections; e refers to Erroneous Instructions.]

**CONFESSIONS—Continued.**

should be considered as a whole, credibility for jury, e 4367.  
statements of defendant as part of *res gestae*, 2528.

at time of arrest, 2529.

proven by state to be taken as true, e 4366.

statement of prosecutrix, whether complaint or confession, for jury, e 4525.

sufficient to convict, 2522.

verbal, how considered by jury, 2531.

instructing that they ought to be received with great caution, e 4364.

voluntary and free from influence, admissibility for court, e 4368.

voluntarily made and corroborated, arson, 2532.

word should not be applied to statements of defendant explaining his conduct, e 4371.

**CONFIDENTIAL RELATIONS—See FRAUD.**

**CONFLICT—**

abandoning, defendant in fault, may plead self defense, e 4724.

self defense, when aggressor may plead, 3134.

self defense, aggressor must give deceased notice that he has abandoned, e 4725.

sudden, arising from quarrel, manslaughter defined, 3025.

**CONFLICTING EVIDENCE—**

elements to be considered in determining preponderance, 329.

duty of jury to reconcile, 330.

how reconciled, 331, 332.

irreconcilable, in evidence, 2772.

**“CONFRONTED AS HE WAS”—**

erroneous insertion in instruction, e 4754.

**CONFRONTED WITH WITNESSES—**

defendant's right to be, receiving stolen property, record of former trial not sufficient, e 4792.

**CONFUSING—**

instruction as to force used in rape, e 4522.

on reasonable doubt, e 4473.

**CONFUSION—**

leaving mind of jury in state of, reasonable doubt, e 4455.

of names, libel, e 4267.

**CONJECTURAL—**

damages, eminent domain, inconvenience, e 3558.

future suffering, measure of damages, personal injury, e 3573.

reasonable doubt must not be, 2683.

**CONJECTURE—**

origin of fire from engine not to be left to, 1990, e 4097.

**CONJUNCTIVE—**

statement of matters which acquit, insanity, e 4397.

**CONNECTICUT—**

parties may consent to certify questions in Supreme Court, 285.

statute relating to instructions, 153.

weighing defendant's testimony, 2537.

**CONNIVANCE—**

accessory, act done without, 2742.

**CONSCIENTIOUS BELIEF—**

of guilt is not sufficient to convict, e 4445.

reasonable doubt, 2687.

**CONSCIOUS—**

defendant not, of nature of act, must be acquitted, 2576, 2577.

**CONSENT—**

embezzlement, from a distracted person, 2926.

incest, of both parties, not essential, 2803.

of co-partner, acts of one partner without, e 4226.

husband, to wife's conveyance of her personal estate, e 3628.

one partner lacking, disposal of firm property, e 4228.

[References are to sections; e refers to Erroneous Instructions.]

CONSENT—Continued.

- paying debt for another without, 3424.
- principal and accessory, 2733.
  - soaking person with turpentine, e 4480.
- rape, defendant need not prove, e 4520.
  - defense of, 2808.
  - involuntary, induced by fear, 2809.
  - prosecutrix under age of, 2816.
- seduction, defense, 2834.

CONSEQUENCE—

- natural and probable, of unlawful purpose, conspiracy, killing, e 4584.
- natural, homicide, presumption that one intends, 3047.
  - presumption that one intends, forgery, 2944.

CONSIDERATION—

- adequacy of, 1075, 1081.
- as to fraudulent conveyance, 1060.
- defined, 620.
- due to argument of counsel, 2758.
- failure of, cancellation of insurance policy without return of premium, e 3665.
  - where there is no fraud, 626.
- for contract not to engage in same business, 623.
  - guaranty, negotiable instruments, 2187.
  - sale, paid in installments, 2249.
- good, 1088.
- inadequacy of, 1135.
- knowledge of want of, negotiable instruments, e 4214.
- must be given to insanity of defendant's mother, e 4409.
  - have been known and understood by parties, 621.
- negotiable instruments*,
  - failure of, 2154.
  - forbearing suit on note, 2159.
  - illegal, 2157.
  - settlement of criminal charge, 2160.
    - old debt, 2156.
  - void, liquor sold and note given on Sunday, 2158.
  - what notice sufficient to put on guard, bound to make inquiry, e 4216.
- new, new party, 2182.
- new promise to perform legal obligations not binding, 622.
- of evidence, character evidence should be considered with all the other evidence, e 4340.
  - facts, jury instructed "should" instead of "might," e 3319.
  - instrument used in homicide, in judging intent, 3052.
  - insults by deceased not limited to time of killing, e 4621.
  - other evidence not eliminated by rule that contract should be construed as legal rather than illegal, e 4206.
- promise for a promise good, 620.
  - not always good, e 3477.
- promise of one person to pay third person, Statute of Frauds, 628.
- recital of, sale of real estate, circumstances, e 4231.
- release without, is void, 625.
- return of, rescinding fraudulent contract, 1129.
- sale, existing debt, 2251.
- sexual intercourse, illegal consideration for promise to marry, 698.
- should be given to motives of witnesses, usurping powers of jury, e 4499.
- valuable, conveyance of real estate, 2222.
  - fraud against creditors, 1066.
- want of, avoids account stated, 422.
- whether paid, in determining whether conveyance is fraudulent, 1061.

CONSIGNEE—

- negligence, railroads, personal injury, 1940, 1941.

[References are to sections; e refers to Erroneous Instructions.]

**CONSISTENT—**

with statute, ordinance must be, arrest for vagrancy, malicious prosecution, e 3720.

**CONSPIRACY—**Chapter XCV, 2903-2920, e Chapter CLXXXVI, 4578-4590.

act of conspirator need not contribute to death of deceased, e 4581.

one is act of all, 2907, e 4578.

admission of one not evidence against other defendants to prove, malicious prosecution, 1283.

assent or knowledge, identity, 2918.

between union miners, right of officer to arrest, believing, e 4323.

circumstantial evidence, necessary proof, 2905.

civil action in case, recovery may be had against one alone, e 4311.

preponderance of evidence, e 4311.

defined, 2903.

each conspirator guilty of crime committed, e 4579.

in obtaining credit upon false representations, 1098.

regard to fraud, 1120.

instructing that evidence of conspiracy is usually circumstantial, e 4585.

intent to defraud, reasonable doubt, e 4590.

intoxication as defense, 2919.

at time of crime and when conspiracy formed, e 4588.

killing policeman in pursuance of, 2961.

probable and natural consequence of an unlawful purpose, e 4584.

liability before and after withdrawal, 2908.

not carried into effect, as affecting right of self defense, e 4582.

liable for crimes not within probable execution of conspiracy, accidents, e 4580.

necessary that design should succeed, 2911.

meeting should have been for unlawful purpose, 2912,

participants after formed, 2910.

principals and accessories, present, aiding and abetting, e 4475.

reasonable doubt, 2719, 2920.

sufficient proof of common design, 2906.

to bribe and corrupt delegates, e 4586.

commit burglary, instruction cannot ignore theory of conspiracy, e 4587.

murder, 2913.

to escape from prison, 2915.

when a felony or misdemeanor, 2916.

incarcerate plaintiff, malicious prosecution, 1277.

kill, all equally liable, 2963.

rob or murder, former acquittal, testimony of conspirator, 2914.

presence at time crime is committed, principals and accessories, e 4476.

to tar and feather, 2917.

trumped up charge, as a defense, 2761.

what facts tend to show, 2909.

must be proved, 2904.

when statute of limitations begins to run, e 4589.

with parties whose names and identity are not disclosed, e 4583.

**CONSPIRATOR—**See CONSPIRACY.

**CONSTITUTIONAL—**

provisions, as to eminent domain, 840.

right, to be confronted with witnesses, receiving stolen property, e 4792.

trial by jury, 10.

**CONSTRUCTION—**

hearers not making proper, slander, charge of fornication, e 4261.

life insurance policy, against company, e 3672.

of building, architect refusing to issue certificate, 686.

of contract a matter for the court, e 3478.

for sinking a well, 633.

of goods sold, under vendee's orders and superintendence, 2268.

inconsistent acts, according to presumption of innocence, e 4426.



[References are to sections; e refers to Erroneous Instructions.]

**CONSTRUCTION—Continued.**

vehicle, oil tank part a part of wagon, 3296.  
writings, negotiable instruments, memorandum notes, e 4203.

**CONSTRUCTIVE—**

malice, difference between it and express, 2631.  
notice of defects in streets or sidewalks, 1642.  
matters contained in deed, intent, 997.  
presence, of accessory, 2731.  
principal in larceny, e 4479.  
will render one a principal, 2732.

**CONSTRUING—**

contract as legal rather than illegal, negotiable instruments, other evidence to be considered, e 4206.  
evidence in defendant's favor, duty of jury, e 4424.

**CONSUMING—**

mortgaged crops, mortgagor, replevin, e 4243.

**CONSUMMATION—**

of agreement to live in adultery, elsewhere than where made, intent not sufficient, e 4511.

**CONSUMPTION—**

brother of insured dying from, 1195.  
suffering from at time of taking out insurance, 1194, 1195.

**CONTEMPT—**

court may fine attorney for contempt while engaged in trial of case, 97.

**CONTEST—**

in chancery, testamentary capacity, 2392.  
self defense, aggressor must give deceased notice that he has abandoned, e 4725.

**CONTESTANT—**

burden of proof on, where due execution of will proved, insanity, e 4291.

**CONTINGENT—**

fees, when may not be revoked, 660.  
liability, mortgage to secure, 1320.

**CONTINUANCE—**

admissions in affidavit for, 388.  
of insanity presumed after once shown to exist, 2593, e 4407.

**CONTINUE FIRING—**

right to, self defense, till safe, 3169.

**CONTINUOUS AGENCY—**

when statute of limitations begins to run, advances made by agent for principal, e 3706.

**CONTRACTOR—**

independent, trespass to real estate, when defendant liable for act of, 2314.  
may recover when architect fraudulently withholds certificate, 512.  
negligence of, 1367.

**CONTRACTS—Chapter XXXVII, 611-682, e Chapter CXXIV, 3476-3489.**

acceptance entering upon performance shows, 646.  
of work as full performance, no waiver of unknown defects, 715.  
accepting work or material does not thereby waive latent defects, 715.  
action for commissions, 764.  
labor and materials, e 3493.  
money loaned, partial payments, 670.  
statute of limitations, 670.  
money lost at gaming, 641.  
action on account, set-off, e 3487.  
additional writing demanded by plaintiff on subscription, 682.  
against engaging in business, consideration for, 623.  
public policy, bona fide purchaser, 638.  
void, limitation of rule, 638.

[References are to sections; e refers to Erroneous Instructions.]

**CONTRACTS—Continued.**

- agreeing to pay for work actually done, partial performance, 655.
- agreement to pay for merchandise delivered to third person, 647.
  - purchase stock, 645.
- application of money to one demand instead of another, 672.
- assignment of judgment, 624.
- assuming agent made, controverted, e 3419.
- board of trade*,
  - intention of parties not their agreement, e 3475.
  - liability of infant, e 3474.
  - transactions legal, 605.
- breach of*,
  - attorney not entitled to compensation, 551.
  - failure of title, 663.
  - assuming facts to be proven, e 3482.
  - irrigation contract, damages, 666.
  - to deliver, damages difference between contract price and market price, 748.
  - furnish medical attendance, to injured servant, 959.
- BUILDING CONTRACTS**, Chapter XXXVIII, 682-691, e Chapter CXXV, 3490-3494.
  - according to specifications, 683.
  - builder must be financially able as well as willing to perform, e 3491.
  - construction of buildings, when no time is set, 686.
  - contractor refusing to sign written contract after award, 689.
  - counter-claim for defective work, 687.
  - delay and extra work, e 3517.
  - extra work must be ordered, e 3494.
  - fulfillment prevented by defendant, 685.
  - labor and materials must be furnished at defendant's request, e 3493.
  - measure of damages not full contract price, e 3515.
  - ordering extra work no bar to recovery of penalties for delay in building, e 3492.
  - owner to keep up necessary preceding work, 687.
  - providing that architect's certificate must be given, 511.
    - opinion shall be binding is conclusive except for fraud or mistake, 511.
  - reasonable time for completion, 686.
  - substantial compliance, rule as to recovery, 684.
  - to be constructed within a reasonable time, 686.
  - view of premises by the jury, 690.
  - when recovery can be had under common counts, 691.
- burden of proof on one alleging insanity, 612.
- capacity to contract presumed, 612.
- caveat emptor, 627.
- changes made at plaintiff's suggestion, 635.
- character and habits may be shown in mitigation of damages in action for breach of promise, 756.
- claim for extra services must be made when work is done, 711.
- completion of, 634.
- compliance with terms, e 3481.
- composition agreement, 677.
- consideration, defined, 620.
  - known or understood by parties, 621.
- construction a matter for the court, e 3478.
  - of, as to delivery, 632.
    - as to goods damaged by weather, 632.
    - by the court, 629, 630.
    - for sinking a well, 633.
    - machine, completion of, 634.
    - to be satisfactory to plaintiff, construed, 635.
- construing as legal rather than illegal, negotiable instruments, other evidence to be considered, e 4206.
- corporation, made as officers, no individual liability, 2419.
- counter claim for goods lost through defective machinery, 727.
- custom and usage, form part of contract, 637.

[References are to sections; e refers to Erroneous Instructions.]

CONTRACTS—Continued.

*damages,*

- by employe for wrongful discharge, 721.
- for breach, e 3506.
  - to ship coal, 752.
  - where notice to stop manufacturing has been given by buyer, e 3509.
- for defective setting of furnace, 757.
- measure of, 744-764, e 3505-3519.
- defective construction of building, 761.
  - manufactured articles, measure of damages, 753.
- defense of payment, burden of proof on defendant, 668.
- degree of insanity necessary to relieve confidence, 613.
- drunkenness, when may avoid, 618.
- elements that must be proved on breach of contract for sale of good will of business, 664.
- entered into by reason of partial insanity, 617.
- evidence of proposed settlement not to be considered, 676.
- existence of, when a question of fact for the jury, limitation of liability, 1826.
- express excludes implied, e 3490.
- failure of consideration, 627.
  - when there is no fraud, 626.
- failure of one to perform entitles another to abandon, 653.
  - title as a breach of, 663.
  - to accept goods on delivery, diminished profits no excuse, 662.
  - contribute money to joint adventure, measure of damages, 754.
  - furnish goods of quality provided, measure of damages, 756.
- false representations, 627.
- fire insurance, condition not waived by oral understanding, e 3667.
- for construction of a machine, construed, 634.
  - contingent fees, ground for breach of, burden of proof, 660.
  - to represent estate obtained by fraud, 660.
- delivery of grain, party must be ready and willing to receive, measure of damages, 661.
- dismissal of criminal prosecution, void, 639.
- life insurance—See Insurance, Life, 1188.
- machinery proving defective, reasonable time to fix, 665.
- payment of money caused by unreasonable and vexatious delay, interest may be allowed, 758.
  - interest may be allowed for unreasonable and vexatious delay, 758.
- re-sale, damages for breach, e 3510.
  - mining claims, condition precedent, marking claim, 2267.
  - of goods, measure of damages for breach, e 3508.
  - for failure to deliver, e 3511.
  - of good will of business, breach of, 664.
- full compliance required, substantial performance not enough, e 3479.
- gaming, action for money lost, 641.
- implied as to employment of architect, 515.
- implied between landlord and tenant, 1228.
  - of ordinary skill by physician, 1303.
- improvidence not evidence of insanity, 615.
- in absence of fraud party who refuses to perform cannot recover money paid, 654.
- insane delusions as to whether matters, will not vitiate, 616.
- insanity, burden of proof on one alleging, 612.
  - must have been of unsound mind at time of making contract, 613.
- intention of, a question of fact for the jury, 631.
- irrigation, breach of, 666.
- joint liability does not necessarily follow joint ownership, e 3488.
- latent ambiguities for the jury, 630.
- law presumes all persons of mature age of sound mind and memory, 612.
- legal effect of, for the court, 631, 708.



[References are to sections; e refers to Erroneous Instructions.]

**CONTRACTS—Continued.**

- liability for merchandise delivered to third person, 647.
- of subscription limited to pro rata share of amount extended, 679.
- on subscription, 678.
- limitation of carrier's liability, 1710-1721.
- made for benefit of third person, latter can sue on, 648.
- impossible of performance by party, damages, e 3515.
- on Sunday, 642, 643.
- MARRIAGE CONTRACTS, BREACH OF—Chapter XXXIX, 692-699, e Chapter CXXVI, 3495, 3496.**
  - common law marriage, e 3496.
  - discovery that woman is not virtuous after promise made, e 3495.
  - how proved, 692.
  - incapacity to contract, 697.
  - in consideration of sexual intercourse illegal, 697, 699.
  - marriage, proof of, 700, e 3495, 3496.
  - measure of damages for breach, 765-767.
  - offer of marriage in good faith good defense, 699.
  - seduction in aggravation of damages, 767.
  - seduction, series, 699.
  - subsequent illicit relations between parties no excuse, 696.
  - unchastity ground for, 695.
  - to be performed within reasonable time when no time set, 694.
  - unchastity no defense, 695.
  - what to consider in assessing damages, 765.
  - not evidence of, 693.
- may be abandoned if other fails to perform, 653.
- avoided by parol agreement, burden of proof, 652.
- rescinded by mutual consent, 650.
- meaning of ambiguous terms in for court, 631.
- measure of damages, for breach,*
  - articles defectively manufactured, 753.
  - for failing to accept goods, 746.
  - furnish goods of quality provided, 756.
  - property bought for resale, 750.
  - purchase of merchandise, 746.
  - purchase of property, 747.
  - refusal to accept goods, 745.
  - renunciation of contract to buy property, 747.
  - series, 760.
  - where party deprived of opportunity to perform, 751.
  - where property not delivered on time, 749.
- mental capacity to make, 616.**
  - powers impaired by age, weakness or bodily infirmity may not vitiate a deed, 614.
- minds of parties must come together to constitute, 611.
- minor's contract for necessities, 619.
- must not ignore evidence of renewal, e 3489.
- recover on one sued on, cannot prove a different one, e 3480.
- negligence in signing without reading, e 3476.
- new promise to perform legal obligations, 621.
- notice to rescind must be given within a reasonable time, 658.
- obtained by making other party drunk, may be avoided, 618.
- of guaranty, consideration for, negotiable instrument, 2187.
- of insurance—See INSURANCE.*
- of sale—See also SALES.*
- only act of God or public enemy will excuse non-performance, 656.
- opportunity to examine does not prevent proof of bad condition, e 3485.
- oral evidence where contract is in writing, e 3483.
- real estate, statute of frauds, 2227.
- ordinary skill defined, 726.
- partial compliance, release, 655.
- party cannot recover money paid when he himself refuses to perform in absence of fraud, 654.
- sue in tort and recover in contract, 1132.

[References are to sections; e refers to Erroneous Instructions.]

CONTRACTS—Continued.

- party must show readiness to perform, 667.
- payment made in settlement of disputed claim will operate as release if retained, 675.
- retention of money under an agreement amounts to, 669.
- performance after knowledge of fraud, damags, e 3639.
- period of, corporations, salary of vice president, 2421.
- person alleging a contract must prove by preponderance, 612.
- price, difference between it and market price, measure of damages on refusal to deliver personal property, 748.
- promise for promise a good consideration, 620.
- not always good consideration, e 3477.
- promise from one person to another to pay third person, 628.
- made upon valuable consideration to pay money to third person, valid, 648.
- to pay for taking care of deceased, 649.
- proof of substantial compliance sufficient to collect on subscription, 682.
- providing against competition, 755.
- punitive damages not allowed on suit, 759.
- quantum meruit recoverable for substantial performances, 718.
- rate of wages changes with change of work, 713.
- reasonable time to fix defective machinery, 665.
- receipt is not conclusive evidence of payment, e 3486.
- refusal to accept goods, measure of damages, 745.
- release of, obtained by fraud, 659.
- without consideration nudum pactum, 625.
- releasing from complete performance of, 655.
- rescinding by mutual consent, 650.
- for non-performance, 651.
- notice of must be given within reasonable time, 658.
- retention of money under agreement amounts to payment, 669.
- revocation of, with attorney to represent on contingent basis, series, 660.
- right to recover from estate for taking care of deceased, 649.
- series, 660.

SERVICE CONTRACTS—Chapter XL, 706-732, e Chapter CXXVII, 3497-3501.

- allowance made for services and accepted stops further claim for services, 711.
- an entirety, 720.
- by members of family, 728.
- intention or expectation to be paid must be mutual, 729.
- compensation changes with change of work, 714.
- degree of care required of dentist, 725.
- discharged employe must use diligence in seeking new employment, 721.
- discharge of employe, tendering other employment, 763.
- employe may recover quantum meruit when terminated by employer, 720.
- employe quitting term without cause, 722.
- quitting term without cause cannot recover for part performed, 722.
- employment for a certain period presumed to continue at same rate, 713.
- entered into without reducing to writing, binding, 706.
- entire contract of hiring recovery of quantum meruit after breach by employe, 719.
- when quantum meruit may be recovered, 719.
- extent of relationship required to render services prima facie evidence of acceptance, 730.
- extra services rendered, without request, 711.
- failure to make payments as agreed, ground for terminating, 717.
- pay for agreed monthly services, 717.
- father not bound to pay daughter while living at home except by special agreement, series, 731.

[References are to sections; e refers to Erroneous Instructions.]

CONTRACTS—SERVICE CONTRACTS—Continued.

- for one year presumed to continue for one year, 713.
- specified time, employe cannot recover for part performance, 720, 722.
- implied, for services, e 3497.
- promise to pay at rate fixed by previous agreement, 712.
- for services rendered if one stands by and sees another work for him, 710.
- knowingly accepted, 710.
- nephew, 730.
- improper conduct of employe as ground for discharge, 724.
- inattention to business, e 3498.
- intention or expectation to be paid must be mutual, 729.
- labor done and services rendered by one person for another without the latter's knowledge or request, no ground of action, 709.
- measure of damages, e 3518.
- member of family, implied promise to pay, 730.
- mere fact of services rendered creates no obligation to pay, 709.
- neglect to reduce to writing, entering upon performance, 706.
- negotiations for settlement, unaccepted work not binding, 716.
- no implied obligation to pay for services of stranger living as member of family, 732.
- promise to pay for service rendered without knowledge of person for whom it is done, 709.
- of member of family, 728.
- of child, of grandchild, e 3500.
- paid for at end of each month and no demand made for pay for extra services, 711.
- series, 731.
- sickness as cause for employe's leaving, 723.
- stranger living as member of family, cannot recover for services, 732.
- may recover for services, when, 732.
- need not pay for board and clothing, 732.
- want of skill or diligence—right to discharge, 725.
- where no demand was made at end of each month for extra services rendered, 711.
- one person works for another with his knowledge and consent, law presumes laborer to be paid, 710.
- payments not made as agreed may terminate contract and collect for services rendered, 717.
- where price not fixed implied promise to pay rate of previous agreement, 712.
- settlement of prior suit—good defense in action on, 673.
- out of court are favored, 676.
- sickness no excuse for non-performance, 657.
- special, sales, in absence of, purchaser buys at his own risk, machinery installed on trial, 2277.
- school teacher, what may be demanded in absence of, excess in social pleasures, 2433.
- specific contract must be proved, burden of proof, 644.
- subscription*,
  - can be withdrawn after work is begun, 681.
  - consideration for, 678.
  - what must be proven on action, 681.
  - who may perform, 678.
- suing for assistance rendered plaintiff while in defendant's employ, e 3501.
- suit between members of family, e 3499.
- terms of for the jury, legal effect for the court, construction of contract for the court, 629.
- test of work and postponement of trial, 634.
- third person may sue on contract made for his benefit, 648.
- to build R. R. station, damages for breach, e 3505.
- deliver goods, degree of care required to protect same from damage by weather, 632.



[References are to sections; e refers to Erroneous Instructions.]

**CONTRACTS—Continued.**

- manufacture, sales, changes made, additional compensation, e 4248.
- purchase personal property, purchaser must show readiness to perform, 667.
- testify for compensation, void, 640.
- trial of machine, test of work, 634.
- unforeseen contingencies, sickness, bad weather or roads no excuse, 657.
- unreasonable withholding of payment, 671.
- varying written by parol, negotiable instruments, must ratify all agent's transactions or none, e 4197.
- verbal controlled by written, 636.
- what constitutes a valid settlement, 674.
  - constitutes, assent of parties, 611.
  - is an act of God as excusing non-performance, 656.
  - recoverable for doing different work from that contracted for, e 3519.
  - show acceptance, 646.
  - will not excuse non-performance, 657.
  - would be insufficient settlement, 674.
- when a man is held to be of sound mind, 615.
- failure to perform entitles other to abandon, 653.
- interest may be allowed on, 671.
- person may recover for taking care of deceased, 649.
- release from may be disregarded, 659.
- whether delivery was made, e 3484.
- work done on faith of subscription, liability for, 680.
- written change by subsequent verbal agreement, 707.
  - controls verbal, 636.
- wrongful delay in payment, interest may be allowed, 671.

**CONTRADICTORY—**

- and inconsistent statements, 2530, 2765.
- statements, 373-380.
  - impeaching witness, 2766.
  - impeachment in general reputation, e 3353-3360.
  - weight to be given, 374-377.

**CONTRIBUTING CAUSE—**

- intoxicating liquor, may be, to justify recovery of damages, e 3689.

**CONTRIBUTORY NEGLIGENCE—**

- IN GENERAL, 1338, 1472-1492.
  - burden of proof as to, 1477, 1509, 1675, 1676, e 3347, 3752, 3831, 3947, 4179.
  - children, 1354, 1355, 1482, 1948, e 3750, 3751.
  - comparative, e 4080.
  - defined, 1351, 1473.
  - effect of, e 3748.
    - terror in sudden emergency, 1358.
  - falling into ditch, dug by plaintiff, e 3944.
  - intoxication, 1356, e 3940, 4075, 4155.
  - malpractice, duty of patient to co-operate with doctor, 1303, e 3722.
  - measure of damages, personal injury, compensatory damages, e 3594.
    - treating injuries sustained, e 3583.
  - must be proximate cause of injury, 1474, e 3830.
  - no bar to relief for fraud, e 3651.
  - personal injuries, e 3746.
  - purchaser guilty of, expression of opinion may amount to warranty, e 4253.
  - should be negatived in instruction, e 3803.
- MASTER AND SERVANT, 962, 1472-1492, e 3829-3837, 3901-3914.
  - admission of servant that explosion was his fault, effect of, 1388.
  - brakeman, e 3913.
  - continuing work without repairing defects after being warned of danger, 1480.

[References are to sections; e refers to Erroneous Instructions.]

**CONTRIBUTORY NEGLIGENCE—MASTER AND SERVANT—Continued.**

- doing work in other way than ordered by master, 1479.
- effect of, 1352.
- employe in coupling cars, 1590.
- failure of servant to apprise himself of dangers of machinery, 1452.
- to heed warning of foreman to get away from falling timber, 1485.
- fellow servant, e 3880.
- giving undivided attention to work, assuming warning would be given of any danger, e 3902.
- in grinding tools, 1490.
- lowering air pumps, 1487.
- operating handcar, e 3907.
- injury through careless use of hammer, 1491.
- intoxication of servant, 1481.
- must be pleaded by defendant, South Carolina, 1476.
- no greater duty of master to protect servant, than servant to exercise on his own behalf, e 3829.
- plaintiff must exercise ordinary care for his own safety, e 4063.
- pushing trucks with shoulders instead of hands, e 3911.
- railroads, injury to servant, 961.
- raising beam in obviously dangerous way, 1484.
- servant, 1532, 1545, e 3774, 3829.
- bound to exercise ordinary care for his own safety, 1472, 1473.
- defeats recovery, 1472, 1509, 1524, e 3906.
- exposing his body between cars, e 3909.
- leg being over side of the car, e 3912.
- surrounding facts and circumstances in evidence to be considered, 1475.
- trying to escape peril, injured while so doing, e 3903.
- uncoupling cars, e 3905.
- using defective rope, 1492, e 3836.
- voluntarily doing work in more dangerous ways than necessary, 1478.
- want of ordinary care of both master and servant, 1486.
- working near dangerous lumber pile, 1483.

**MUNICIPAL CORPORATIONS, 1667-1677, e 3939-3948.**

- carelessness and absent mindedness, series, 1669, 1670.
- circumstances to be considered in determining, series, 1668.
- defeats recovery, injury on side-walk, 1667, e 3939.
- defined, 1685.
- driver, defective streets, e 3948.
- falling into man-hole, sidewalk, 1685.
- hole in sidewalk, 1669.
- in passing over sidewalks, 1336, 1672, e 3945.
- knowledge of defective sidewalk, e 3942.
- street, e 3943.
- may be considered where person injured by hole filled with water in street, 1634.
- what amounts to, e 3939.

**RAILROAD PASSENGERS, 1800-1821, e 3965-4009, 4143.**

- alighting*,
  - at dangerous places, 1788.
  - from caboose while it is being uncoupled, e 3916.
  - from train, 1789, 1803-1812, 1814.
  - on side away from station, e 3997.
- from moving train, e 3993, 3994.
- by direction of, e 3995.
- what jury may consider, e 3995.
- when suddenly placed in perilous position, e 3996.
- boarding moving engine, 1599, 1600, e 3908.
- train, 1805.
- jury may consider age of plaintiff, e 3994.
- riding on coal car without consent, 1957.
- locomotive, 1956.

[References are to sections; e refers to Erroneous Instructions.]

**CONTRIBUTORY NEGLIGENCE—RAILROAD PASSENGERS—Continued.**

shipper of live stock riding on engine, 1813.  
voluntarily riding in dangerous place, e 3992.  
approaching crossing at high rate of speed, e 4059.

**RAILROADS,**

attempting to cross although view obstructed, e 4058.  
burden of proof, 1961.  
crossing in front of approaching car, e 4181.  
    over road known to be dangerous, e 3946.  
    railroad track in buggy, looking out at back only, 1917.  
    track knowing that cars were shifted there, 1951.  
danger must be impending to be a defense, 1359.  
defective fence, stock escaping, 1969.  
driver of vehicle remaining at safe distance from approaching train presumed, 1925.  
driving across track carelessly, 1955, e 4062, 4072.  
    with baby in arms, e 4053.  
    with lines hanging loose, 1926.  
duty to stop, look and listen, e 4180.  
    is excused, when, e 4057.  
effect of plaintiff's deafness, vigilance in approaching crossing, e 4076.  
encountering danger to save lives of passengers, e 3901.  
failure of driver of vehicle to use reasonable care, collision, e 4182.  
    to discover approaching train, 1953, e 4071, 4078.  
        hear noise of approaching train, e 4060.  
        reasonable care in driving across track, e 4067.  
failure to stop, look and listen, e 4056.  
gates down at railroad crossing, 1918.  
going on railroad track after discovery of approaching train, 1923.  
    notwithstanding obstruction and noise, 1920.  
heeding watchman's signal to stop, 1924.  
imputed negligence, parent and child, e 4079.  
knowledge of proximity of engines, 1954.  
land owner, failure to extinguish fire action against railroad, e 4111.  
law regulating speed, wanton misconduct, 1960.  
leaning against loose plank in chute on stock pen, e 3914.  
looking and listening for approach of trains before crossing, e 3944.  
must exercise ordinary care, duty to look for approaching trains, e 4066.  
negligence not contributing to injury, e 4144.  
no defense if defendant could have avoided injury after discovering peril, e 4073.  
ordinary care, 1945.  
pedestrian passing over tracks at street crossing, e 4170.  
person injured at crossing, 1950, e 4069.  
plaintiff's knowledge of dangerous character of crossing, e 4054.  
possibility of avoiding injury after discovering plaintiff's peril, 1958.  
producing miscarriage, 934.  
reckless conduct of plaintiff not necessarily a defense, e 4077.  
rescuing child on track, e 4068.  
standing on track, 1952.  
    duty to look and listen, e 4070.  
surrounding circumstances, 1930.  
track once fenced, 1968.  
train run at dangerous speed, failure to slacken speed, when able to do so, e 3904.  
turning back toward track on sudden approach of train, e 4074.  
unconscious person, attendant circumstances, 1959.  
unloading cattle, 1489.  
using defective shaft of wagon, 1488.



[References are to sections; e refers to Erroneous Instructions.]

CONTRIBUTORY NEGLIGENCE—Continued.

SLEEPING CAR COMPANY,

whether placing the ring in pocket book is, liability for loss of,  
e 4004.

STREET RAILROADS,

*alighting from car,*

failure to discover bolt on which dress caught, e 4145.

take hold of hand rail, e 4151.

getting off moving car, 2072, e 4151.

jumping at command of conductor, 2073.

to escape blow by conductor, e 4156.

previous methods of passengers, e 4154.

to exercise ordinary care, e 4150, 4152.

trying to escape from apparently imminent danger, 2075,  
e 4156.

what jury may consider in determining whether passenger  
exercised care, e 4150.

bicyclist colliding with street car, 2105.

boarding moving car, 2071, e 4149.

burden of proof on defendant, 2101, 2063, 206.

as to children, 2102.

crossing in front of approaching car, not negligence per se, e 4177.

driver of vehicle, 2110, e 3941.

crossing track, care due, ordinary care defined, 2107.

near track, reasonable care of, 2106.

duty to stop, look and listen, 2104.

going upon track without warning to motorman, 2108.

injury avoidable nevertheless, 2109.

by trailer, 2074.

injuries, rule in Tennessee, e 4178.

intoxication, burden of proof, 2103.

obeying instructions to move to another part of car, 2070.

payment of fare in genuine coin, 2076.

pedestrians, duty to look out for approaching car, e 4177.

persons other than passengers and employes, 2100.

standing on platform by direction of employe in charge of car,  
2068, e 4147.

of street car when overcrowded, 2066-2067, e 4146.

standing on running board of street car, 2069, e 4148.

TELEGRAPH COMPANIES,

furnishing incorrect or insufficient address to companies, non-  
delivery, e 4184.

CONVERSATION CRIMINAL—See CRIMINAL CONVERSATION.

CONVERSION—

after taking up estrays in good faith, 3231.

alleged, saw mill machinery, 2345.

burden of proof, 2344.

by bailee, 2334.

by warehouseman, 2337.

defendant rightfully in possession accidentally losing property be-  
fore demand, 2336.

demand and refusal, evidence of, 2339.

by agent, evidence of agency, 2340.

no particular form necessary, may be verbal, 2338.

not necessary where actually proven, 2341.

embezzlement, immaterial what becomes of money after its con-  
version, e 4598.

gist of offense of embezzlement, 2928.

intent, finding lost property, concealing fact of finding, 3216.

larceny, by one having possession without claim, 3250.

measure of damages, 758-772, e 3520-3521.

money of bank, embezzlement, 2931.

note, excuse for non-delivery upon demand made, e 4210.

partition fence, measure of damages, 772.

personal property, measure of damages, 769.

proceeds of sale by agent, embezzlement, 2936.

[References are to sections; e refers to Erroneous Instructions.]

# CONVERSION—Continued.

plaintiff must prove in trover, what constitutes, 2332.  
 property wrongfully taken and consumed, 2335.  
 tender, as good as payment, not good if conditional, 2342.  
     waiver of production of money, 2343.  
 timber, wrongfully, measure of damages, 770.  
 trespass, of part of realty, not necessary, e 4813.  
 venue of, embezzlement, 2929.  
 wrongful intent must be proven, 2333.

# CONVEYANCES—

between husband and wife, scrutinize closely, 1086.  
 fraud against creditors, fiduciary relations, e 3634.  
 fraudulent as against creditors, 1054-1094.  
     mere suspicion not sufficient, 1056.  
 of personal estate, by married women, consent of husband, e 3628.  
 real property, by deed only, e 3619.  
 real estate, valuable consideration, 2222.

# CONVICT—

duty to, expression of opinion, 2760.  
 or acquit, duty to, argumentative, e 4501.

# CONVICTION—

absolute certainty not required for, reasonable doubt, 2680.  
 assuming that it would be justifiable on corroborated testimony of  
     accomplice, e 4488.  
 burglary, cannot be had from mere possession of stolen property,  
     must be accessory, e 4567.  
 cannot be had if single juror has reasonable doubt, e 4462.  
     on mere belief of jury, must be satisfied beyond reasonable  
     doubt, e 4447.  
 conscientious belief of guilt not sufficient, e 4445.  
 conspiracy, what proof necessary, 2904.  
 former, burglary, not charged in indictment, added punishment  
     instructed, e 4573.  
     of defendant, 2779.  
 from prejudice, caution against, reasonable doubt, 2688.  
 homicide, proof of motive not necessary for, 3078.  
 justifiable though all facts and circumstances are not in evidence,  
     e 4471.  
 larceny, horse stealing, what necessary for, 3214.  
 may be based on evidence introduced by defense, e 4457.  
     had for either selling or giving away intoxicating liquor, e 4770.  
     on circumstantial evidence, rule when direct evidence at-  
     tainable, e 4355.  
     though the act surrounded in a degree of doubt, e 4453.  
 murder in second degree, not reversed for erroneous definition of  
     murder in first degree, e 4627.  
 must be based on guilt proved beyond reasonable doubt, 2675.  
 not justified by evidence necessarily leading to a conclusion of  
     guilt, e 4451.  
     justified by high degree of probability of guilt, e 4449.  
     prevented by well founded doubt of defendant's guilt of any  
     offense, e 4452.  
 notwithstanding evidence of good character, 2479.  
 of former offense, admitted to affect defendant's credibility, e 4391.  
     guilt, must arise from evidence, not from lack of it, e 4461.  
     impending death, dying declaration under, referring compe-  
     tency of evidence to jury, e 4688.  
 larceny by comparison with another's guilt, failure to prove  
     intent or knowledge of crime, e 4790.  
 larceny, whether unexplained possession of stolen property  
     sufficient for, e 4787.  
 on circumstantial evidence, homicide, extenuating circumstances,  
     2504.  
     necessary elements, 2496.  
     what must be proved, 2505.

[References are to sections; e refers to Erroneous Instructions.]

**CONVICTION—Continued.**

- on confession alone, 2522, e 4373.
- proof of intercourse alone, rape, 2806.
- presumption of innocence not a shield from, 2644.
- prevented by reasonable doubt of one jurymen, 2690.
- proof required for, principal and accessory, 2727.
- reasonable doubt, evidence required, 2679.
- records prima facie proof of, e 4503.
- testimony of accomplice, charging that it is unsafe, e 4490.
- must be corroborated to justify, 2748.
- to a moral certainty, reasonable doubt, 2682.
- whether warranted by uncorroborated admission of relationship, incest, e 4517.

**CONVINCED—**

- by evidence, preponderance sufficient, e 3334.

**COOLING TIME—**

- homicide, hostile acts, e 4685.
- provocation, 3095.
- facts, constituting, question of law, 3096.
- whether a question of fact or of law, e 4684.
- murder in first degree, assault by deceased on defendant, 2992.
- second degree, killing before it had elapsed, 3012.

**CO-OPERATING—**

- with burglar, attempt of burglary, 2887.

**CO-OPERATION—**

- necessary between patient and doctor, malpractice, contributory negligence, e 3722.

**CORN—**

- bad condition may be proved although partial examination was made, e 3485.

**CORNERS—**

- lost, government, rule that monuments govern, e 3460.

**CORONER'S VERDICT—**

- is evidence of cause of death, 1213.
- life insurance, suicide, e 3683.
- not evidence of negligence, 1349.

**CORPORAL PUNISHMENT—**

- killing by, 2959.

**CORPORATIONS—**

- and individuals stand equal, 365.
- authority of president of, as to negotiable instruments, release of liability, e 4195.
- error for counsel to criticise method of securing statute, 239.
- liability of persons holding themselves out as officers, 2418.
- may be guilty of malice, 789.
- members and officers in same position as other creditors, 2417.
- no individual liability for contracts made as officers, 2419.
- not bound by acts of individual members, 478.
- notice to chairman not notice to board, 478.
- estoppel, 2422.
- preference of creditors of an insolvent corporation, series, 1084.
- promissory note made for previous indebtedness, liability of directors, e 4194.
- public utility, irrigation, 666.
- purchase of capital stock, ownership, burden of proof, 2420.
- salary of vice president, period of contract, 2421.
- same status as individual, action for negligence, 1366.
- stands in law same as any other person, 239.
- street railroad, prejudice against, reading instructions by lawyers, 2017.

**CORRECT—**

- statement of abstract proposition of law sometimes error, e 4619.



[References are to sections; e refers to Erroneous Instructions.]

**CORRECTING—**

error by new trial, twice putting in jeopardy, e 4504.  
false statement, fraud, innocently made, e 3649.  
statement of attorney in argument, reference to Biblical laws, 2756

**CORRECTNESS—**

of apprehension of danger, right of self defense does not depend on, e 4705.

**CORROBORATED—**

confessions, entitled to great weight, 2520.  
testimony of accomplice, no greater weight because, e 4487.

**CORROBORATION—**

circumstantial evidence sufficient for, seduction, 2835.  
evidence as to ancestors' insanity admissible only in, 2601.  
lacking as to admission of relationship, incest, whether conviction justifiable, e 4517.  
necessary, confession, 2523, e 4373.  
of confession, received with caution without, 2524.  
of testimony, favoring defendant's theory of innocence, e 4427.  
*of testimony of accomplice,*  
    assuming that it is sufficient to convict, e 4488.  
    by confession, 2750.  
    must be extraneous evidence, seduction, 2753.  
    necessary to convict, 2748, e 4485.  
    rape, character of, as affecting, e 4524.  
    not necessary, 2751.  
    what sufficient, 2749.  
omitting to define, e 4489.  
rape, whether necessary, 2820.  
required of false witness, e 3325.  
seduction, e 4536.  
statute not requiring, testimony of accomplice sufficient, e 4486.  
voluntary confession, arson, 2532.

**CORRUPTION—**

of delegates, conspiracy for, e 4586.

**CO-SURETIES—**

negotiable instruments, partners, 2190.

**COTTON YARD—**

negligence, railroads, injury by fire, 1996.

**COUGH—**

habitual, defined, 1192.

**COUNSEL—**

admissions of, cannot prejudice defendant's rights, e 4374.  
advice of, in malicious prosecution, 1279, 1280, 1284.  
*argument of,*  
    causing reasonable doubt, should not acquit, e 4463.  
    cautioning jury against, e 3321.  
    consideration due to, 2758.  
    laying foundation for civil suit, 2757.  
denunciation of witness by, credibility, e 3320.  
full statement of facts to, in malicious prosecution, 1279, 1280.  
statement by, e 3322.

**COUNSELING—**

necessary, principal and accessory, 2739.

**COUNTER ASSAULT—**

bringing on difficulty, self defense, 2849.  
not justified by assault, e 4540.

**COUNTS—**

guilty only as to one proven, reasonable doubt, 2702.  
recovery on proof of allegations contained in one or more counts of declaration, 1345.  
two, in indictment, duty to consider all evidence, 2774.

[References are to sections; e refers to Erroneous Instructions.]

**COUNTY—**

commissioners, duty to construct bridges in workmanlike manner, 1664.  
court, can only bind county when acting as court, 479.

**COURSES—**

and distances controlled by monuments, 1138.

**COURT—**

control over examination of witnesses, 102.  
drawing inference of fact, murder, concealment of body, e 4652.  
jury should receive law from, criminal trials, 2620.  
may caution witnesses as to incrimination, 86.  
    emphasize to the jury the importance of the case on trial, 406.  
    their duties, 406.  
should protect continued interruption by counsel, 102.  
U. S., manslaughter defined, 3024.

**COVENANT—**

to repair, landlord and tenant, what is, e 3694.

**COW—See VICIOUS ANIMALS.**

**COWARDICE—**

killing through, self defense barred, 3137.

**CREDIBILITY—**

of witnesses in general, Chapter XVI, 327-340, e Chapter CIV, 3300-3322.

“accepting” evidence of either party, e 3315.

**admissions,**

as affecting, Chapter XXI, 381-390, e Chapter CXI, 3361-3371.  
at time of accident, 383.  
of husband or wife as affecting, 386.  
    plaintiff, 382.

affirmative evidence better than negative, 336, e 3303.  
    compared with negative, 336.

aid in determining preponderance and burden of proof, 351.

and weight of testimony are questions of fact, 327.

appearance of witness, e 3307.

believing evidence of plaintiff's side, e 3314.

    some witnesses and discarding others, e 3313.

character and former life of witness may be considered, 337.

circumstantial evidence, 2508.

commenting on weight of evidence, e 3318.

conduct of the witnesses on the stand, 332.

confessions made under influence of hope or fear, e 4370.

conflicting evidence, elements to be considered by jury, 329.

    how jury determine those more worthy of credit, 329.

conflicting testimony, duty of jury to reconcile, 332.

    what jury should consider, 332.

corroboration required of false testimony, e 3325.

court does not express an opinion of, 405.

degree of credit to be given the witness for the jury alone, 338.

denunciation of witness by counsel, e 3320.

depends on ability of witness to know and disposition to tell the truth, 338.

determined by appearance of witnesses, 331, 332.

    manner of testifying, 331, 332.

    witness' apparent candor or want of it, 331, 332.

        fairness or want of it, 331, 332.

        intelligence or want of it, 331, 332.

        interest or want of it, 331, 332.

disinterested witness entitled to greater weight, 338.

    means of information, 339.

duty of jury to distrust entire testimony when willfully false in a material fact, 345.

    reconcile conflict of testimony, 330, 345.

    reconcile testimony, e 3302.

[References are to sections; e refers to Erroneous Instructions.]

**CREDIBILITY—Continued.**

dying declaration for jury, premonition of death not a guaranty of truth, e 4687.

elements to be considered in determining, 334, 335, 337.

weighing testimony of false witness, 342.

where witness testifies falsely, 347.

in determining, 411.

in Missouri, 341.

in passing upon, 328.

entire testimony of witness may be disregarded, when, 346.

distrusted when willfully false to a material fact, 345.

equal number of witnesses' evidence not necessarily evenly balanced, 331.

on same point on each side, 331.

evidence as to reputation for truth and veracity may be considered, 347.

evenly balanced, 331.

not necessarily evenly balanced, 331.

of impeachment may be disregarded unless corroborated, 373.

witness swearing falsely, when may be disregarded, 342.

willfully and knowingly swearing falsely may be disregarded, 342b.

*expert testimony*—Chapter XXII, 391-397, e Chapter CXI, 3373-3379.

does not establish truth of fact, 393.

must be supported by other evidence, 392.

subject to same rules as other testimony, 393.

weight to be given, 393, 394, 395.

false swearing, must be corroborated, e 3324.

should be to a material matter in issue, e 3329.

false testimony may be disregarded whether corroborated or not, 341.

falsus in uno, falsus in omnibus, 344, e 3327-3328.

fear of losing employment, e 3310.

for the jury, 1509.

former life of witnesses, 337.

general reputation, e 3353-3360.

how determined, 334, 341.

preponderance of evidence is determined, 351.

testimony of parties should be weighed, 363.

plaintiffs should be weighed, 363.

hypothetical question, 392.

Illinois rule for passing upon, 348.

impeachment in general—Chapter XX, 373-380, e Chapter CVIII, 3353-3360.

in conflicting evidence jury may look to opportunity, 331.

*interest of witnesses,*

as affecting, 338.

as a party or otherwise, 338.

bias, or prejudice, 328, e 3304.

party in other similar litigation, e 3305.

manner of determining credibility, 338.

interested witness may be as honest as another, e 3306.

swearing falsely, may be disregarded unless corroborated, 342.

jury are the exclusive judges of, 333c.

has liberty to reject all or any portion of testimony of witness

who is known to have sworn falsely, 347f.

right to consider surrounding circumstance, 331.

jury instructed "should" instead of "might" consider certain facts, e 3319.

**JURY,**

*may consider,*

all the evidence, facts and circumstances, 334.

apparent fairness or bias of witness, 334.

bias of witness, 334.

candor of witness, 334.

consistency of the testimony of witness, 334.

demeanor of witness, 334.



[References are to sections; e refers to Erroneous Instructions.]

**CREDIBILITY—JURY—Continued.**

- frankness of witness, 334.
- means of information of witness, 334.
- motives of testimony, interest of witnesses, 328.
- opportunity of witness for seeing and knowing, 334.
- reasonable story told by witness, 334.
- temper of witness, 334.
- which witness more worthy of credit, 334.
- may** determine, from appearance of witness, 329.
- disregard entire testimony where witness swears falsely, 341.
- testimony willfully false, 344.
- give credence to witness whom they believe, 331.
- regard surrounding facts and circumstances where witnesses equal, 331.
- reject evidence of witness who has knowingly sworn falsely to material fact, 347.
- take into account experience and relation among men, 332.
- treat with distrust and suspicion testimony of witness who testifies falsely, 347.
- need** not disregard all of the evidence of witness who testifies falsely, 347.
- not** bound to accept as true statements that are not reasonable, 334.
- should** consider all the evidence, 328.
- evidence altogether, 332.
- of both parties in determining, 335.
- judge all witnesses precisely the same, 333.
- not** disregard evidence from caprice, 333.
- because of witness' employment, 333.
- reconcile conflict of testimony, 332.
- sole judges of, and weight of evidence, 327, 328, 333.
- larceny**, tax schedules admissible to attack credibility of prosecuting witness, e 4780.
- matter** exclusively within province of the juror, 347.
- means of information may be considered in determining, 339.
- method** of determining preponderance, 353.
- what is proven, 328.
- nature** of evidence given by witnesses, 332.
- negative** evidence compared with affirmative, 336.
- no** presumption that witness is telling truth, conduct on stand, e 3312.
- not** considered on motion to direct, 254.
- decided by personal experience of jurors, e 3360.
- to be determined by the court, 347.
- number** of witnesses may be limited, 86.
- to be considered in determining, 354.
- of** complaining witness in bastardy proceedings, 2794.
- confession, for jury, e 4367.
- defendant swearing falsely, 2561.
- and complainants witnesses should be judged alike, 333.
- conviction of former offense, admitted to affect, e 4391.
- of** evidence, may be submitted to jury, 182.
- his own witnesses vouched for by party, e 3358.
- impeached witness uncorroborated, e 3355.
- partners, books falsified, e 3351.
- parties to the suit, e 3349.
- witnesses, 1186.
- one** credible witness against many, knowingly false testimony, as to material facts, e 3301.
- who testifies falsely in one particular may not be believed, 345.
- opinions of other witnesses, jury not bound by, 328.
- opportunity and ability of witness to know, e 3308.
- oral admissions received with caution, 385.
- palpably false testimony, 343, e 3326.
- paying expenses of witness, e 3311.
- positive witness entitled to more weight than negative, 336.
- preponderance**, how determined, 335.

[References are to sections; e refers to Erroneous Instructions.]

# **CREDIBILITY—Continued.**

- presumption that witness speaks the truth may be repelled, how, 333c.
- probabilities and speculations, e 3317.
- prosecutrix only witness, bastardy proceedings, 2795.
- rape, character of, as affecting, e 4524.
- question of fact, 327.
- reasonable account for possession of stolen goods, burglary, commenting on weight of evidence, e 4570.
- rejecting evidence of perjured witness, 2767.
- relationship, probability of story told, 328a.
- singling agent out for comment, e 3415.
- out one witness, believing theory of either side, e 3316.
- for comment, e 3331.
- swearing falsely—Chapter XVII, 341-350, e Chapter CV, 3323-3331.
- testimony disregarded, wilfully false, e 3323.
- of parties—Chapter XIX, 363-372, e Chapter CVII, 3349-3352.
- stipulated into the case, 2771.
- unless testimony palpably false may be considered, 343.
- value of expert testimony, 392.
- verbal admission to be received with caution, 384, e 3362.
- weight of verbal and written admissions, e 3361.
- to be given contradictory statement, 375.
- testimony of impeached witness, 342.
- interested witness swearing falsely, 342.
- uncontroverted testimony of credible witness, 340.
- to more intelligent and better informed witnesses, e 3309.
- what jury may consider in determining weight of evidence, 332, 334, e 3300.
- should consider in passing upon, 328.
- where interested witness swears falsely, 342.
- when evidence is conflicting, elements to be considered, 329.
- conflicting, jury may determine from manner of testifying, 329.
- evidence of witness may be disregarded unless corroborated by credible evidence, 348.
- jury may disregard testimony unless corroborated by other credible witness, 348, 349.
- witness must be corroborated by other credible evidence, 348.
- where witness deliberately testifies falsely to material fact, 347.
- has testified falsely to material matter, 347.
- testify opposite each other, 331, 332.
- willfully and knowingly exaggerating evidence, 350, e 333, 3330.
- false testimony of witness in material facts may be disregarded, 346.
- may be disregarded unless corroborated by other credible evidence, 346.
- witness knowingly testifying falsely, 342.
- swearing falsely, Missouri rule, 341.
- may be disregarded by jury, 341, 344, 347.
- testifying to reputation of drunkard, e 4342.

# **CREDIT—**

- giving voluntarily upon an outlawed account does not save the running of the statute of limitation, 1254.
- negotiable instruments, balance on account, 2140.
- obtaining upon false representations, 1098.
- partnership, extended on account of particular partner, notice of dissolution, 2211.
- sale on, 1078.

# **CREDITORS—**

- corporation, members and officers in same position as others, 2417.
- fraud against—Chapter LI, 1054-1094, e Chapter CXXXV, 3629-3636.
- assignment void, false representation of financial standing, knowledge of assignee, e 3631.
- bailment or sale, rights of creditor, e 3636.
- fiduciary relations, conveyance set aside, e 3634.
- never presumed, must be proven, e 3630.

[References are to sections; e refers to Erroneous Instructions.]

**CREDITORS—Continued.**

- right to transfer property in payment of debt due, motive immaterial, e 3632.
- sale not void for mere knowledge of vendee of fraudulent intent, e 3633.
- wife getting property from husband, e 3635.
- fraudulent sale to hinder, burden of proof, e 3629.
- giving a mortgage to defraud, 1321.
- knowledge of, debtor selling property and retaining possession, replevin, e 4239.
- payment of proceeds of sheriff's sale to, after appointment of trustee, good faith, burden of proof, 2424.
- right to prefer, 1079-1084.
- specific intent to defraud, 1058.
- when wife's estate may be liable for husband's debts, 1027.

**CRIME—**

- admission of other crimes, Indiana, 2564.
- completed, when, larceny, date of, 2781, 3237.
- detection of, means must not amount to inducement or solicitation, 2780.
- state must prove homicide, 3172.
- time not of the essence of, larceny, 3238.

**CRIMINAL—**

see also

ABDUCTION.	IDENTITY OF ACCUSED.
ABORTION.	INCEST.
ADULTERY.	INDICTMENT.
ALIBI.	INSANITY.
ARREST.	INTENT.
ASSAULT AND BATTERY.	INTOXICATING LIQUORS.
ATTEMPT TO ESCAPE.	INTOXICATION.
BASTARDY.	LARCENY.
BIGAMY.	MALICE.
BRIBERY.	MALICIOUS MISCHIEF.
BURDEN OF PROOF.	MANSLAUGHTER.
BURGLARY, ROBBERY.	MOTIVE.
CHARACTER, EVIDENCE.	MURDER.
CIRCUMSTANTIAL EVIDENCE.	PERJURY.
CONCEALED WEAPONS.	PHYSICIANS AND SURGEONS.
CONFESSIONS.	PREMEDITATION.
CONSPIRACY.	PRESUMPTION OF INNOCENCE.
DEFENDANT'S TESTIMONY.	PRINCIPALS AND ACCESSORIES.
DISORDERLY HOUSE.	PROVOCATION.
DYING DECLARATIONS.	RAPE.
EMBEZZLEMENT.	REASONABLE DOUBT.
FALSE PRETENSES.	RECEIVING STOLEN PROPERTY.
FLIGHT.	ROBBERY.
FORGERY.	SEDUCTION.
GAMES AND GAMBLING.	SELF DEFENSE.
HOMICIDE.	

- accused entitled to list of witnesses and copy of indictment, 113.
- agreement to dismiss prosecution void, 639.
- bank receiving deposits while insolvent, 574.
- wrongfully accepting deposits while in failing circumstances, series, 576.
- cases, order of statement in discretion of court, 72.
- compelling defendants to put shoe in foot-print, 150.
- submit to tests for identification, 150.
- court can not direct verdict of jury, 263.
- deposit of check for collection, series, 575.
- erroneous to instruct jury to find defendant guilty, 263.
- failure of bank, prima facie evidence of insolvency, 574.
- giving instruction with abstract principle of law not error, 179.
- great latitude of cross-examination of prosecuting witness, 138.
- if jury have reasonable doubt they should acquit, 409.
- have no reasonable doubt should convict, 409.
- satisfied beyond reasonable doubt jury should convict, 399.
- in capital cases verdict should be returned in presence of parties and their attorneys, 273.



[References are to sections; e refers to Erroneous Instructions.]

# CRIMINAL—Continued.

- intent of bank to defraud defined, 573.
  - presumed from doing prohibited act, bigamy, 2798.
  - receiving stolen property, must exist at instant of receiving, 3253.
- jury in considering evidence should consider no creed, condition, color or nationality, 399.
  - judges of law and facts, 181.
  - must determine issue from evidence produced before them, 110.
  - should not be influenced by prejudice or passion, 403.
- latitude of cross examination, 138.
- number of peremptory challenges allowed, 59.
- prima facie evidence, of insolvency of bank, 574.
- proceedings, malicious prosecution, justification for beginning, e 3712.
- prosecution,—agreement to dismiss—void, 639.
  - adultery, disposition or inclination, 2787.
- reference of state's attorney to failure of defendant to testify, 238.
- right of accused to meet witnesses face to face, 114.
  - public trial absolute, 63.
- separation of jurors during trial, 99.
  - jury with consent, 101.
- surgical instruments used for illegal purposes may be shown jury, 146.
- tests for purposes of identification, 150.
- tools used in commission of burglary may be shown jury, 146.
- under common law no provision made for list of witnesses, 113.
- verdict should be returned in open court and in presence of attorneys, 273.
- weapon used in assault may be shown jury, 146.
  - court may direct verdict of not guilty, 263.
  - fraud of bank inferred, 573.
  - jury may disregard court's instructions as to law, 181.
  - list of witnesses not furnished, they may be excluded, 113.
- where jury satisfied of defendant's guilt they owe it to the community to find him guilty, 189.
  - several indicted number of peremptory challenges, 59.
- witnesses subsequently discovered may testify, 113.

# CRIMINAL CONVERSATION—Chapter XXVII, 495-501, e Chapter CXV, 3430-3432.

- character evidence may be offered, 498c.
- condonation no defense, e 3430.
  - of offense may lessen damages, 500.
- consent of husband good defense, 500.
- damages, jury may consider the shame, ridicule and mental anguish of husband in assessing, 776.
  - measure of, 773-777.
  - what may be considered in assessing, 773.
- wounded feelings of husband and wife may be considered in assessing, 774.
- domestic and social relations of husband and wife may be considered in assessing damages, 774.
- elements that must be proven to sustain, 498.
- erroneous comment on evidence, e 3431.
- husband forgiveness no defense, 499.
- hypothesis of innocence, e 3431.
- may be lessened by condonation, 500.
- measure of damages should be compensation for injury suffered, 776.
- must be without plaintiff's aid or procurement, 775.
- relations between plaintiff and his wife may be considered in assessing, 773.
- subsequent relations between husband and wife may be considered in assessing damages, 773.
- what must be proved to sustain the action, 498.

# CRITERION—

- for determining who are principals, 2724, e 4474.
- of murder, intent to kill not, e 4662.

[References are to sections; e refers to Erroneous Instructions.]

# **CROPS—**

- growing, sale of land, title to, 2220.
- when personal property, 2219.
- levy of, by landlord, 1330.
- lien on, by landlord, knowledge of by purchaser, 1333.
- mortgaged, mortgagor consuming, replevin, e 4243.
- possession of, landlord and tenant, 1233.
- purchaser of from tenant, lien of landlord, 1332.
- replevin, levy on and taking possession, 2244.
- title to, landlord and tenant, 1233.
- to be divided after harvest between landlord and tenant, 1233.

# **CROSS EXAMINATION, 134-138.**

- federal rule, 135-136.
- latitude, 134.
- leading questions, when proper, 137.
- of opposing party, latitude, 134.
- on whole issue, 135-136.

# **CROSSING TRACK—**

- assuming risk of, 1869.
- by fire engines, 2095.
- by vehicles, 2094.
- contributory negligence, personal injury, 1950.
- dangerous place, voluntarily, railroads, 1907.
- duty of person, 1882.
- failure of railroad servants to avoid threatened injury, 1896.
- in covered milk wagon, 1916.
- knowing that cars were shifted there, contributory negligence, 1951.
- looking out of back of buggy only, 1917.
- negligence, guilty as charged in declaration, 1866.
- presumption that party stopped, looked and listened, 1921.
- swiftly on bicycle, without looking and listening, 1915.

# **CROSSINGS—see also NEGLIGENCE RAILROADS.**

- backing railroad cars, after gate opened, 1894.
- duty of railroad to maintain gates or flagman, 1891.
- ring bell at, 1882.
- duty to look and listen excused, 1914.
- stop, look and listen, 1910.
- failure of person to stop, look and listen, 1911.
- farm, negligence, duty of railroad to repair bridge, 2011.
- railroads, less care required, 2009.
- stock injured, 2010.
- fire engines crossing track, 2095.
- gates down, contributory negligence, 1918.
- highway, reasonable care required at, 1863.
- train has preference, 1868.
- horse injured in flangeway, 1980.
- injury at, employe operating car for private use, 1901.
- through horse balking, 1898.
- "kicking" car, when willful negligence, 1895.
- liability for repairs, 1938.
- made public by use, duty of railroad to give signal, 1890.
- negligence, inferred, from injury, ordinances, 1934.
- obstructing view of track at, by cars, 1878.
- open gate, negligence, 1893.
- pedestrians, 2093.
- private, duty of railroad to give signals, 1889.
- proof of death must correspond with allegation, 1933.
- right of railroad servants to assume that driver of vehicle will remain at safe distance, 1925.
- stock injured, 1974.
- neglect to ring bell, etc., 1984.
- vehicles crossing track, 2094.
- warning given by approaching trains, 1870.
- watchman at, care to be exercised, 1897.
- when flagman necessary at, negligence, 1892.

[References are to sections; e refers to Erroneous Instructions.]

**CROSSINGS—Continued.**

whistle blown at insufficient distance from, 1887.  
need not be blown continuously, 1886.

**CRUEL—**

and inhuman manner, manslaughter not always in, e 4643.  
treatment, killing servant or child by, 2960.

**CRUELTY—**

abusive language amounts to, in some states, 1007.  
not sufficient to constitute, bodily harm necessary, 1008.  
acts of, provoked by complainant, 1009.  
as an excuse for desertion, 1005.  
cause for divorce, 1006-1009.  
condonation of, 1012.  
divorce, 1006-1009.  
acts must be limited to time alleged in bill, e 3622.  
personal violence not necessary in some states, 1007.

**CULVERTS—**

and bridges, degree of care required by railroads, 1760.  
knowledge of presence of dangerous culverts or cattle guards, 1582.

**CURE—**

expense of, measure of damages, personal injury, e 3570, 3584.

**CUSTODY—**

killing policeman after escape from, murder in first degree, e 4633.

**CUSTOM AND USAGE—**

estoppel by insurance company by uniform course of business, 1169.  
form part of contract, 637.  
general, authority of one who occasionally runs engine, e 3874.  
must be generally known and established among those engaged in business, 637.  
principal consents in agent's market, 472.  
terms of contract of agent affected by, 601.

**CUSTOMARY—**

and usual commission to be allowed broker, 599.

**CUTTING TIMBER—**

damages, measure of, 771.  
eminent domain, damages, market value, e 3560.  
purchaser at tax sale, trespass, 2310.  
unlawful, trespass, real estate, 2309.

**CUTTING TREES, 3299.**

trespass, for telephone system, 2311.

**DAM—**

right to, flooding land, liability, what constitutes a stream, e 4279.  
watercourses, dedication, 2363.

**DAMAGES, MEASURE OF, Chapters XLI-XLIV, 733-991, e Chapters CXXVIII-CXXXI, 3502-3618.**

**IN GENERAL, 733-738.**

attorneys' fees not to be included, e 3524.  
exemplary defined, 738.  
for dishonoring check, e 3457.  
general and special, defined, 733.  
including too much law in one instruction, e 3530.  
jury not to compromise between questions of liability and amount of damages, e 3740.  
should not permit question of probability of large judgment being appealed in considering, 735.  
liability to be settled first, 734.  
limited to claim in complaint, 736.  
nominal, defined, 869.  
question of appeal should not be considered by jury in assessing, 735.  
rank and influence of defendants, e 3524.  
recoupment of, action on bond, 2139.  
reference to verdict in other cases, 245.



[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—IN GENERAL—Continued.**

remote or speculative not to be considered, 849.  
where check is raised, 506.

**ALIENATION OF AFFECTION, e 3428, 3502.**

of wife, elements that may be considered, e 3502.

**ASSAULT AND BATTERY,**

for civil assault, 519, 963-969, e 3606-3608.  
abusive language, mitigation of, 969.  
assessing damages without proof, e 3607.  
mental suffering and mortification of feeling may be considered  
in action of assault, 967-968.  
mitigation of, 969, e 3438.  
punitive, may be allowed, 964.  
reference to defendant's ability to pay, e 3606.  
social position, sense of shame, humiliation, loss of honor, may  
be considered in estimating, 967-968.  
undue familiarity with female, what considered, e 3443.  
what to consider, smart money, 963.

**ATTACHMENT AND GARNISHMENT, 739-743, e 3503-3504.**

amount of, e 3503.  
exemplary may be allowed for maliciously suing out garnish-  
ment, 743.  
wrongful attachment, 741-742, e 3503.  
for wrongful writ of sequestration, e 3503, 3504.  
in action on garnishment bond, 743.  
in attachment, suspension of business proper element, 740.  
issuance of attachment without statutory grounds therefor, 741.  
on bond in attachment, 743.  
loss of credit may be considered as an element, 743.  
wrongful, elements of, 739.  
writ of sequestration wrongfully sued out, e 3504.

**COMMON CARRIERS,**

condition requiring claim to be presented within specified time,  
1717.  
elements that may be considered in assessing, against carrier  
where passenger is compelled to ride in filthy or unfit cars,  
1764.  
for allowing improper persons in car, 1764.  
compelling passenger to ride with objectionable fellow pas-  
senger, 1764.  
failure to deliver machinery, e 3511.  
heat car, 1763.  
failure to run trains according to schedule, 1770.  
for goods lost, market value where to be delivered, 800.  
injuries received by passenger riding in filthy or unfit car,  
1764.  
negligence in drying, curing, packing and handling fruit, 796.

**CONTRACTS AND SALES, 744-764, e 3505-3519.**

actual loss of wages, 762.  
breach of promise, character and habits of plaintiff, 766.  
to marry, 765, 766, 767.  
breach of special building contract, cannot recover quantum  
meruit or quantum valebat, e 3516.  
contract price and market price, at place of delivery is measure  
damages, 748.  
contract providing against competition, 755.  
default in delivery on time, 749.  
defective construction under building contract, 761.  
plans, architects, e 3436.  
setting of furnace, 757.  
work, measure of damages in removing, series, 760.  
defects in articles manufactured, 753.  
depriving party of opportunity to perform, 751.  
difference between contract and current price on refusal to ac-  
cept goods, 745.  
discharge of employe, 763.  
servant, 762.

[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—CONTRACTS AND SALES—Continued.**

- doing different work from that contracted for, e 3519.
- failing to accept goods, 746.
- failure of irrigation company to supply water, 666, e 3512.
  - to contribute money to joint adventure, 754.
  - deliver grain, 661.
  - furnish of quality provided, 756.
  - purchase merchandise, 746.
- fair cash market value, 843.
- for dentist's work, 725.
  - goods sold, e 3507.
  - prevention of performance of contract, e 3515.
  - time lost in making inquiries about lost goods, e 3511.
- in action for commissions, 764.
- increased value of land in contemplation of parties to contract, e 3505.
- installing machinery not reasonably fit for purpose intended, 761.
- notice to stop manufacturing having been given by buyer, e 3509.
- negligence, overflow of boiler, 2127.
- omitting element, extra work, delay, e 3517.
- property bought for resale, 750.
- punitive not allowed on suit on contract, 759.
- refusal to accept personal property, 745.
  - deliver personal property, 747.
- removing defective work, series, 760.
  - switch supposed to be permanent, 2007.
- renunciation of contract to buy property, 747.
- re-sale, e 3510.
- sale of goods, special purpose must have been brought home to party to justify special damages, 3508.
  - mortgaged property, e 3729.
  - series, 760.
- servant entitled, in absence of agreement, to what services are worth, e 3518.
- special in sale of goods, e 3508.
- to ship coal, series, 752.
- warranty, measure of damages for breach of, e 3513.
  - of title, e 3514.
  - to furnish repairs measured by the cost of such needed repairs, e 3513.
- where employe wrongfully discharged, 721.
  - property not delivered within specified time, 749.

**CONVERSION, 768-772, e 3520-3521.**

- cannot be recovered where owner negligently permits, 795.
- time, when measured in conversion, e 3520.
- value of property at time of conversion with interest, 768, e 3521.
- wrongful conversion of property, 769, e 3520.
  - timber, 770.
- wrongful removal of partition fence, 772.

**CRIMINAL CONVERSATION, 773-777.**

- condonation, may be lessened by, 500.
- domestic and social relations of husband and wife may be considered in action for, 774.
- jury may consider the shame, ridicule and mental anguish of husband in assessing, 776.
- must be without aid or procurement of husband, 775.
- should be compensation for injury and damage done, 776.
- what may be considered in assessing, 773.
- wounded feelings and affections of husband may be considered in action for criminal conversation, 744.

**EMINENT DOMAIN, Chapter XLII, 840-881, e Chapter CXXIX, 3543-3556.**

- actual fair cash market value, measure of, 843-845.
- pecuniary loss not necessarily the rule of damages, 850.

[References are to sections; e refers to Erroneous Instructions.]

DAMAGES, MEASURE OF—EMINENT DOMAIN—Continued.

- allowance for benefits, public utility, expense of adjusting land after part taken, e 3553.
- assessed once for all, e 3550.
- availability for manufacturing purposes, 847.
- benefits are limited to such as derived from improvements, 852.
  - may be deducted, when, 851.
  - of drainage, argumentative, e 3557.
  - to be considered, e 3551.
- best use to which the property was reasonably susceptible, e 3545.
- borrowing earth, interfering with drainage, e 3561.
- change of street grade, 871-873.
- common benefits not considered, e 3555.
- conjectural, inconvenience, e 3558.
- construction of railroad, 854.
- creating irregular fields, e 3550.
- cutting timber, market value, e 3560.
- damage to residue, e 3564.
- depreciation in value of property on account of public improvements, 850.
- difference in market value of land as affected by the running of cars, e 3548.
- elements considered when part only of property taken, e 3563.
- expense of procuring another place of business may be considered in assessing, 848.
- extension and operation of railroad causing diminution in value of real estate, 856.
  - of lots may be considered by jury in assessing, 862.
- facts as well as stipulations must be considered in assessing, 881.
- financial condition of parties immaterial, 874.
- fire, increased danger from may be considered in assessing, 861.
- future loss in construction of buildings, 849.
- improvements, leasehold interest, e 3556.
- inconvenience an element of, 858.
  - in working mine, an element, 859.
  - of access to property, e 3549.
  - cutting of farm, e 3559.
- increased danger from fire from locomotives, e 3549.
- injuries to adjoining property may be considered in action of condemnation, 842.
  - business, elements involved, e 3537.
- inspection of premises by jury, e 3554.
- jury should be governed by testimony of witnesses and by inspection in assessing, 863.
- just compensation defined, 841.
- lessening business, element of, 849.
- loss of probable profits in business may be considered, 848.
- market value enhanced, e 3552.
  - of land taken or not taken, 880.
- other uses to which property may be put may be considered, 846.
- part condemned, remainder irregular fields, 878.
- peculiar benefits may be deducted, 851.
- possible benefits are to be excluded in assessing damages, 852.
- present or future, may be considered in assessing, 884.
- presumption, burden of proof, e 3566.
- private property not to be taken or damaged, constitutional provision, 840.
- projected improvement may be considered in assessing, 843.
- property not taken, benefits, e 3562.
  - on adjoining street, 857.
- public safety, increased cost of doing business, e 3546.
- railroad right of way through farmland, measure of, 867.
  - unfenced, 866.
- real estate, market value of acreage for purpose of subdivision, 804.
- remote and speculative, 849.



[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—EMINENT DOMAIN—Continued.**

right of way through farmlands, 867.  
 riparian owners entitled to use of dock, etc., 868.  
     ice to middle of stream, 868.  
 rule as to compensation and benefits conferred, e 3547.  
 taking property of railroad company, e 3544.  
 to be assessed as of the day of filing petitions, e 3543.  
 use for which property is suitable and adapted may be considered, 846.  
 value of whole tract to be considered in assessing where part taken, 877.  
 waiver, right of property owner, statute, e 3565.  
 weight to be given view of premises by jury, 864.  
 what may be considered in assessing, 842, 850.  
     owner or juror would take, incompetent, 845.  
     should and should not be considered in assessing, 877.  
 when nominal only, for erosion of shore land, 869.  
 where part only condemned benefits to remainder not to be considered, 876.

    condemned, diminished value of remainder considered, 876.

**FIRE, INJURIES BY, 832, 1185, e 3526, 3527.**

destruction by fire, negligence assumed, e 3535.  
 for goods destroyed by fire, proof of loss, e 3526.  
 loss by fire, 833, e 3536.  
 maximum amount specified in insurance certificate, e 3527.  
 to growing timber, 802.  
 value of land before and after, 802.

**FRAUD, DECEIT, MISREPRESENTATION,**

actions for fraud, 831, 1103, 1122, e 3522.  
     misrepresentation, e 3523.  
 exemplary cannot be assessed without proof of actual damages, e 3524.  
     may be allowed in action for fraud and deceit, 830.  
 performance after knowledge, e 3639.

**INJUNCTIONS,**

wrongful issuance of injunction, e 3506.

**INTEREST,**

breach of contract, interest allowed, e 3506.  
 interest may be allowed for non-payment of money, when, 758.  
     when should be allowed, computation of, 736.  
 unreasonable and vexatious delay, interest, 506, 737.

**INTOXICATING LIQUOR, SALE OF, 778-781, e 3528-3530.**

causing death, 778.  
 loss of support, an element of in action for sale of intoxicating liquors, 781.  
 may be allowed for causing intoxication of husband, 781.  
 mental suffering not an element of, 780.  
 pecuniary loss only may be allowed, 780.  
 what may be considered in assessing for causing intoxication, 779, 781.  
 when exemplary may be allowed, for wrongful sale of intoxicating liquors, 778, 779, 1223, e 3528.

**LANDLORD AND TENANT,**

action by landlord for failure of tenant to keep in repair, e 3695.  
 damages to personal property in putting tenant out of possession, e 3533.

*eviction,*

    what should cover, 829.  
 punitive, eviction by landlord in wanton and unwarranted manner, e 3704.  
 wrongful eviction, 828, 829.

**LIVE STOCK, INJURIES TO, 782-785, e 3529-3530.**

by collision of train, 784.  
 duty to sell to avoid loss, e 3529.  
 elements to be considered, 784.  
 for injury to cattle, e 3530.

[References are to sections; e refers to Erroneous Instructions.]

- DAMAGES, MEASURE OF—LIVE STOCK, INJURIES TO—Continued.**  
 for injury to horses while being transported, 785.  
 herding cattle on plaintiff's land, measure of, 825.  
 in action for injuries to stock in transportation, 782-3.  
 option to return stock or sue for, warranty of live stock, e 4255.
- MALPRACTICE,**  
 measure of, 1302, 1303.  
 patient can only recover for additional pain, 1298.
- MALICIOUS PROSECUTION AND FALSE IMPRISONMENT, 786-791, e 3531, 3532.**  
 actual and punitive damages may be allowed in action for malicious prosecution, 790.  
 arrest of passenger, 789.  
 considering plaintiff's feelings, 1284.  
 reputation of plaintiff, 1284.  
 elements that may be considered in determining in action for malicious prosecution for wrongful arrest, 789.  
 in action for malicious prosecution, 786, 1277, 1284.  
 injury to credit of business man, 1284.  
 feeling, credit and reputation, 788.  
 punitive may be allowed, 790.  
 what jury should consider in assessing for malicious prosecution, 786, 1284, e 3531.  
 when exemplary may be allowed, 787, 789.  
*false imprisonment,*  
 measure of, 791, e 3532.  
 claim not lost because release obtained by defendant, e 3717.  
 exemplary or vindictive for false imprisonment, e 3532.
- NEGLIGENCE CAUSING DEATH—Chapter XLIV, 970-991, e Chapter CXXXI, 3609-3618.**  
 action by administrator where death is from other causes, 978.  
 next of kin for injuries causing death, 980.  
 coal mine operator, words of statute, 990.  
 discretion of jury, expectancy of life, e 3615.  
 disease causing death accelerated by personal injury, substantial damages, e 3617.  
 earning capacity of deceased, age and duration of life, e 3610.  
 elements of, death of wife, 979.  
 that may be considered, 976-977, 986.  
 evidence of pecuniary loss, e 3612.  
 expectancy of life, 971.  
 mortality tables, not conclusive, e 3614.  
 fair and just compensation based upon pecuniary loss, 970.  
 in action by husband for negligence causing death of wife, 979.  
 ill health of widow not to be considered in assessing damages for causing death, 975.  
 instructions need not contain all the elements necessary for recovery, 988.  
 interest of heirs in estate, e 3616.  
 jury may consider aid, society, solace and comfort, 986.  
 limited to actual pecuniary loss, e 3609.  
 loss of society, comfort and care of parent and husband may be considered in action for causing death, 976-977.  
 mental grief and suffering not an element of, 983.  
 nominal only where no pecuniary loss, 981.  
 of minor child, 983, 984.  
 only such damages allowed as shall make good the actual pecuniary loss, 982.  
 pecuniary circumstances of widow and children in actions causing death, 975.  
 loss not presumed, 980.  
 superintendence of family, e 3611.  
 sustained by wife and children, 974.  
 plaintiff's receiving of pecuniary aid from deceased must be proven, 980.

[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—NEGLIGENCE CAUSING DEATH—Continued.**

- proportional to injury, e 3613.
- punitive damages in discretion of jury, e 3618.
  - not to be given, 991.
- reasonable probabilities of life, 987.
- of servant, 985.
- to be assessed with reference to pecuniary loss sustained by wife and children, 974.
- what to consider in action causing death, 974.
- when not to be considered in assessing damages, 991.
- where death is from other cause, measure of, 978.

**NUISANCES, 792-794.**

- erection of boiler near house of another, 792.
- for nuisances reducing the value of property, 792.
  - creating smoke, noise, smells causing nuisance, 794.
- to personal property can only be recovered for proximate cause, 801.
- real property, caused by nuisance, 793.

**PERSONAL INJURIES, Chapter XLIII, 882-962, e Chapter CXXX, 3567-3608, 4146.**

- ability to labor before and after injury, 894.
  - play musical instrument, 888.
- absque injuria, must be a direct physical disturbance, 865.
- action by husband for injuries to wife, 948.
- aggravated injuries occasioned by carelessness of injured after accident, 930.
- aggravating former diseased condition, 914-917.
- alighting from train, 1789.
- allegations in declaration, e 3603.
- argumentative instructions, e 3602.
- arising from failure of carrier to properly heat car; approximate cause, 1763.
- assuming damage of which there is no proof, e 3598.
  - facts in issue, e 3608.
  - liability, e 3596.
- attributable to a diseased condition in whole or in part, 915.
- authorizing double damages, e 3597.
- becoming pregnant after injury, not necessarily negligent, 952.
- bodily and mental suffering, e 3572.
  - disabilities, 900.
- burden on plaintiff to prove each element of damage, 941.
- care of plaintiff not limited to time of accident, e 3595.
  - to be taken by injured person, 928.
- comment of court, as to absence of evidence, e 3601.
- compensatory damages only, 941.
  - allowed, 911.
- computing present worth of future earnings, e 3581.
- conjectural future suffering, e 3573.
- contributory negligence, compensatory, e 3594.
- diminished capacity of laborer, 1509, e 3568.
  - to labor and earn money, 892, 895.
- disfigurement of person, element of damages, 918.
- doctor's bills and medicine, 946.
- due care to be taken after the injury, 906, 928-932.
- duty to employ medical assistance, e 3582.
- ears impaired, object of ridicule, 920.
- ejection of passenger, exemplary, 1827.
- element of damages for injuries to passenger in alighting from train, 1789.
  - that may be considered, 882-888, 893, 895, 898, 899, 902, 905, 917.
  - where death occurs from other cause, 978.
- enlightened consciences of honest jurors, their sense and judgment, 905.
- exemplary*, 935, 942-945, 950.
  - actual damages very small, 943.



[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—PERSONAL INJURIES—Continued.**

- ejection of passenger, 1827.
- master and servant, injury to employe, 962.
- may be allowed for mortification of feeling arising from insult, 966.
  - when act is malicious or wanton, 965.
- wanton and malicious acts, 945.
- when given, e 3585.
- when not given, 960, e 3586.
- expectancy of life, mortuary tables, e 3580.
- expense of cure, value of time, cost, etc., e 3570.
- eyesight or hearing impaired, 919.
- failure to use due care in treating injury, 928-930.
- fault about half and half, e 3593.
- for failure of carrier to properly heat car, 1763.
- form of verdict, damages must be based on evidence, e 3600.
- from ditch built on one's own land, negligence, 2130.
- fright, mental suffering or nervous shock, 909.
- future mental and bodily suffering may be allowed, 926.
  - pain and suffering, 901.
- future payments, e 3571.
- grief from contemplating injured body, pecuniary, e 3574.
- gross negligence defined, 962.
- hastening development of disease, 914.
- husband for injuries to wife, 948.
- if present condition is result of other disorder, none should be allowed, 927.
- illness caused by poisonous gases from excavation, 946.
- impaired ability to labor and pursue business, 891.
- impairment of mental powers, health, etc., 906.
- in sound judgment and discretion of jury, 911.
- inability to act as housewife, 954.
  - bear children, 953.
  - earn money, 961.
  - work in any capacity, 954.
- inconvenience, 945.
- induced by dwelling upon claim against railroad not to be considered, 910.
- injured must use all means in his power to effect a cure, 917.
  - care in selecting doctor, 931.
- injured not insurer of doctor's skill, 931.
- injury to plaintiff's good repute, 967.
  - wife, action by husband and wife, by wife, e 3588.
- instructions too general, e 3605.
- jury may estimate damages from facts and circumstances in proof, 937.
  - should consider age and condition in life, 911.
  - consider whether injury is permanent, 922.
  - not speculate, but should base damages on the evidence, 901.
  - take into consideration all the facts and circumstances in the evidence, 925.
- jury taking declaration to jury-room, e 3604.
- knowledge, observation and experience of jury in business affairs of life, 937.
- left to sound discretion of jury guided by testimony, 901.
- limited to those alleged in complaint, 909, 939.
- loss must be directly caused by the injury, 897.
  - of earnings in business, 889.
  - earnings as a race-horse trainer, 889.
  - time, etc., 898, 917, 1509.
  - and expenditures and probable amount of pain plaintiff will suffer in future, 902.
  - pain and suffering, medical aid allowable, 893.
- lost earnings, disfigurement and impairment of use of hands, 896.

[References are to sections; e refers to Erroneous Instructions.]

DAMAGES, MEASURE OF—PERSONAL INJURIES—Continued.

*married women,*

- can recover for medical expenses, 949.
- cannot recover for time and services as housekeeper, 949.
- mental and physical pain and suffering, 949, 953.
- right of to recover for her own injuries, 950.
- what to consider, 951.

medicines and medical attendance, 948, 961.

memory impaired, nervous system, 908.

mental and physical pain and suffering, 923, 950, 951, 961, 1509.

mental and physical suffering, loss of time, etc., 898, 950, 951.

faculties, impairment of, 906-907.

or physical suffering, permanency of suffering, 903.

suffering without physical injury, 921, e 3577.

*minor,*

amount left to the enlightened conscience of an impartial jury, 957.

cannot recover for diminution of earning power during minority unless emancipated, 958.

common sense of jury, 957.

diminished capacity to labor, 955-956.

earnings, e 3590.

medicines and medical attendance, 955, 956.

pain and suffering, 955-956.

possibility of death before reaching 21 years, 955.

pecuniary loss, 955-956.

permanency of injuries, 955-956.

such damages as will actually compensate will be allowed, 956.

too young to have selected an avocation, 957.

what to consider, 955.

money expended attempting to be cured, specific proof necessary, e 3584.

mortality tables, competent evidence, 911, 913, e 3614.

misplaced heart and liver, 917.

must be based on evidence, e 3600.

found from evidence, 924, e 3599.

negligence in treating injuries, e 3583.

negligence in treatment of wound, 932.

may be so gross and reckless as to imply intent for purpose of allowing exemplary damages, 944.

of injured person increasing pain, 949.

nervous prostration not to be considered, when, 910.

no proof of actual damages, exemplary damages, 945.

not liable for aggravated injuries occasioned by carelessness of injured after accident, 930.

the proximate cause, 895.

occupation, habits of industry, health and prospects, elements of, 887.

omitting element of damages in an instruction not error if instruction otherwise correct, 940.

mental suffering, e 3578.

"under the instructions of the court," e 3567.

only direct and proximate results to be considered, previous ill health, 916.

reasonably certain results, e 3576.

pain and anguish of body and mind, 919.

suffering, elements to be considered in assessing, 901-905, 918.

mental and physical, 940, 946, 1509.

pain and suffering of wife, action by husband, 948.

passenger expelled from train, series, 839.

past and future bodily pain and suffering, 899.

mental suffering, on account of disfigurement of person, element of, 918.

past and present pain, mental and physical allowable, limitation of rule, 910, 927.

[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—PERSONAL INJURIES—Continued.**

- permanency of injuries, 925, 949, 951, 953.
  - of maladies may be considered, 924.
- physical pain and mental anguish, 894.
- physician's fees, 903.
- plea of compromise and settlement, 947.
- postponement of marriage on account of, 954.
- pregnancy preventing proper treatment of injuries, e 3589.
- present and past condition may be considered in assessing, 914-917.
  - physical condition, time lost, pain and suffering, e 3579.
  - or future which is the necessary result of the injury, may be considered, 884.
- previous earning capacity, e 3569.
- probable duration of injury, 926.
- producing miscarriage, mental and physical pain and suffering, 934.
- prospect of ultimate recovery, pain and suffering to be considered, 905.
- railroad passenger, future injury reasonably certain, e 3591.
- reasonable and just compensation based upon the evidence, 885.
- reasonably certain future sufferings, e 3575.
- reasonable expenses for purposes of being cured is recoverable, 896.
- recovery must be limited to allegations and proof, 939.
- shortening life not an element, 912.
  - may be considered in extent of injury, 912.
- should be placed in the same position as though no injury had taken place, 886.
- should seek proper medical attentions, 930.
- society of wife, action by husband, e 3587.
- sound discretion guided by testimony, 901.
  - of jury from all the facts in the case, 936.
- standard, life and annuity tables, competent evidence, 913.
- suffering and distress of mind, 900.
  - from disease at time of injury, 914.
- sympathy should not have any consideration in assessing, 886.
- to employe, what to consider, 961, 962.
- injury to passenger, impairment of capacity to labor and earn money, pain and suffering, 895.
- to passenger, negligence in moving cars, 894.
  - postal clerk, compensation from other sources will not release or diminish amount of damages, 938.
- servant, proximate, e 3592.
  - no punitive damages, when, 960.
  - violation of contract to furnish medical attendance, 959.
- unless capable of attending to business, 890.
- value of service in management of business, 891.
- violating instructions of physicians, 933.
- what may be considered in assessing, 882, 913, 924.
  - may be taken into consideration in assessing damages for married woman, 949.
  - the jury may think right and proper in view of all the facts and circumstances proved, 935.
- where death occurs from other cause before trial, 978.
  - incurable, 893.
  - injured fails to make reasonable effort to earn money after injury, 897.
  - injured person is in bad health before the fall, what may be considered, 915.
- whether certain ailments resulted from injuries may be considered, 927.
  - permanent or temporary, all evidence should be considered, 923.
- wrongfully expelling female passenger from the car, may show previous condition, 914n.



[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—Continued.**

**PROPERTY, INJURIES TO, 795-806, e 3533-3537.**

*personal property,*

cannot be recovered if could have been avoided by reasonable care of plaintiff, 801.

unless owner makes reasonable efforts to prevent, 795.

for failing to use ordinary diligence in caring for personal property, 796.

market value of property destroyed, 797.

natural gas explosion in house, statement of agent, 799.

owner must make reasonable efforts to stop, 795.

to flowers by escaping gas, 798.

to horse and cart, 908.

where same can be repaired, e 3534.

*real estate,*

by fire, 802.

ejectment, homestead, place of residence, 2234.

estimating value of reversionary interest in real estate, 806.

for cutting, carrying away, and destroying timber, 771.

injuries to dock by vessel, 805.

trees putting up telephone wire, 803.

unnecessary trimming of trees, 875.

**SEDUCTION, 767, 773-777.**

in action for seduction, 777.

seduction of plaintiff after contract of marriage may be shown in aggravation of, 767.

what may be considered in assessing, 777.

**SHERIFFS, 807-809, e 3538.**

suit on replevin bond, 809.

wrongful levy, e 3538.

seizure of mortgaged goods by sheriff, interest, 808.

taking of property by sheriff, 807.

**SLANDER AND LIBEL, 810-820, e 3539, 3540, 4258, 4269.**

action for slander and libel, 812.

adultery, charge of, 820.

bad reputation of plaintiff may be shown, 811.

burden of proof as to, function of jury, e 4258.

compensatory only, words spoken without malice, 814.

drunkenness in mitigation, 813.

injury to reputation or character in action for slander or libel, 812.

in mitigation of, plaintiff's reputation may be shown, 811, e 4269.

may be allowed where defendant attacks character of plaintiff, 767.

not aggravated, slander and libel, plea of good faith, 2291.

pecuniary circumstances of defendant may be considered, 816.

plea of justification must be filed in good faith, 810.

presumed, speaking actionable words, 2283.

reiteration, vindictive damages may be allowed, 817.

wealth of defendant may be considered, 819.

what to consider in assessing, 818.

when exemplary damages may be given, 815, 816.

words spoken without malice, compensatory only, 814.

**TELEGRAM,**

failure to deliver, 835, 836.

limitation of rule as to mental suffering for failure to deliver telegram, 836.

what may be considered in assessing for failure to deliver telegram, 836.

**TRESPASS, 821-826, e 3541-3542.**

destroying sign, 826.

exemplary, "evident disregard of plaintiff's rights," e 4272.  
may be allowed, 821.

or punitive may be allowed in suit against corporation, 823.

happening of accident does not justify award of, e 4275.

[References are to sections; e refers to Erroneous Instructions.]

**DAMAGES, MEASURE OF—TRESPASS—Continued.**

- on growing crops, 824.
- land, for herding cattle, 825.
- smart money or exemplary damages, 822.
- real estate, no effort to prevent, 2316.
- title in third person, no defense for one without title, 2307.

**VICIOUS ANIMALS, 827.**

- for injuries by vicious cow, 827.
- vicious dog, 827.
- must be established by preponderance of the evidence, 827.
- vicious dog, necessary essentials to recover, 2346.

**WAREHOUSEMEN,**

- deduction from claim for storage, etc, e 3507.
- goods stored in warehouse, inherent qualities, 837, 838.

**WATERCOURSES,**

- diverting surface water, elements of injury, 2353.
- injury to roadway, overflowing lands, e 4283.
- nominal and special, polluting watercourse, e 4281.
- placing obstructions in natural watercourses, 2356.

**DAMNUM ABSQUE INJURIA—**

- eminent domain, 865.

**DANGER—**

- conduct in presence of, negligence, railroads, 1929.
- duty of master to explain to minor dangers and hazards of work, 1384.
- employment of minor in dangerous position, liability of master for injury to, 1383.
- imminent to person on street car track, failure to check speed, 2099.
- knowledge of by servant, safer way of conducting business, no ground for action, 1466.
- known, failure of servant to use precaution against, 1465.
- person must use faculties in proportion to, 1909.
- to street car conductor, unknown to passenger, negligence, failure to give warning, 2045.
- must be impending for contributory negligence to a defense, 1359.
- obvious, duty of servant to look out for, 1453.
- raising beam, 1484.
- passenger trying to escape from, contributory negligence, 2075.
- place of, voluntarily crossing to, railroads, 1907.
- presumption of, from electric wires, negligence, telegraph companies, 2123.
- railroad track a proclamation of, 1908.
- resistance must be in proportion to, self defense, honest belief, reasonable doubt, 3120.
- servant ignorant of, liability of, 1382.
- self defense,*
  - apparent, deceased shooting first, 3118.
  - apprehension of, must act upon honest belief, 3113.
  - assault with deadly weapon by deceased, 3116.
  - assuming that it existed, defendant's belief in danger, e 4694.
  - belief in, must be reasonable as well as honest, 3106, e 4696.
  - deceased acting with others to assault, 3115.
  - attempting or purporting to draw weapon, 3117.
  - need not believe death of assailant necessary, 3114.
  - duty of retreat when possible without increasing, 3162.
  - guilty of murder, where insufficient grounds for belief of, 3108.
  - if actual, appearance and strength of deceased are immaterial, e 4707.
  - imminence of, must be left to jury, e 4708.
  - submitted to jury, e 4703.
- may act upon appearances, though they turn out to be false, 3111.
- must be shown by overt acts and must be imminent, e 4700.
- some overt act, defendant need not act as a brave man, e 4706.
- such as to arouse fear in a reasonably prudent man, e 4697.

[References are to sections; e refers to Erroneous Instructions.]

**DANGER**—Continued.

- must seem actual, present and urgent, 3112.
- need not be real, may act upon appearances, 3110, e 4699.
- manifest, e 4701.
- no more force to be used than apparently necessary, 3121.
- real or apparent, 3109.
- right does not depend on correctness of apprehension, e 4705.
- when retreat more dangerous than to fight, unnecessary, e 4742.

**DANGEROUS**—

- character of deceased, self defense, overt acts, e 4731.
- condition, leasing premises in, whether duty of landlord to keep in reasonably safe condition, e 3696.
- machine, operation of by servant after promise of master to supply device for lessening danger, 1468.
- man, reputation as, purporting to draw weapon, prior threats, 3151.
- place in coal mines, 1486.
- servant continuing to work in, after notice of defect to master, 1467.
- working near dangerous lumber pile, 1483.
- weapon, deadly weapon defined, e 4667.
- work, servant engaging in extra hazardous work, different from ordinary employment at command of fellow servant, 1441.

**DATE**—

- of sale of intoxicating liquors, exact date not required, 1222.

**DAUGHTER**—

- defense of by father, self defense, e 4758.
- father not bound to pay for services rendered while living at home except by agreement, series, 731.
- killing seducer of, manslaughter, e 4655.
- not liable for seduction by another, e 3432.

**DAY**—

- proof of, when adultery took place, e 4510.
- time, or night time, burglary, 2884.

**DEAD**—

- bodies, disinterring, for surgical experiment, intent, proof required, 3284.
- witnesses who testified in commitment court, what evidence considered, 2770.

**DEADLY ASSAULT**—

- provocation for homicide, referring to great provocation as slight, e 4679.

**DEADLY WEAPON**—3067-3075, e 4224, 4631, 4632, 4662-4667, 4709, 4726, 4771.

- assault by deceased with, 3116.
- with, implied malice, 2867, e 4544.
- self defense, retreat, e 4739.
- carrying, mutual threats to kill, 2968.
- of, no justification for killing, 3140.
- deceased attempting or purporting to draw, 3117.
- defense of habitation, justifiable homicide, 3183.
- defined, dangerous weapon, 3067, e 4667.
- does not determine whether murder or manslaughter, e 4662.
- jury's belief must arise from the evidence, e 4632.
- killing with, not prima facie evidence of murder in first degree, e 4631.
- large stone or piece of iron, 3001.
- malice not a necessary inference from killing with, 3073.
- presumed from use of, may be rebutted, 2633, 3072.
- mutual combat, premeditated design, 3082.
- no duty of retreat when attacked with a pistol, 3163.
- not depending on whether deceased had, may use more force than actually necessary, e 4709.
- possession of, by deceased, no defense, 3075.
- presumption as to self defense, 3123.
- presumed to intend death, 3070.



[References are to sections; e refers to Erroneous Instructions.]

**DEADLY WEAPON**—Continued.

- presumption from killing, provocation, 3069.
- previously formed design to use, 3071.
- purporting to draw, threats, reputation as dangerous and violent man, 3151.
- pursuing and beating with, self defense, e 4726.
- question of fact, metallic knucks, gas pipe, 3068.
- sudden transport of passion, without adequate cause, leather belt, 3016.
- suddenly snatched up, 3017.
- whether there is a presumption of malice, e 4668.

**DEAFNESS**—

- of street car passenger, contributory negligence, 2065.

**DEALER**—

- in intoxicating liquor, responsible for acts of bartender even without knowledge and against orders, e 4771.

**DEALING**—

- with partnership after dissolution of firm but without notice, e 4224.

**DEATH**—

- act of conspirator need not actually contribute to, e 4581.
- assault and battery, murder, deliberation, 2864.
- by violence, malice presumed from fact of killing, 3060.
- caused by blow, circumstances from which to determine whether or not, 3074.
- reckless driving of horses, 2964.
- declaration under clear conviction of impending, referring competency of evidence to jury, e 4688.
- fear of, abandonment of homestead by reason of, selling during temporary absence, e 4236.
- intoxication, suit by widow, exemplary damages, 778.
- neglect of wound, homicide, 2973.
- some drug or poison, abortion, e 4506.
- hastened by acts or omissions of surgeons, e 3724.
- homicide, from other causes, 2975.
- malpractice, resulting from other causes, burden of proof, e 3725.
- of assailant, self defense, defendant need not believe it necessary, 3114.
- of deceased, whether evidence of malice, e 4665.
- premonition of, no guaranty of truth, credibility of dying declaration for jury, e 4687.
- presumption of, from seven years' absence, 1210, e 3684.
- resulting from abortion, murder or manslaughter, intent, 2785.

**DEBT**—

- existing, consideration for sale of logs, 2251.
- negotiable note taken in payment, 2172.
- paying for another without his consent, e 3424.
- security for pre-existing, negotiable instruments, innocent purchaser, 2171.
- settlement of old, negotiable instruments, consideration, 2156.

**DEBTOR**—

- about to depart from state in action of attachment, 537.
- insolvent, fraud against creditors, transfer of property in payment of debt due, motive immaterial, e 3632.
- selling property and retaining possession, knowledge of creditor, replevin, e 4239.

**DECEASED**—

- acting with other persons to assault, 3115.
- assaulting defendant, cooling time, 2992.
- with deadly weapon, 3116.
- attempting or purporting to draw weapon, 3117.
- defendant attacking brother of, 3130.
- drawing of gun by, no duty of retreat, 3164.
- having deadly weapon, right of self defense does not depend on, may use more force than actually necessary, e 4709.

[References are to sections; e refers to Erroneous Instructions.]

**DECEASED—Continued.**

- insults by, homicide, consideration of, not limited to time of killing, e 4621.
- making first hostile demonstration, murder, direct evidence not necessary, 2994.
- motives of, do not determine defendant's motives, e 4704.
- murder in first degree, having had illicit intercourse with defendant's wife, 2996.
- past conduct of, evidence of provocation for homicide, 3092.
- physical power of, self defense, may be considered, 3144.
- possession of deadly weapon by, homicide, no defense, 3075.
- presumption as to self defense, 3123.
- putting body of in river, circumstantial evidence, e 4359.
- quarrelsome disposition of, self defense, 3143.
- reasonable doubt as to which of several killed, 2704.
- seeking quarrel with intention of shooting, murder in first degree, 2993.
- shooting first, 3118.
- sought by defendant with malice and induced to assault defendant, 3128.
- trespass by, self defense, 3168.
- turbulent disposition of, homicide, 2976.

**DECEIT—See also FRAUD.**

- action of, assuming to act as agent, e 3423.
- as to ownership of note, offer to pay, 2163.
- exemplary damages may be allowed, 830.
- intent to deceive, necessary to constitute fraud, e 3645.

**DECLARATION—**

- allegations in, measure of damages, personal injury, e 3603.
- as alleged in, 1338, e 3345, 3845, 3846, 3970, 3990, 4046, 4121, 4152.
- or any other count thereof, injury, 1345, 1365, 1831, e 3745.
- guilty as charged in, negligence, 1866, e 3740, 3785, 4028.
- manner and form in the, personal injuries, e 3857.
- jury should find upon what count verdict is based, 413.
- verdict on dismissed counts, 413.
- jury taking, to jury-room, measure of damages, personal injury, e 3604.
- materiality of allegations, leaving jury to determine, e 3744.
- not all material allegations need be proved, e 3344.
- plaintiff making out case as laid down in, e 3768.
- pleading instruction using words "alleged in declaration" sufficient, 1755.
- as alleged in declaration in one or more counts, 1345.

**DECLARATIONS—**

- by defendant, evidence of, e 4372.
- of testator, undue influence, 2413.
- previous, of testator, undue influence, mental capacity, e 4309.

**DECLARATIONS, DYING—See DYING DECLARATIONS.**

**DEDICATION—**

- dams, watercourses, 2363.
- of lands for use of railroad, negligence, 2006.
- by railroads, e 4113.

**DEDICATION OF HIGHWAYS—See HIGHWAYS.**

**DEDUCTION—**

- statute of limitations, none for temporary absences not amounting to change of residence, e 3707.

**DEEDS—Chapter XLVI, 991-1000, e Chapter CXXXII, 3619-3621.**

- acceptance of, 994.
- boundaries, disregarding monuments, survey, e 3461.
- bound by terms, 994.
- cancellation of, fraud, 1134.
- series, 1135.
- cancelled, fraud, property sacrificed from pecuniary necessity, e 3653.
- condition of reconveyance, 998.

[References are to sections; e refers to Erroneous Instructions.]

**DEEDS—Continued.**

constructive notice of matters therein, 997.  
 delivery of, intention, 992.  
 description of land in deed cannot be varied by parol evidence, 580.  
 intent, constructive notice of matters therein, 997.  
 locating land covered by 996.  
 lost, 1000.  
 mistake, 998.  
 name of deceased party forged, 2949.  
 not necessary to transfer possession, 456.  
     vitiated because of age weakness, or bodily infirmity of maker, 614.  
 obtained without grantor's consent, escrow, 993.  
 of third party as evidence in ejectment, 1044.  
 person claiming color of title under, bound by description therein, 588.  
 plat referred to therein becomes part thereof, 589.  
 presumption as to truth of contents of certificates of notary public, e 3621.  
 ratification of while intoxicated, 1135.  
 recording at request of grantor not conclusive proof of delivery, e 3620.  
 referring to plat for fuller description becomes part thereof, 589.  
     further description, incorporates plat, 996.  
 required for transfer of real property, e 3619.  
 reservation of water in, 995.  
 two tracts conveyed in one, 450.  
 when given by way of mortgage, 999.  
 with condition as to reconveyance, 998

**DEFAULT—**

judgments not appealable, 298.  
 mortgage, replevin by, 2236.  
 of sick member of fraternal life insurance society, notice of inability to pay, e 3680.  
 possession by mortgagor after, 1316.

**DEFECTIVE—**

construction of building, measure of damages, 761.  
 hearing, negligence, 1357.  
 machinery, reasonable time to fix, 665.  
 work, expense of removing, measure of damages, 760.

**DEFECT—**

in title to real estate, notice of, heirs, facts calling for inquiry, 2228.  
 knowledge of, negotiable instruments, or want of consideration, e 4214.  
 vendee's failure to notice, recovery for fraud, e 3650.

**DEFENDANT—**

acting under impulse, not enough to establish insanity, e 4401.  
 acts of, homicide, intent to be inferred by jury from, 3050.  
 adulterous disposition, rape, how material, 2814.  
 aggressor, manslaughter, when not barred from defense of sudden passion, e 4649.  
 and wife competent witnesses, weighing testimony, Missouri, 2554.  
 at fault, cannot plead self defense, 3131.  
 competent witness, 2553.  
 conditional admission at time of accident, 383.  
 conduct of, 2565.  
 declarations by, evidence of, e 4372.  
 fabrication of testimony by, 2562.  
 failure to testify not to be taken against him, rule in various states, 2556-2560.  
 favor, duty of jury to construe evidence in, e 4424.  
 former conviction of, 2779.  
 has burden of proving insanity, e 4394.  
 homicide, immaterial whether angry or excited, 2977.  
 how testimony should be weighed, 365.  
 identified by independent circumstances, reasonable doubt, 2699.



[References are to sections; e refers to Erroneous Instructions.]

**DEFENDANT—Continued.**

innocence, hypothesis of, duty of jury to adopt, 2709.  
 proof consistent with, jury must acquit, 2711.  
     must be inconsistent with any reasonable hypothesis of, 2710.  
 insanity, need only raise reasonable doubt, e 4406.  
 joint defendants, arson, what must be proved, e 4796.  
 jury should find in favor of when evidence equally balanced, 356.  
 may introduce the evidence upon which conviction is based, e 4457.  
     rely upon any theory or claim he may see fit, trumped-up charge  
     of conspiracy, 2761.  
 mother, insanity of, must be considered, e 4409.  
 must be given benefit of presumption of innocence, 2642.  
     proved guilty beyond reasonable doubt, burglary, 2888.  
 must prove inability to retreat, e 4333.  
     insanity or drunkenness as an excuse, e 4332.  
 need not prove facts inconsistent with his guilt to raise reasonable  
 doubt, e 4456.  
     testify, 2555.  
 need only create reasonable doubt, self defense, 2718.  
 not conscious of nature of act, must be acquitted, 2576-2577.  
     entitled to most favorable aspect of evidence, e 4425.  
     prejudiced by any admission his counsel may make, e 4374.  
 opening statement, entitled to make, when, 71.  
 possession of replevin, not prima facie evidence of ownership, e 4238.  
 presumed to be innocent till contrary appears beyond a reasonable  
 doubt, 2634.  
 rape, need not prove consent, e 4520.  
 relying upon failure of state to prove case against him, e 4428.  
 sanity, reasonable doubt of, acquits, 2594.  
*self defense,*

    attacking brother of deceased, 3130.  
 entitled to separate instruction as to threats, 3155.  
 not obliged to wait, may act promptly, 3170.  
 provoking affray, 3126.  
 seeking deceased with malice and inducing deceased to assault  
 him, 3128.

    meeting to provoke difficulty, killing unavoidable, 3129.  
 to be judged from his standpoint, 3122.

several defendants, degree of homicide, 3036.

**DEFENDANT'S TESTIMONY—2533-2565, e 4376-4390.**

conviction of another offense, admitted to affect credibility, e 4391.  
*weighing rule in,*

    Alabama, 2533.  
 Arkansas, 2534.  
 California, 2535.  
 Colorado, 2536.  
 Connecticut, 2537.  
 Florida, 2538.  
 Illinois, 2539.  
 Indiana, 2540.  
 Indian Territory, 2540.  
 Iowa, 2541.  
 Louisiana, 2542.  
 Michigan, 2543.  
 Mississippi, 2544.  
 Missouri, 2545.  
 Nebraska, 2546.  
 New Mexico, 2547.  
 North Dakota, 2541.  
 Oklahoma, 2547.  
 Washington, 2548.  
 West Virginia, 2549.  
 Wisconsin, 2550.  
 Wyoming, 2550.  
 U. S. courts, 2551.  
 Georgia statute, unsworn statement of defendant, 2552.

[References are to sections; e refers to Erroneous Instructions.]

**DEFENDANT'S TESTIMONY**—Continued.

- title in ejectment, 1036.
- to be given full benefit of presumption of innocence, 2636.
- tried by evidence only, not on suspicion, evidence excluded or stricken out, 2762.
- using insulting words, plea of self defense not barred, 3139.
- when burden of proof is on, 362.
- willfully sworn falsely, 2561.

**DEFENSE**—See also **SELF DEFENSE**.

- action for sale of intoxicating liquor, acts or statements of intoxicated person, e 3690.
- alibi, completest that can be devised, 2434-2435.
  - singling out, e 4322.
  - when entitled to consideration, e 4318.
- arson, insanity as, 3270, e 4800.
- assault and battery, mutually entered into, e 3438.
  - retaking property, e 3439.
- burden of proof, state need not negative matter of defense, e 4329.
- by one joint defendant, negotiable instruments, 2137.
- carrying concealed weapons, apprehension of personal injury, 3275.
- condonation, criminal conversation, e 3430.
- consent of prosecutrix, rape, 2808.
- conspiracy, intoxication, 2919.
- contradictory, alienation of affection, e 3427.
- contributory negligence, railroads, possibility of avoiding injury after discovering plaintiff's peril, 1958.
- criminal, need not be satisfactorily established, e 4331.
- homicide, death from other causes, 2975.
- delirium tremens, 2611.
- discrediting, alibi, e 4321.
- embezzlement, restitution not good, e 4601.
- forgery, drunkenness, 2951.
- former acquittal as, 2778.
- homicide, turbulent disposition of deceased, 2976.
- inability to retreat, burden of proof on defendant, e 4333.
- insane impulse overcoming will power, sufficient, 2578.
- insanity, need not be proven by direct evidence, 2599.
  - or idiocy, must be clearly proved, requisites, 2591.
  - offense must be direct consequence of, 2592.
  - requires preponderance, 2597.
  - should be examined with care, 2571.
  - when irresistible impulse not good, e 4403.
- intoxicating liquor, license, burden of proof on defendant, 3187.
- intoxication, belittling, saying "there is some evidence," e 4419.
  - not amounting to insanity, presumption, 2612.
  - producing insanity, 2613.
- irresistible impulse from voluntary intoxication, not good, 2609.
- larceny, taking under mistaken claim of right, 3229.
- murder in second degree, criminal intimacy of deceased with defendant's sister, not good, 3018.
  - possibility of saving life not good, 2974.
- not involved, instructing on, e 4330.
- of habitation, self defense, 3183.
  - alibi, established by reasonable doubt, 2713.
  - of another, self defense, parent, 3179.
  - daughter by father, self defense, e 4758.
  - domicile, guest in house may protect it from invasion, e 4764.
    - killing in, self defense, e 4762.
- of property, guest in house may protect it from invasion, e 4764.
  - killing in, not limited to force actually necessary, e 4766.
    - to prevent intrusion on premises, e 4763.
  - shooting trespasser, e 4765.
  - of sister, killing in, need not be proven "necessary" self defense, e 4760.
  - son, self defense, killing in, 3180.
  - statute of limitation, ignoring, e 3416.

[References are to sections; e refers to Erroneous Instructions.]

# DEFENSE—Continued.

- possession of deadly weapon by deceased, not good, 3075.
- seduction, previous intercourse with others, e 4533.
  - voluntary consent, 2834.
- slander and libel, repeating report, not good, 2292.
  - truth of words, 2297.
- sudden passion, manslaughter, defendant the aggressor, when not barred, e 4649.
- trespass on real estate, claim of title, not good in face of warning from owner, 2318.
  - title in third person, not good for one without title, 2307.
- when insane delusion sufficient, 2587.
  - temporary insanity not good, e 4402.

# DEFINITION—

- of abortion, present, aiding and abetting, murder, 2786.
- accessory, 2726.
- accident, discharging pistol, e 4538.
- accomplice, not given, incest, e 4518.
- act of God, 1660.
- adequate cause, 3037.
- adverse possession, 430.
- alibi, necessary distance from place, e 4316.
- arson, 3268.
  - joint defendants, e 4796.
- assault and battery, 518, 519, 2838, e 4537.
  - aggravated assault, 2852.
    - with intent to kill or murder, 2854, 2865.
- attempted rape, 2821, 2828.
- break and enter, 2304.
- bribery, e 4801.
- burglary, 2872.
  - failure to include all elements, e 4560.
- carnal abuse, 2827.
- cash value, 1185.
- circumstantial evidence, 517, 2491.
- color of title, 438.
- common law marriage, e 4307.
  - bigamy, e 4514.
- consideration, 620.
- conspiracy, 2903.
- contributory negligence, 1351, 1473, 1667, 1685.
- cooling time, 3096.
- corroboration, omitting, e 4489.
- covenant to repair, e 3694.
- damages, general and special, 733.
- dangerous weapon, e 4667.
- deadly weapon, 3067, e 4667.
- dedication, 1141.
- defense of habitation, 3183.
- defense of person or property, 3181.
- degree of care as to facts not in issue, e 4123.
  - of city and traveller, 1671.
- destruction, 1156.
- disorderly house, 2799.
- drunkenness, 3198.
- due care, 1594.
- dying declarations, 3099.
- embezzlement, 2921, e 4591.
- emotional insanity, 2585.
- eviction, 1245.
- excusable homicide, 3172.
- exemplary damages, 738, e 3539.
- express malice, 2630.
- false representations, 1095.
- fellow servants, 1428-1433, 1554, e 3799.
- floaters policy, 1186.



[References are to sections; e refers to Erroneous Instructions.]

DEFINITION—Continued.

- fraud, larceny, 3242.
- game or gambling, 3276.
- good health, 1211.
- gross negligence, 962, e 3738.
- habitual cough, 1192.
- drunkard, 1198.
- hypothetical questions, 397.
- incest, 2803.
- inherent qualities of goods, 838.
- insanity, e 4394.
- insolvency, 1083, e 4312.
- intent and premeditated design, 3056.
- intoxicating liquors, 3184.
- intoxicating within the meaning of the law, 3185.
- jury trials, 14.
- just compensation, 841.
- larceny, felonious intent explained, 3210.
- should include all essential elements, e 4775.
- whether petit or grand, 3236.
- libel, e 4258.
- malice, 1267, 1284, 2626, 2865, 2954, 2957, 3059, e 4663.
- malice aforethought, 2627, 3058.
- malicious mischief, 3279.
- mandamus, 284.
- manslaughter, 3023, 3024, 3025, 3026, 3041, e 4642.
- and self defense distinguished, 3033.
- in first degree, 3028.
- in second degree, 3029.
- in fourth degree, 3031.
- manual labor, 1214.
- market value, 2263.
- materiality, perjury, 3264.
- moral certainty, e 4464.
- murder, various states, 2953-2957.
- and manslaughter, 2988.
- elements, Michigan, 2989.
- and voluntary manslaughter distinguished, 3032.
- in first degree, 2985, 2990, 2997.
- erroneous, will not reverse conviction in second degree, e 4627.
- and second degree, distinction between, 3006.
- in second degree, 3004, 3005, 3008, e 4636, 4641.
- necessaries, 1013.
- negligence, 1336, 1509, 1667, 1747, e 3737, 4117.
- night time, adultery, 2788.
- nominal damages, 869.
- ordinary care, 562, 1337, 1353, 1377-1379, 1486, 1509, 1594, 1667, 1801, 1806, e 3737, 3739, 3749, 3917, 4142, 4152.
- ordinary care by physicians, 1292.
- ordinary care of plaintiff, 1353.
- ordinary diligence, 1114, 1745.
- overt act, justification for killing in self defense, 3147.
- peddling without license, e 4815.
- possession of land, trespass, e 4271.
- premeditation and deliberation, 3080, 3081, e 4672.
- preponderance, 351, 1083, e 3332.
- presumption and prima facie evidence, in connection with possession of stolen goods, e 4569.
- principals, 2723, e 4474, 4479.
- probable cause, 1259-1262, 1284.
- proper care and diligence, e 4189.
- provocation, 3040.
- provoking difficulty, e 4712.
- proximate cause, e 3742.
- perjury, 3267.
- rape, 2805, 2826.
- assault with intent to commit, 2828.
- reasonable care, 1594, 1685.

[References are to sections; e refers to Erroneous Instructions.]

**DEFINITION—Continued.**

reasonable doubt, 2647-2674, 2686, e 4430, 4431.  
 residence district, intoxicating liquor, 3208.  
 risk ordinarily incident to employment, 1562.  
 robbery, 2889.  
     confused with larceny, e 4622.  
     omission of intent, e 4574.  
 sale, 2246.  
 sale of intoxicating liquors, within state, 3186.  
 sedate and deliberate mind, homicide, premeditation, Texas statute, 3084.  
 seduction, 502, 2829, e 4530.  
 self defense, 3101, 3103, e 4691.  
     includes saving life of another, 3178.  
     must be given to jury, e 4693.  
 slander, e 4257.  
 statute of limitations, 1248.  
 sudden passion and adequate cause, 3037.  
 suicide, 1207.  
 taking and carrying away, 3220.  
 taking from person, 2897.  
 trespassers, 2304.  
 undue influence, 2415.  
 voluntary manslaughter, 3027.  
 watercourses, 2351.  
 willful or wanton negligence, 1360, 1874.  
 "willfully," "deliberately," "feloniously," "premeditatedly" and "malice aforethought," 2632, 3058.  
 statutory, murder in second degree, variance from, Florida, e 4640.  
     not always applicable, manslaughter, e 4643.

**DEFAUD—**

intent to, conspiracy, reasonable doubt, e 4590.  
 embezzlement, necessary element, 2921.  
 false pretenses, necessary element, e 4603.

**DEGREE—**

*of care,*  
     in bailment of horse, 556.  
     required for bailment for sole benefit of bailor, 558.  
     of bailee, 555.  
*of crime, error to prevent verdict in lesser, e 4625.*  
     doubt, act surrounded in, jury may convict nevertheless, e 4453.  
     homicide, several defendants, 3036.  
     intoxication, excuse for crime, e 4410.  
     immaterial, if it caused the injury, e 3688.  
     manslaughter, reasonable doubt whether murder, 2707.  
*of murder,*  
     committed in perpetration of robbery, 2997.  
     deceased having had illicit intercourse with defendant's wife, 2996.  
     distinguished, 2987.  
     what constitutes first, 2985.  
     distinction between first and second, 3006.  
     first, premeditation, distinguishing characteristic, 3083.  
     metal knucks or means unknown, stabbing with knife, 3002.  
     killing child by beating mother, 3019.  
     presumption as to, burden of proof, 2475.  
     second, criminal intimacy of deceased with defendant's sister, no defense, 3018.  
*of offense, reasonable doubt as to, guilty of less offense, 2706.*  
*of proof,*  
     based on crime, e 4494.  
     circumstantial evidence need not be conclusive, 2502.  
     fraud, e 3656.  
     fire insurance, e 3670.  
     required, circumstantial evidence, e 4351.  
     in criminal cases, e 4441.  
     too high, on the part of the state, e 4442.

[References are to sections; e refers to Erroneous Instructions.]

**DEGREE**—Continued.

of provocation, manslaughter, slight or trivial not sufficient, 3040.

**DELAWARE**—

reasonable doubt defined, 2651.

**DELAY**—

guarantor not released by, liable till note paid, 2185.

in finishing building not justified by order of extra work, e 3492.

in payment of premium, 1212.

negotiable instruments, calling undue attention to, assuming fact of, e 4208.

**DELEGATES**—

conspiracy to bribe and corrupt, e 4586.

**DELEGATION**—

by city to street railroad companies, duty to keep streets safe, e 4160.

of duty, master cannot delegate duty to furnish reasonably safe places to work, 1496.

**DELIBERATE**—

intent, to kill, homicide, malice aforethought, act presumed to be done advisedly, 3048.

intentional, and unlawful burning, arson, malice presumed, e 4793.

no power to, insanity, power to intend, e 4398.

willful and premeditated homicide must be a crime, e 4675.

**DELIBERATELY**—

defined, homicide, 3058.

formed specific intent, homicide, ignoring lower degree of homicide, e 4661.

shooting, not necessarily a crime, e 4616.

**DELIBERATION**—

assault and battery, murder had death ensued, 2864.

duration of, murder in first degree, 2986.

homicide, what amounts to, premeditation, e 4672.

jury sent back for, e 3392.

murder in second degree, not necessary element, Wyoming, 3011.

necessary element, assault with intent to murder, 2865.

to constitute malice, though not for any particular period of time, e 4666.

murder in first degree, e 4628.

not necessary element, assault with intent to kill, 2866, e 4552.

of jury, defendant's failure to testify not to be alluded to, Texas, 2560.

opportunity for, not equivalent to fact of, homicide, e 4674.

**DELIRIUM TREMENS**—

as affecting contract of insurance, 1199.

defense on criminal charge, 2611, e 4417.

permanent distinguished from temporary insanity, 2589.

**DELIVER**—

ready and willing to, failure to accept, 2259.

**DELIVERY**—

by common carriers, 1739-1745.

damage to goods by weather prior to, 632.

excuse for failure of, sale, refusal to accept, 2260.

extension of time for, oral evidence, e 3483.

intoxicating liquor, one sale delivered at different times, 3194.

of deed, intention, 992.

recording at request of grantor not conclusive proof, e 3620.

of negotiable instrument, burden of proof, 2143.

note, excuse for failure to make immediately upon demand, e 4210.

telegrams, incorrect or insufficient address, good defense for failure of, 2117.

negligence, causing business deal to fall through, 2119.

negligence defined, 2114.

of warehouse receipts equivalent to tender of grain, 564.



[References are to sections; e refers to Erroneous Instructions.]

**DELIVERY**—Continued.

- sale, duty to protect goods from rain, 2261.
- prevented by destruction of goods, title where, 2255.
- sending more and different goods, 2269.
- to third person, price to be ascertained by measurement, consideration, existing debt, 2251.
- symbolical, 1068.
- to common carriers, 1692-1695.
- whether made or not, terms of contract, e 3484.

**DELUSIONS**—

- insane, capacity to make wills, groundless suspicion not necessarily insane delusion, e 4298.
- distinguished from erroneous conclusion, 2588.
- when sufficient defense, 2587.
- wills, groundless suspicion, 2383.
- laboring under, partial insanity, 2586.
- wills, regarding property of wife or child, 2384.

**DEMAND**—

- and refusal, evidence of conversion, 2339.
- conversion, made by agent, evidence of agency, 2340.
- not necessary where defendant has actually converted property, 2341.
- excuse for non-delivery of note upon, e 4210.
- of payment, negotiable instruments, protest, 2164.
- replevin, necessary when plaintiff consented to defendant's possession, 2238.
- necessary when plaintiff loaned property to defendant, 2240.
- where property seized under process, 2241.
- not necessary when defendant claims title, 2237.
- possession tortious, 2239.
- taking wrongful, otherwise if taking not wrongful, e 4237.
- trover and conversion, no particular form necessary, may be verbal, 2338.
- whether necessary in action for trover or replevin, 1116.

**DE MEDIATATE LINGUAE**—

- allowed in Kentucky, 61.

**DEMONSTRATION**—

- self defense, person not necessarily aggressor because making first, 3135.

**DENIAL**—

- by defendant of criminative circumstances, e 4360.
- rape, testimony not to be taken as true because none made, e 4528.

**DENTISTS**—See also **MALPRACTICE**.

- degree of skill required, 725.
- measure of damages, 834.
- practice without license, receiving pay for work, e 4810.

**DENUNCIATION**—

- of witness by counsel, credibility, e 3320.

**DEPOSITS**—

- acceptance by bank when in failing circumstances, 576.
- bank receiving, knowingly insolvent, e 3458.
- can only be drawn in whose name it is deposited, 567.
- general and special, in attachment, 545.
- in bank of money of third person, 568.
- to credit of another, 567.
- may be appropriated by bank to pay note, when, 569.
- special or general, embezzlement, 2933.

**DEPOSITIONS**—

- should not be taken by jury, 216.
- be given same weight as witness appearing in court, 412.
- weight of, e 3397.
- to be given testimony of absent witness, 412.

**DEPRAVED HEART**—

- killing with, regardless of human life, correct principle misapplied, e 4619.

[References are to sections; e refers to Erroneous Instructions.]

**DEPUTY SHERIFF—**

making arrest for misdemeanor, can kill only in self defense, 2451.

**DERAILMENT—**

of street car, presumption of negligence, e 4131.

**DESCRIPTION—**

in mortgage, must be sufficient to constitute notice, 1312.

of land contained in deed cannot be contradicted by parol evidence, 580.

what is sufficient to constitute notice, 1312.

**DESERTION—**

absence alone not sufficient proof of in action for divorce, 1003.

as cause for divorce, 1001-1005.

cruelty as an excuse for, in action for divorce, 1005.

grounds of, by wife, 1004.

of husband where wife refuses to change residence, 1030.

**DESIGN—**

common, conspiracy, sufficient proof, 2906.

principal and accessory, 2737.

formed, not essential element of murder, Alabama statute, e 4615.

premeditated, distinguished from intent, 3056.

no presumption of, 3085.

not necessary to prove assault with intent to murder, e 4551.

previously formed, definition of murder in second degree, e 4636.

does not bar plea of self defense, e 4727.

success not necessary, conspiracy, 2911.

to kill, killing without, manslaughter in third degree, Missouri, 3030.

previously formed, bars plea of self defense, 3138.

to use deadly weapon, homicide, previously formed, 3071.

**DESTRUCTION—**

defined, 1156.

fire commencing at the time or after falling of building, 1181.

of building, burden of proof on insurance company charging plaintiff with, 1184.

goods insured, if jury cannot find market value of, to find for defendant, 1182.

premises by fire, liability for rent, 1235.

subject matter of sale, before delivery, question of title, 2255.

**DETECTION—**

of crime, means must not amount to inducement or solicitation, 2780.

**DETECTIVE—**

burglary committed at suggestion of, to entrap defendant, e 4562.

testimony of, different from that of other interested witnesses, e 4498.

greater care in weighing, 2768.

**DETENTION—**

replevin, burden of proof, 2243.

**DETERMINATION—**

of guilt, must precede fixing punishment, 2763.

larceny, of value of property, 3219.

of insanity by jury, 2572.

motive, homicide, 3077.

self defense, what considered, 3142.

**DETERMINING—**

who are principals, true criterion, 2724.

**DEVICE—**

embezzlement, obtaining possession by, 2927.

**DIFFERENCE—**

between implied or constructive malice and express malice, 2631.

slander and libel, charge invading province of jury, e 4259.

when deals are made and closed on difference, held gambling, 608.

**DIFERENT—**

owners, larceny of cattle of, at same time, one offense, 3232.

times, delivery at, sale of intoxicating liquor, 3194.

[References are to sections; e refers to Erroneous Instructions.]

**DIFFICULTY—**

- bringing on, assault and battery, self defense, 2849.
- with intent to kill, duty of retreat, e 4558.
- defendant provoking, self defense, slandering family of deceased, e 4730.
- freedom from fault in bringing on, essential element in self defense, e 4692.
- mere intent to provoke, does not bar plea of self defense, e 4715.
- of convicting without testimony of accomplice, calling attention to, e 4491.
- provoking*,
  - assault and battery, third party interfering in fight, e 4542.
  - bar to plea of self defense, 3126-3133, e 4710.
  - self defense, for purpose of killing, e 4713.
  - what constitutes, e 4712.
- self defense, commencing, several persons on each side, 3127.

**DIGNITY—**

- of evidence, circumstantial and direct equal, e 4350.

**DILIGENCE—**

- bringing suit, negotiable instruments, liability of endorsers, 2178.
- failure to use in drying, curing, packing and handling fruit, measure of damage, 796.
- of defendant, testimony of plaintiff, e 3350.
- required, sales commission broker, e 4249.
- to repudiate agreement, 572.
- to defeat charge of malpractice, e 3721.
- unavailing, negotiable instruments, return of officer not conclusive, 2179.

**DIMINISHED—**

- capacity to labor, element of damages, 1509, e 3568.

**DIMINUTION—**

- of amount of recovery, guaranty by doctor as to giving relief, e 3723.

**DIPLOMA—**

- and certificate from state board of medical examiners not required to entitle to practice, e 4809.
- practice of medicine, from accredited school, 3286.

**DIRECT EVIDENCE—**

- circumstantial evidence entitled to as much weight as, 2507.
- is of equal dignity, e 4350.
- compared with circumstantial, e 4349.
- defined, 517.
- not needed to prove insanity, 2599.
- rule as to circumstantial evidence, conviction on, e 4355.

**DIRECT KNOWLEDGE—**

- that goods were stolen, not necessary to convict of receiving stolen property, e 4791.

**DIRECTING—**

- attention to lack of motive as strong evidence, e 4669-4670.
- method of arriving at verdict, e 3393.
- verdict, manslaughter, e 4651.

**DIRECTING VERDICT—See MOTION TO DIRECT VERDICT, VERDICT.**

**DIRECTOR—**

- of bank, liability for allowing improper loans, e 3455.
- liable for himself only, e 3456.
- liability of, corporation note given for previous indebtedness, e 4194.

**DISABILITY—**

- effect of prior, personal injury, negligence, street railroads, 2013.

**DISCARDING—**

- some witnesses and believing others, e 3313.

**DISCHARGE—**

- of gun in air, 2850, 2970.
- prima facie evidence, malicious prosecution, e 3709.

**DISCOUNT—**

- purchasing notes at, e 4209.



[References are to sections; e refers to Erroneous Instructions.]

**DISCOVERY—**

embezzlement, statute of limitations runs from, time when committed, e 4602.  
of wife in adultery not sufficient provocation for homicide, e 4678.

**DISCREDITING—**

circumstance, false and fraudulent alibi, 2441.  
defense or evidence of alibi, e 4321.  
expert evidence as of very low order, e 3374.  
capacity to make wills, e 4300.  
testimony of police officers, 2769.  
relatives of accused, e 4497.

**DISCRETION—**

burglary, intent how manifested, 2877.  
of jury, punitive damages left to, negligence causing death, e 3618.

**DISCRIMINATION—**

credibility, believing evidence of plaintiff's side, e 3314.

**DISEASE—**

all systems of healing must appeal to the intelligence, e 4263.  
causing death, accelerated by personal injury, measure of damages, substantial damages, e 3617.  
dying of certain, life insurance, burden of proof, when on defendant, e 3674.  
irresistible impulse must result from, 2583.

**DISFIGUREMENT—**

of person, element of damages for personal injuries, 918.

**DISHONESTY—**

charge of, slander and libel, 2294.  
in business, imputing, libel, e 4262.

**DISINTERRING—**

dead bodies for surgical experiment, intent, proof, required, 3284.

**DISMISSAL—**

of appeal, when allowed, 326.  
will not always follow failure to give notice, 293.  
of case, prima facie evidence, malicious prosecution, probable cause, burden of proof, e 3710.  
school teacher, when reviewable by court, grounds for, 2432-2433.

**DISORDERLY HOUSE, 2799-2802.**

admissions of inmates, e 4515.  
defined, lewdness, 2799.  
keeping, other offenses not in issue, 2800.  
prosecution under statute against procurers, e 4516.

**DISPARAGEMENT—**

of testimony of expert witness, e 3373.

**DISPARAGING—**

evidence of good character, purpose of admissibility, e 4346.  
plea of self defense, caution as to, 3174.

**DISPOSAL—**

of property as he pleases, right of testator, capacity to make wills, e 4299.

**DISPOSING—**

mind and memory, sound and, capacity to make wills, e 4293.  
partnership property by one partner without knowledge or consent of other, e 4228.

**DISPOSITION—**

adulterous, criminal prosecution, 2787.  
rape, of defendant and prosecutrix, how material, 2814.  
knowledge of, vicious dog, 2347.  
quarrelsome, of deceased, self defense, 3143.  
steer's vicious, knowledge of, due care, 2349.  
toward children, character evidence, infanticide, 2487.  
turbulent, of deceased, homicide, 2976.

**DISPROVED—**

beyond reasonable doubt, insanity must be, when once shown to exist, 2593.

[References are to sections; e refers to Erroneous Instructions.]

**DISPUTED CLAIM—**

accepting less amount offered in payment, 428.

**DISREGARD—**

of plaintiff's rights, trespass, "evident," exemplary damages, e 4272.

**DISREGARDING—**

all or part of testimony unless corroborated, favoring defendant's theory of innocence, e 4427.

monuments, deeds, surveys, e 3461.

testimony, bastardy proceedings, prosecutrix only witness, 2795.

**DISREPUTABLE—**

women, collection of bribe money from, by agent, 3272.

**DISSOLUTION OF PARTNERSHIP—**

dealing with firm after, but without notice, e 4224.

negotiable instruments, knowledge of, by payee, e 4196.

notice of, credit extended on account of membership of particular partner, 2211.

means of learning of and neglect to use same, e 4225.

when notice necessary, what sufficient, 2215.

**DISTANCE—**

alibi, what necessary, e 4316.

**DISTINCTION—**

between confessions and any other testimony, e 4362.

credibility of different witnesses, e 3313.

first and second degree of murder, 3006.

intent and premeditated design, homicide, 3056.

justifiable homicide and manslaughter, e 4610.

manslaughter and self defense, 3033.

murder and manslaughter, 2988, 3032.

in first and second degrees, 2987.

principal and accessory, abrogated, 2727.

**DISTINGUISHING—**

between right and wrong but no power to choose, insanity, e 4404.

light from wrong, insanity, matters which acquit stated conjunctively, e 4397.

test of sanity, 2573.

**DISTRACTED PERSON—**

embezzlement from, consent, 2926.

**DISTRESS—**

for rent, enforcing lien on crops by landlord, 1233.

warrant, levy of not necessary to perfect lien, 1331.

wrongful, ratification of, trespass, personal property, 2301.

**DISTRICT—**

residence, what constitutes, intoxicating liquor, 3208.

**DITCH—**

built on one's own land, negligence, damage caused, 2130.

taxation of, upon land already taxed, e 4234.

**DIVERSION—**

of surface water, measure of damages, elements of injury, 2353.

to other purposes, intoxicating liquor purchased for medicinal purposes, druggists, e 4773.

**DIVERTING WATERCOURSE—**

no right, 2352.

obstructions, damages, 2356.

preventing natural flow of water, omitting element of ordinary care, e 4280.

**DIVISION FENCE—**

when agreed upon by mistake, 585.

when boundary line between adjacent owners, 583.

**DIVORCE—Chapter XLVI, 1000-1012, e Chapter CXXXIII, 3622-3624.**

*adultery*, 1010-1012.

as ground for, must be proved, 1011.

condonation of, 1012.

degree of proof required, e 3624.

not presumed, preponderance of proof required, e 3623.

[References are to sections; e refers to Erroneous Instructions.]

**DIVORCE—Continued.**

- cruelty*, 1006-1009.
  - abusive language, 1007.
    - not sufficient to constitute, bodily harm necessary, 1008.
  - acts of cruelty must be limited to time alleged in bill, e 3622.
    - provoked by complainant, 1009.
  - as cause, 1006-1009.
    - excuse for desertion, 1005.
  - condonation of, 1012.
  - extreme and repeated, as ground for divorce, 1006.
    - when personal violence not necessary, 1007.
- desertion*, 1001-1005.
  - absence alone not proof of desertion, 1003.
  - abusive language, provocation for wife leaving, 1001.
  - grounds of desertion by wife, 1004.
  - separation by mutual consent, 1002.
- drunkenness*, 1010-1012.
  - habitual drunkenness as ground for, 1010.

**DOCKS—**

- building, on navigable stream, 2360.
- injuries to by vessel, measure of damages, 805.

**DOCTOR—See PHYSICIANS AND SURGEONS, and MALPRACTICE.**

**DOCTRINE—**

- of escape, self defense, ignoring, acting upon mere threats or appearances, e 4698.
  - estoppel, 2423.
  - reasonable doubt, applying to subsidiary facts, e 4439.
  - retreat, common law, qualified by modern cases, e 4740.
    - does not apply to policeman making arrest, e 4743.
  - self defense, 3102.

**DOGS—**

- on street railroad track, duty to avoid injury to, e 4176.
- repelling seizure of, assault and battery, 2844.
- vicious*,
  - knowledge of disposition, 2347.
  - necessary essentials to recover, 2346.
  - reputation not competent, 2348.
  - when exemplary damages may be allowed for bite of, 827.

**DOMESTIC RELATIONS—Chapter XLVII, 1013-1027, e Chapter CXXXIV, 3625-3628.**

See DIVORCE, GUARDIAN AND WARD, HUSBAND AND WIFE, INFANTS, MARRIED WOMEN, MINORS, PARENT AND CHILD.

**DOMESTIC REMEDIES—**

- sale of drugs without license, excepted, 3287.

**DOMICILE AND RESIDENCE—Chapter XLVIII, 1028-1033.**

- change of, wills, 2366.
- defense of, guest in house may protect it from invasion, e 4764.
- killing in defense of, self defense, e 4762.
- must be actual removal with the intention of remaining to constitute change, 1029.
- of husband that of wife, 1031.
  - pauper requiring legal residence, 1033.
  - widow, 1031.
- what constitutes, 1028.
- when a person not a resident of the state, 1032.

**DOMINANT HERITAGE—**

- watercourses, surface water, e 4284.

**DOUBLE DAMAGES—**

- authorizing, personal injury, e 3597.

**DOUBLE RENT—**

- by tenant wrongfully holding over, 1231.

**DOUBT—**

- as to mental capacity, must be raised by evidence of drunkenness, 2619.



[References are to sections; e refers to Erroneous Instructions.]

**DOUBT—Continued.**

- benefit of, given defendant, alibi, 2437.
- identity of accused, defendant or somebody else, 2448.
  - defendant's guilt, must be substantial, not mere possibility of innocence, 2635.
  - motive, no evidence of insanity, e 4399.
  - success, recovery of compensation, attorneys, e 3450.
- well founded, of defendant's guilt of any offense, will not prevent conviction, e 4452.
- whether defendant or another was guilty agent, reasonable doubt, e 4466.
  - presumption of innocence to be regarded as evidence, e 4423.

**DOUBTFUL—**

- negotiable instruments, 2155.

**DRAFTS—See NEGOTIABLE INSTRUMENTS.**

**DRAINAGE—**

- benefits of, eminent domain, damages, e 3557.
- duty to keep open and free from obstructions, 2229.
- interfering with, eminent domain, damages, railroads, e 3561.

**DRAM SHOP ACT—See also INTOXICATING LIQUOR.**

- damages for violating, e 3528.

**DRAWING—**

- inference of fact, by court, murder, concealment of body, e 4652.
- of gun by deceased, duty of retreat, none, 3164.
- weapon, self defense, by deceased, 3117.
  - reputation as dangerous and violent man, threats, 3151.

**DRINKING—**

- liquor without feeling its effects, no evidence that liquor was not intoxicating, e 4769.

**DRIVER OF VEHICLE—**

- failure to heed signal of train, 1922.
- negligence of, passenger injured, 1677.
- presumed to remain at safe distance from approaching train, 1925.

**DRIVING—**

- across railroad track carelessly, contributory negligence, 1955.
- logs, degree of care required, 2131.
  - down navigable stream, use of banks, 2359.
- over railroad tracks with lines hanging loose, 1926.
- reckless, or horses, death caused, 2964.

**DRUGS—**

- death from, abortion, e 4506.
- insanity caused by, requisites, burden of proof, 2590.
- rape, overcoming resistance by, excuse, e 4521.
- sale of, without license, domestic remedies excepted, 3287.

**DRUGGIST—**

- intoxicating liquor, sale by, 3189.
- malpractice, negligence, e 3726.
- sale of intoxicating liquor by, purchased for medicinal purposes but diverted to other purposes, e 4773.

**DRUNKARD—**

- reputation of, credibility of witnesses testifying to, e 4342.
- sale of liquor to, liability for, e 3685.

**DRUNKENNESS—See INTOXICATION.**

- as affecting contract, 618.
  - an excuse, burden of proving on defense, e 4332.
  - cause for divorce, 1010-1012.
- assault and battery, incapable of forming intent, 2861.
- contract procured by other party, when may be avoided, 618.
- defense in forgery, 2951.
  - to bribery, of jurors, intent essential, e 4802.
- defined, 3198.
- evidence must raise a reasonable doubt as to mental capacity, 2619.
- from recent use of liquor, not sufficient, must be insane, 2610.
- getting drunk to commit crime, 2607.

[References are to sections; e refers to Erroneous Instructions.]

**DRUNKENNESS**—Continued.

- ground for divorce, 1010.
- habit must exist at time of sale of intoxicating liquor, 3199.
- habitual, as ground for divorce, 1010.
- in mitigation of damages in action for slander or libel, 813.
- may be excuse for crime, where specific intent necessary to constitute, e 4411.
- reduce crime from murder to manslaughter, 2618.
- not amounting to insanity, no defense, presumption, 2612.
- occasioned by fraud, contrivance or force, e 4415.
- sale of intoxicating liquor to person in habit, intent necessary, 3200.
- voluntary, irresistible impulse from, no defense, 2609.
- no excuse, 2606.
- for crime, considered with reference to intent, e 4553.
- wills, when insanity, 2380.

**DUE**—

- care and skill required of an attorney, 547.
- of railroad employe, defined, 1594-note.
- diligence defined, 1114.
- to be exercised by purchaser, fraud, 1114.
- execution of will proved, burden of proof on contestant, insanity alleged, e 4291.
- what is sufficient proof, e 4288.
- process of law does not require unanimous verdict, 264.

**DUEL**—

- assuming facts, argumentative, e 4623.

**DURATION**—

- of deliberation, murder in first degree, 2986.
- life, probable, measure of damages, negligence causing death, e 3610.

**DURESS**—

- negotiable instruments,
- abuse of criminal process, lawful imprisonment not duress, 2152.
- burden of proof, preponderance, e 4213.
- ratification of voidable note, 2153.
- threats of imprisonment, 2151.
- settlement and receipt obtained by, 424.

**DUTIES AND POWERS OF JURY**—Chapter XXIII, 398-414, e Chapter CXI, 3380-3397.

See **JURY**.

**DUTY**—

- finder of lost property, to search or advertise for owner, 3215.
- of carriers to passengers, negligence, street railroads, 2020.
- engineer of passenger train, negligence, highest duty to passenger, 1972.
- examining work and giving certificate, architect, e 3435.
- jury, to construe evidence favorable to defendant, e 4424.
- landlord, to keep in reasonably safe condition, leasing premises out of repair, e 3696.
- owner of party wall, to protect and maintain, 2224.
- public authorities as to approaches to railroad tracks, 1900.
- railroad to maintain lookout for licensees on track, 1860.
- repair bridge over farm crossing, negligence, 2011.
- use reasonable care to avoid injuring person on track, 1851.
- to acquit or convict, argumentative, e 4501.
- consider all the evidence, 2773, 2774.
- convict, expression of opinion, 2760.
- employ medical assistance, measure of damages, personal injury, e 3582.
- keep drains open and free from obstructions, 2229.
- to look and listen,
- at railroad crossings excused, 1914.
- contributory negligence, standing on railroad track, 1952.
- driving upon railroad track although view obstructed, 1919.

[References are to sections; e refers to Erroneous Instructions.]

**DUTY—Continued.**

- to make resistance, rape, unless overcome by drugs, e 4521.
- reconcile testimony, credibility, e 3302.
- shippers and consignees, negligence, railroads, 1938-1942.
- wait, no duty to, self defense, defendant may act promptly, 3170.

**DUTY OF RETREAT—**

- assault with intent to kill, bringing on difficulty, e 4558.
- with deadly weapon, e 4739.
- burden of proof, 3166.
- common law doctrine qualified by modern cases, e 4740.
- does not apply to policeman making arrest, e 4743.
- drawing of gun by deceased, none, 3164.
- necessary unless it would increase peril, e 4741.
- none when attacked in own dwelling, 3165, 3183.
- on own premises, e 4746.
- with pistol, 3163.
- without fault on public highway, e 4744.
- question for jury, e 4745.
- to give warning before killing if practicable, 3171.
- use all reasonable means to avert necessity of killing, 3119.
- when none, 3160-3166.
- there is any reasonable way of escape, 3161.
- without increasing danger to life, 3162.

**DWELLING—**

- attacked in, no duty of retreat, 3165.
- defense of, what justifiable, homicide, 3183.
- used as public resort, intoxicating liquors found, presumptive evidence of illegal sale, 3204.

**DYING DECLARATION—**

- admission of, in homicide cases, 115.
- credibility for jury, premonition of death not a guaranty of truth, e 4687.
- foundation for, 3099.
- not of highest order, to be received with caution, e 4686.
- repetitions of, how considered compared with other repetitions, e 4689.
- state may rely on, need not produce eye-witness, e 4690.
- to be received with caution, 3100.
- under clear conviction of impending death, referring competency of evidence to jury, e 4688.
- weight for jury, what considered, 3098.
- why admissible, weight, for jury, 3097.

**EARNING CAPACITY—**

- of deceased, measure of damages, negligence causing death, e 3610.
- previous, personal injury, damages, e 3569.

**EARNINGS—**

- future, computing present worth, measure of damages, personal injury, e 3581.
- measure of damages, personal injury, infant, e 3590.

**EARS—**

- impaired, object of ridicule, rule of damages, 920.

**EARTH—**

- borrowing, eminent domain, damages, e 3561.

**EDUCATION—**

- as an element of credibility of witnesses, e 3309.

**EFFECT—**

- of evidence as to reputation, limiting, e 4347.
- spoliation of wills, e 4310.

**EJECTING—**

- trespasser, assault and battery, justification, 2842.

**EJECTION—**

- of passenger, 1827-1831.
- carrier may eject for failure to produce ticket or pay fare, e 3999.



[References are to sections; e refers to Erroneous Instructions.]

**EJECTION**—Continued.

- for failure to pay additional fare, e 4000.
- from moving train, e 4001.
  - street car, negligence, use of more force than necessary, 2056.
  - wantonly and wilfully, e 4002.
- of trespasser,
  - assault and battery, 2842.
  - from moving train, e 4020.
  - on real estate, by force, 2313.
- wrongful, from street car, refusal to pay fare, 2055.

**EJECTMENT**—Chapter XLIX, 1034-1045.

- bona fide settler, abandonment, 1043.
- constructive possession extended to land described in deed even though void, 1042.
- deeds of third party as evidence, 1043.
- defect in defendant's title, 1036.
- homestead, measure of damages, 2234.
- occupancy, constructive possession extended to land described in deed, 1042.
- only legal title involved, 1034.
- ownership presumed from actual peaceable possession may be rebutted, 1039.
- plaintiff must show better title than defendant to recover, 1037.
  - good title to recover, 1038.
- possession prima facie evidence of title, 1037.
- right to possession must be shown, 1040.
  - sue, when title is conveyed before suit, 1045.
- source of title, starting point, title deduced from a common source, 1035.
- title conveying possession, suit, 1045.
  - of third party, 1036.
- two parties in constructive possession, oldest and best title prevails, 1041.
- where common law rule prevails, 1034.

**ELECTION**—

- judges refusing to receive vote, e 4817.
- testimony limited by, reasonable doubt, 2700.

**ELECTRIC LIGHT COMPANY**—

- degree of care due by, e 4189.

**ELECTRIC**—

- wires, negligence, lineman working near, degree of care required, 2122.
- uncovered, knowledge to servant, assumption of risk, 1458.
- utmost degree of care in construction and maintenance by street railroad company, e 4162.

**ELIGIBILITY**—

- of jurors not confined to white persons, 27.

**ELEMENTS**—

- arson, joint defendants, e 4796.
  - proof of value of property, e 4797.
- assault with intent to commit rape, 2822.
- assault with intent to kill*,
  - deliberation not necessary, e 4552.
  - intent, e 4548.
  - malice and deliberation not necessary, 2866.
  - what state must prove, e 4546.
- bribery*, e 4801.
  - intent essential, 3273.
  - drunkenness as defense, e 4802.
- burglary*,
  - entry, 2881.
  - intent to steal, 2875.
  - omitting value of property, ownership of building, property in building, e 4561.
  - robbery, what necessary, 2873.
- conversion, must be proved by plaintiff, trover, 2332.

[References are to sections; e refers to Erroneous Instructions.]

**ELEMENTS—Continued.**

credibility of witnesses, what to consider, weight of evidence, e 3300.  
crime, intent necessary, intoxication may be excuse, e 4411.

of larceny, time not of the essence, 3238.

criminal transfer of intoxicating liquor, knowledge and criminal intent, 3201.

damage, personal injury, reasonably certain future sufferings, e 3575.

danger, self defense, actual, present and urgent, 3112.

defense of habitation, 3183.

dying declarations, foundations for, 3099.

weight for jury, what considered, 3098.

*embezzlement,*

all must be included, e 4592.

bailee cannot commit, obtaining possession by trick, device or fraud requisite, 2927.

felonious intent, 2923.

omitting "without the assent of his employer," e 4600.

*false pretenses,*

intent to cheat or defraud necessary, e 4603.

some property must have been obtained, 2939.

*forgery,*

assisting or encouraging another, 2942.

what must be proved, 2941.

*fraud,*

representations must be made to defrauded party, e 3648.

rescission of sale, motive or intent need not be shown, e 3642.

fraudulent representations, knowledge of falsity of representation, e 4816.

*homicide,*

must be proved beyond reasonable doubt 2979.

series, 2984.

injury, diverting surface water, measure of damages, 2353.

irresistible impulse, insanity, 2582-83.

*larceny,*

asportation of property essential, e 4776.

definition should include all essential, e 4775.

horse stealing, what necessary to convict, 3214.

possession of stolen property not material, e 4784.

taking must be with felonious intent, 3211.

value must be proved, 3218.

what constitutes taking and carrying away, 3220.

is necessary to prove, 3217.

whether felonious intent essential, e 4781.

libel, intent, presumption of intent, e 4260.

malice, deliberation necessary, though not for any particular period of time, e 4666.

slander and libel, 2287.

*manslaughter,* 3023, e 4642.

and self defense distinguished, 3033.

facts amounting to, 3026.

in first degree, 3028.

second degree, 3029.

fourth degree, 3031.

intent to kill necessary, Texas, e 4645.

not necessary, Alabama, e 4644.

sudden heat of passion or sudden affray, either sufficient to reduce crime, e 4647.

U. S. Courts, 3024.

*murder,*

and manslaughter, Michigan, 2989.

formed design not essential, Alabama statute, e 4615.

Illinois, 2955.

malice need not be expressed, e 4664.

*murder in first degree,*

form of verdict, e 4630.

Idaho, Nebraska, 2990.

[References are to sections; e refers to Erroneous Instructions.]

**ELEMENTS—Continued.**

- intent, administering poison, 3057.
- poison, 2995.
- premeditation, distinguishing characteristic, 3083.
- those omitted supplied by other instructions, e 4628.
- murder in second degree*,
  - California statute, 3007.
  - deliberation not necessary, malicious and coldblooded, Wyoming, 3011.
- necessary, embezzlement, intent to defraud, 2921.
- for conviction on circumstantial evidence, 2496.
- in witnessing wills, 2365.
- negligence, e 4096.
- master and servant, defective scaffold, 2132.
- railroads, injury by fire, 1994.
- of case, instruction to find verdict must contain all, e 3655.
- perjury*,
  - that accused was sworn must be proved, 3256.
  - to be proved beyond reasonable doubt, 3269.
  - what to be considered, 3267.
- provoking difficulty, self defense, e 4712.
- robbery*,
  - force not necessary, 2891.
  - omission of intent, e 4574.
- sale of intoxicating liquor, within state, 3186.
- self defense*, 3102, e 4691.
- belief in danger must be honest, 3113.
- duty to retreat, 3160-66.
- essential, 3101.
- law of, stated, 3103.
- omitting, defendant must believe himself in imminent peril, e 4695.
- freedom from fault in bringing on difficulty, e 4692.
- physical power of deceased, 3144.
- what sufficient and what insufficient to show, 3105.
- to be considered in assessing damages, personal injury, e 3567.
- undue influence, wills, 2395, 2416.
- voluntary manslaughter, what constitutes, 3027.

**ELEVATORS—**

- assumption of negligence, by falling of, e 4009.
- degree of care, required in operation of, e 4009.
- toward servants, 1842.
- duty to keep in repair, 1396, 1397.
- failure of master to guard opening, 1397.
- fall of, injuring passengers, e 4009.
- falling into shaft of, 1467.
- injury to passengers through fall of, 1842.
- passenger carriers, 1842.
- personal injuries, measure of damages, 905.

**EMANCIPATION—**

- of minor, 1019.

**EMBANKMENT—**

- construction of, by railroad, eminent domain damages, e 3561.
- watercourses, obstructions, right of action, 2358.

**EMBEZZLEMENT—Chapter XCVI, 2921-2938, e Chapter CLXXVII, e**

- agent not disclosing agency, converting proceeds, 2936.
- amount of money embezzled, e 4596.
- assumption of ownership, ignoring fact that point was contested, e 4599.
- bailee cannot commit, possession obtained by trick, device or fraud, 2927.
- by banker, Illinois statute, 2937.
- employee during employment, 2934.
- defined, e 4591.
- elements of, all must be included, e 4592.
- felonious intent inferred from act, employee, 2925.
- necessary, 2923.



[References are to sections; e refers to Erroneous Instructions.]

**EMBEZZLEMENT**—Continued.

fraudulent secretion of the money a necessary element, e 4597.  
 from a distracted person, consent, 2926.  
 funds embezzled cannot be paid out of sums received by bank illegally, 570.  
 immaterial what becomes of money after its embezzlement, e 4598.  
 intent as shown by proof of other embezzlement, comment on weight of evidence, e 4593.  
     to defraud presumed from act, not conclusive, e 4594.  
 meaning of term, must be done secretly with intent to defraud, 2921.  
 no felonious intent, when, 2924.  
 of money, check is not money, 2930.  
 original taking of bailee need not be felonious, gist of offense is conversion, 2928.  
 ownership of property, intent, 2922.  
 pledging bonds, held as treasurer, in security for his note, intent, 2932.  
 receipt as evidence, 2938.  
 restitution no defense, e 4601.  
 right to retain commission by agent, 2935.  
 special or general deposit, 2933.  
 statute of limitations, e 4602.  
 venue of conversion, 2929.  
 whether wrongfully converted or drawn for benefit of bank, 2931.  
 "willfully" and "intentionally," e 4595.  
 "without the assent of his employer," e 4600.

**EMBRACING WOMAN**—

assault and battery, intent to injure, 2853.

**EMINENT DOMAIN**—Chapter XLII, 840-881, e 3543-66.

access rendered more difficult, 855.  
 actual cash market value, 843-845.  
 allowance for benefits, public utility, expense of adjusting land after part taken, e 3553.  
 availability of land for manufacturing purposes may be considered, 846.  
     benefits deriving from change in street grade not to be considered, 871.  
     limited to such as are derived from improvement, 852.  
     of drainage, e 3557.  
     peculiar to land may be deducted from amount of damages, 851.  
     to be considered, e 3551.  
 borrowing earth, interfering with drainage, e 3561.  
 by reason of the use and operation of trains, 855.  
 change in street grade, damages to abutting property, 871.  
 common benefits not considered, e 3555.  
 comparison of uses to which property may be put, in assessing damages, 842.  
 conjectural, inconvenience, e 3558.  
 constitutional provision, as to taking private property, 840.  
 creating irregular fields, e 3550.  
 cutting timber market value, e 3560.  
 depreciation of value of property on account of public improvements, 850.  
 elements considered when part only of property taken, 843, 862, e 3563.  
     that may be considered in assessing damages, 843, 862.  
 evidence and stipulations must be considered in assessing damages, 881.  
 extension and operation of railroad, causing diminution in value of real estate, measure of damages, 856.  
 extension of lots may be considered by jury in assessing damages, 862.  
 fair cash market value, measure of damages, 842.  
 financial condition of parties immaterial in assessing, 874.  
 flow of water across may be considered, 847.  
 for appropriation of street, 870.

[References are to sections; e refers to Erroneous Instructions.]

**EMINENT DOMAIN**—Continued.

- change in street grade, measure of, 871.
- construction of railroad, measure of, 854.
- erosion from shore lands, 869.
- railroad right of way, measure of damages for land taken, 853.
- through farmland, 867.
- unnecessary trimming of trees by telephone, 875.
- future loss in construction of buildings, element of damages, 849.
- how jury should assess damages, 863.
- improvements, leasehold interest, e 3556.
- inconvenience in working mines, 859.
- cutting of farm, e 3559.
- increased danger from fire, 861.
- inspection of premises by jury, e 3554.
- jury may view premises—to aid in assessing, 863.
- should be governed by testimony of witnesses and inspection of premises, 863.
- just compensation defined, 841.
- loss of probable profits of business may be considered, 848.
- market value enhanced, e 3552.
- of land, taken and not taken, 880.
- property with and without railroad, 878.
- not to be allowed if property will sell for more after improvement is made, 855.
- other uses to which property may be put may be considered in assessing damages, 846.
- possible benefits to be excluded in assessing damages, 852.
- presumption, burden of proof, e 3566.
- private property not to be taken or damaged for public use without just compensation, 840.
- projected improvements may be considered in assessing damages, 842.
- property on adjoining streets, 857.
- public improvement—damnum absque injuria, 865.
- remote and speculative damages, 849.
- contingencies such as frightening horses—not to be considered, 877.
- right of free access and egress from property, 870.
- of way unfenced, 866.
- railroads—value of property before and after construction of road, 854.
- riparian right owners, 868.
- entitled to use of dock, 868.
- special benefits equal to or greater than damage, 872.
- special price not considered in assessing damages, 844.
- telephone construction—unnecessary trimming of trees, 875.
- time and expense of procuring another place of business, element of damages, 848.
- to adjacent property by reason of construction of railroad, 854.
- may be considered, 842.
- to mine by construction of railroad, 859.
- property adjacent to stream, 868.
- on street adjoining railroad, 857.
- use for which property is suitable and adapted may be considered in assessing damages, 846.
- value of building stone, may be considered, 860.
- view of premises by jury, 863.
- waiver, right of property owner, proceeding under the statute, e 3565.
- weight to be given testimony in reference to use of adjoining lots, 864.
- what injury may be considered in assessing damages, 841.
- jury may consider in estimating damages, 846.
- may be considered in determining damages for land taken for right of way, 853.
- owner or juror would take is incompetent in assessing damages, 845.

[References are to sections; e refers to **Erroneous Instructions**.]

**EMINENT DOMAIN**—Continued.

*where part only condemned*—

- benefits to remainder not considered, 876, e 3562
- damage to residue, e 3564.
- diminished value of remainder, 876.
- elements to consider, 879.
- remainder cut into irregular fields, measure of damages, 878.
- remote contingency, 877.
- whole tract to be considered, 877.
- widening street, benefits may be deducted from damages allowed, 851.

**EMOTIONAL INSANITY**—

defined, 2585.

**EMPLOYEE**—

- embezzlement by, during employment, 2934, e 4600.
- felonious intent inferred, 2925.
- liability of master, see negligence, master and servant, 1370.
- negligence of, fire insurance, sprinklers, e 3669.
- railroad, operating hand car for private use, injury at crossing, 1901.
- weight to be given testimony, 367.

**EMPLOYER**—

- embezzlement, without the assent of, e 4600.
- liability of, sale of intoxicating liquor, 3192.

**EMPLOYMENT**—

- embezzlement by employee during, 2934.
- fear of losing, credibility, e 3310.

**ENCOURAGING**—

- aiding or advising abortion, e 4507.
- another to kill, accessory, 2743.
- forgery, without doing writing, 2942.
- principal and accessory, 2734, 2739, 2740.

**ENDORSERS**—

- liability of, due diligence, bringing suit, 2178.
- when a guarantor, Illinois, 2184.
- before maturity, innocent holder, 2176.
- constitutes prima facie liability, 2181.
- in blank, 2175.
- intention, liability, 2177.

**ENGAGING**—

- in mutual combat, whether plea of self defense barred, e 4728.

**ENGINE**—

- fire, collision with street railroad car, 2028.
- railroad,
  - backing, tender foremost, 1849.
  - employee riding on footboard of engine, 1605.
  - knowledge of proximity of, contributory negligence, 1954.
  - negligence, emitting unusual quantity of sparks, 1995.
  - running past cotton yard, 1996.
- steam, stationary, nuisance, smoke and soot, 2195.

**ENGINEER**—

- duty of passengers, 1972.
- failure of, to obey signal to slow up train, 1532.
- to see animals on track when he should, 1979.
- right of, to assume that track is reasonably safe, 1518.
- injury to, through defective step on engine, 1512.

**ENJOYMENT**—

- diminished of premises, tenant remaining bound to pay rent, 1234.

**ENLIGHTENED CONSCIENCE**—

- of impartial jury, estimating damages to minor for personal injuries, 957n.

**ENTRAPPING DEFENDANT**—

- burglary committed at suggestion of detective, e 4562.

**ENTRY**—

- burglary, must be by force, threats or fraud, e 4571.



[References are to sections; e refers to Erroneous Instructions.]

**ENTRY**—Continued.

- by force or threats essential, 1048.
- by mortgagee, right to possession, e 3728.
- of landlord, for condition broken, forfeiture of lease, e 3693.
- trespass, upon land obtained by fraud, 2312.
- what constitutes, burglary, 2881.
- without force but by consent and will of complainant, 1047.

**EPITHETS**—

- vile, on public street, breach of the peace, 3294.

**EQUAL DIGNITY**—

- of circumstantial and direct evidence, e 4350.

**EQUITABLE ESTOPPEL**—

- building on public highway, adverse possession, e 4233.

**EQUITY**—

- right to trial by jury does not extend, 12.

**ERRORS**—

- argued for first time in reply brief will be disregarded, 321.
- assignment of, necessary, 300.
- avoids an account stated, 422.
- complained of shall be specifically designated in brief, 322.
- correcting by new trial, twice putting in jeopardy, e 4504.
- in admitting evidence obviated by instruction, 185.
- when not obviated by instruction, 185.
- in overruling challenge for cause not available unless peremptory challenges are exhausted, 36.
- not specifically referred to in briefs waived, 322.
- should all be argued in brief, 321.

**ERRONEOUS CONCLUSION**—

- distinguished from insane delusion, 2588.

**ERRONEOUS INSTRUCTIONS**—See INSTRUCTIONS.

**ESCAPE**—

- any reasonable way of, self defense, duty of retreat, 3161.
- attempt to*, 2456-2464.
  - guilt presumed from, 2457.
  - how considered, 2456.
  - inference to be drawn therefrom may be either strong or slight, terms explained, 2462.
  - murder, 2998.
  - releasing prisoner from jail by delivering tools to prisoners, 2464.
  - to avoid arrest, prima facie evidence, homicide, 2458.
- conspiracy for, from prison, 2915.
- conspiracy to, when a felony or misdemeanor, 2916.
- doctrine of, self defense, ignoring, acting upon mere threats or appearances, e 4698.
- from custody of policeman, killing after, murder in first degree, e 4633.
- prison, homicide committed, all who aid or abet are principals, 2745.
- of prisoner, homicide committed in preventing, e 4608.
- keeping under strict guard, 2426.
- preventing, homicide, 2962.
- shooting officer to, right to make arrest, 2452.

**ESSENCE**—

- of crime, larceny, time not, 3238.

**ESSENTIAL ELEMENT**—

- asportation of property, larceny, e 4776.
- assault with intent to kill, intent, e 4548.
- bribery, intent, 3273.
- drunkenness as defense, e 4802.
- for recovery, vicious dog, 2346.
- intent to use force, rape, 2824.
- of assault with intent to commit rape, 2822.
- larceny, definition should include, e 4775.
- whether felonious intent, e 4781.

[References are to sections; e refers to Erroneous Instructions.]

**ESSENTIAL ELEMENTS**—Continued.

murder, formed design not, Alabama statute, e 4615.  
ownership must be proved, arson, 3269.  
self defense, 3101.

**ESSENTIAL FACTS**—

murder in first degree, poison, 2995.

**ESTABLISHING**—

criminal defense, need not be satisfactorily established, e 4331.  
plantation roads, negligence, railroads, 2008.  
self defense beyond reasonable doubt, burden of proof, e 4472.

**ESTATE**—

interest of heirs in, measure of damages, negligence causing death,  
e 3616.  
power of testator to exclude relatives from share in, e 4285.  
wills, power to exclude relatives from sharing, 2364.

**ESTOPPEL**—

boundary agreement, e 3459.  
doctrine of, 2423.  
equitable, building on public highway, adverse possession, e 4233.  
fire insurance agent, implied authority, e 3661.  
from plea of self defense, none where one attacks another in protection of a woman, e 4761.  
*insurance company*,  
estopped from claiming that profits of loss were insufficient, 1158.  
objecting that proofs of loss were not furnished in proper time, 1159.  
incumbrance on the premises, 1172.  
uniform course of business, 1169.  
negotiable instruments, defendant inducing plaintiff to buy note, 2150.  
notice to corporations, 2422.  
person having interest in goods covered by chattel mortgage who stands by and allows property to be sold, estopped, 1305.  
statute of limitations, 1255.  
voluntary payment of rent does not work, as to use of premises, e 3697.

**ESTRAYS**—

larceny of, 3230.  
taken up in good faith, subsequent intent to convert, 3231.

**EVADING THE LAW**—

insanity as a means of, 2571.

**EVICITION**—

forcible expulsion not necessary, 1245.  
from part of premises, extinguishment of all rent, 1246.  
measure of damages when done without probable cause and without malice, 828.  
right of landlord, done in wanton unwarrantable manner, punitive damages, e 3704.  
what constitutes, 1245-1246.  
when wrongful what damages should cover, 829.  
wrongful, right to procure warrant, 1247.

**EVIDENCE**—

abiding conviction of guilt must arise from, not from lack of it, e 4461.  
absent witness, when evidence of admissible, 116.  
"accepting" that of either party, e 3315.  
acts or statements of intoxicated person, action for sale of liquor, e 3690.  
admissibility of former testimony, 118.  
*admission*,  
after beginning suit, e 3367.  
as affecting credibility, 331-390, e 3361-3371.  
by silence when reply is called for, e 3365.  
how to be regarded by jury, 381-382.

[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE**—Continued.

- in affidavit for continuance, 388.
- in letters, e 3371.
- pleadings obviates necessity of proof, 387.
- made in effort to compromise, e 3370.
- not subject to mistakes as a matter of law, e 3364.
- of, by the Court, 103.
- husband or wife, 386.
- matters set out in affidavit for continuance of opposite party, e 3368.
- one not evidence against other defendants to prove conspiracy, malicious prosecutions, 1283.
- admitted without objection cannot be excluded by an instruction, 187.
- admitting written rules of street car company, e 4134.
- adverse possession must be proven by preponderance, 430.
- affidavit for continuance may be contradicted, 388.
- affirmative compared with negative, 336.
- all facts and circumstances need not be in, to justify conviction, e 4471.
- all must be excluded when one essential allegation not proved, 253.
- among best known to law, instructing that confession freely and voluntarily made is, e 4365.
- answers not responsive or incompetent may be stricken out, 132.
- appearance and conduct of witnesses, 122.
- argument should be confined to, 228.
- arson, of ownership, essential, 3269.
- as to ancestors' insanity, admissible only in corroboration, 2601.
- relationship, incest, admission, 2804.
- assault with intent to kill, reasonable doubt must be as to all, not only as to intent, e 4557.
- assuming facts without, intoxicating liquor, trick or evasion, e 4772.
- attempt to bribe juror, proof required, other attempts incompetent, 3271.
- attorney acting as witness questionable, 143.
- talking to witness, 380.
- as witnesses, 143.
- may be witnesses, 142.
- weight to be given to, 372.
- bad character of deceased immaterial when killing unlawful and premeditated, 2489.
- belief of jury must be limited to, larceny, e 4777.
- believing plaintiff's side, e 3314.
- bill of sale is only, e 4250.
- birth of child as tending to prove that defendant was the father, e 4512.
- books falsified, credibility of partners, e 3351.
- burglar's tools may be shown in evidence, 146.
- burglary, possession of recently stolen goods, of what weight, e 4563.
- stolen property, jury may determine weight, e 4564.
- casual statements by defendant to third party, weak, 2521.
- character*,
  - defendant's previous disposition toward children, infanticide, 2487.
  - jury may take into consideration, 2476.
  - may justify acquittal, 2480.
  - not sufficient to acquit, 2478.
  - of deceased, same offense to kill bad person as to kill good one, 2490.
  - of defendant, 2477.
  - of witnesses, e 3360.
  - previous bad character of defendant, 2488.
  - reputation for honesty, 2486.
  - when jury should convict notwithstanding, 2479.
- clear preponderance not required, e 3335.
- co-habitation presumption of marriage, when, 702.
- comments of counsel on withholding, 238.



[References are to sections; e refers to Erroneous Instructions.]

# **EVIDENCE—Continued.**

## *comment on, by court,*

- as to absence of, measure of damages, personal injury, e 3601.
- insanity from blow on head, e 4408.
- pouring gasoline and turpentine on person and igniting, e 4483.
- reasonable doubt, e 4454.
- to be disregarded, 2759.
- weight of, e 3318.
  - embezzlement, proof of other embezzlements as showing intent, e 4593.
  - robbery, considering condition of prosecuting witness, e 4575.
  - usury, e 4204.

commission of other crimes, must be limited to its legitimate object, e 4344.

comparing affirmative and negative testimony as regards ringing of bell or sounding of whistle, e 4043.

compelling defendants to put foot in shoe-print, 150.

competent for any purpose should be admitted, 129.

conclusive negligence, injury by fire not, 1989.

of malice, prosecution for purpose of collecting private debt is, 1270.

conduct of defendant, 2565.

attorneys, court, or parties, 121.

conducting cross examination, 138.

## *confessions,*

entitled to great weight when spontaneous, voluntary and corroborated, 2520.

must be considered as a whole, with other evidence, 2515-2516.

corroborated, 2523.

sufficient to convict, 2522.

treated like any other, 2514.

conflict in, how same should be reconciled, 332.

consistent with defendant's innocence, jury must acquit, reasonable doubt, 2711.

conspiracy to rob or murder, former acquittal, testimony of conspirator, 2914.

constant habit to stop, look and listen at railroad crossings, 1913.

contradictory, complainant's, reasonable doubt, 2836.

*contradictory statements*, Chapter XX, 373-380, e Chapter CVIII, 3353-3360.

as tending to impeach, 374.

at previous trial, 347.

for jury, 375.

out of court, 374, e 3359.

cooling time, homicide, hostile acts, e 4685.

coroner's verdict not evidence of, 1349.

corroboration required of false witness, e 3325.

*cross examination*, Chapter IX, 134-138.

latitude, 134.

leading questions, 137.

must base hypothetical facts on evidence, 127.

of character witness, 139.

on subject covered by direct, 135-136.

should follow direct, 134.

court can not permit examination of persons in Illinois, 152.

## *court may*

admit evidence after argument has begun, 103.

admit evidence out of regular order, 103.

compel submission of injuries, 147.

in its discretion permit examination in presence of jury, 152.

instruct jury to disregard incompetent, 187.

not instruct jury to disregard, 187.

prohibit attorney from arguing own evidence, 143.

regulate order of introducing, 869.

require witness to be examined on all matters, 107.

cumulative, when may be excluded, 103.

[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE—Continued.**

- damages must be found from, measure of damages, personal injury, e 3599.
- death of witness, when admissible, 116.
- dedication, what is evidence of, 1142.
- defendant can not be compelled to submit to tests for purpose of identification, 150.
- convicted on own testimony alone, confession must be corroborated, e 4373.
- defendant not entitled to most favorable aspect, e 4425.
- tried by, not on suspicion, evidence excluded or stricken out, 2762.
- degree of preponderance required, e 3333.
- deposition of absent witness should be given same weight as though present, 412.
- direct defined, 517.
- not necessary, murder in first degree, deceased making first hostile demonstration, 2994.
- discrediting, alibi, e 4321.
- dismissal of civil suit, prima facie evidence of want of probable cause, 1263.
- drunkenness, must raise a reasonable doubt as to mental capacity, 2619.
- duty of jury*
  - to consider all, 2773.
  - to consider all, two counts in indictment, 2774.
  - to construe in defendant's favor, e 4424.
  - to harmonize all proven facts, 340.
  - to reconcile conflict of, 330.
  - to reconcile with defendant's theory of innocence, e 4427.
- dying declarations*
  - not of highest order, to be received with caution, e 4686.
  - received with caution, 3100.
  - when admitted, 115.
  - why admissible, weight, for jury to determine, 3097.
- effect of failure to give information of injury, negligence, street railroads, 2016.
- eminent domain, damages, inspection of premises by jury, e 3554.
- employees, weight to be given, 367.
- entries in family Bible admissible, 128.
- equal number of witnesses on each side, 331.
- equally balanced, e 3339.
- error to compel woman to bare body, 150.
- refuse counsel opportunity to make statement of what he expects to prove, 130.
- errors in admitting may be cured by instruction, 187.
- erroneous comment on, criminal conversation, e 3431.
- establishing agency, e 3414.
- examination of person, 151.
- exception should be taken to ruling of court excluding, 130.
- excluding same is directing verdict, 252.
- of testimony by opponent's admission of facts, 131.
- exorbitant price as evidence of fraud, 1119.
- experiments and photographs, 123.
- expert testimony*, Chapter XXII, 391-397, e Chapter CX, 3372-3379.
  - as to value of services, e 3377.
  - considered in connection with other testimony, 395.
  - definition of, 391.
  - discredited, e 3374.
  - entitled to equal weight with other evidence, 126.
  - how jury should consider, 391.
  - merely advisory, 396.
  - must be supported by other evidence, 392.
  - not to exclude other evidence, 395.
  - should not be discredited, 126. e 3373.
  - given undue prominence, 126.
  - subject to same rules as other testimony, 393.

[References are to sections; e refers to Erroneous Instructions.]

# **EVIDENCE—Continued.**

- unsatisfactory, e 3375.
- valueless if hypothetical question unproved, 392
- value of, e 3376.
- weight of for jury, e 3372.
- when admissible, 126.
  - not necessary, 126.
- expressing opinion on, e 4484.
- expulsion from church not admissible, 140.
- extraneous, must be introduced to corroborate testimony of accomplice, seduction, 2753.
- fabrication of, used against accused, 2563.
- failure of brother to testify, 371.
  - parties to testify, presumptions, 144, 371, e 3352.
  - produce books and papers, e 3366.
  - produce material witness, presumption, 144.
  - show revengeful or unlawful purpose, assuming existence of, e 4750.
- falsus in uno, falsus in omnibus, 344.
- flight not presumptive, but tending to prove guilt, e 4326.
- forgery, elements necessary to be proved, 2941.
  - possession and uttering forged instrument, 2947.
- former testimony of witness, how proven, 117.
  - when admissible, 116.
- foundation for dying declaration, 3099.
- from which to determine whether death caused by blow or not, 3074.
- general reputation, Chapter XX, 373-380, e Chapter CVIII, 3353-3360.
- given by attorneys not conclusive, 552.
- good character*
  - and absence of motive, may generate a reasonable doubt, e 4341.
  - court should not state reasons, e 4343.
  - disparaging, purpose of admissibility, e 4346.
  - may be considered with all other evidence, reasonable doubt, e 4334.
  - morality and virtue, e 4337.
  - previous as against positive facts showing guilt, 2483.
    - may create reasonable doubt, 2698.
    - overcome positive evidence of guilt, 2481.
  - prosecution may rebut, though not allowed to attack defendant's character in first instance, e 4345.
  - reputation in community for peace and quietude, e 4336.
  - reputation of defendant, no presumption that it is good, e 4338.
  - requires stronger proof of malice, 2482.
  - should be considered with all the other evidence and not apart, e 4340.
  - to what extent considered in raising reasonable doubt, e 4339.
- good reputation, e 3357.
  - limiting its scope and effect, e 4347.
- greater latitude allowed in equity than at law, 103.
- "has sought to prove" considered, 2525.
- how credibility is to be determined by jury, 334.
  - should be weighed by jury, 363.
  - testimony of plaintiffs should be weighed, 363.
    - of defendant should be weighed, 365.
  - to be considered by jury, 400.
  - weight of, may be determined, 353.
- husband may testify for wife, 368.
- hypothetical questions, 127, 393.
  - defined, 397.
  - what they should embrace, 127.
- if admitted need not be proven, 131.
- if evenly balanced, jury should find for the defendant, 351, 356.
- ignoring part, assaulting trespasser, e 4543.
- impeachment, Chapter XX, 373-380, e Chapter CVIII, 3353-3360.
  - in general, 140, 141.
  - must be as to a material matter, e 3356.



[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE—Continued.**

- questions as to specific acts, 140.
- improper cross-examination as to wealth of party, 102.
  - ejection, deeds of third parties, 1043.
  - hypothetical questions what may be assumed, 127.
  - regard to intoxication, should not be taken from jury, e 4418
- inadequacy of purchase price as evidence of fraud, 1119.
- indictment not, 2566-2567.
- individual investigation by juror error, 124.
- insanity, wills, 2387.
- inspection and admissibility of documents, 112.
- instructing jury to disregard, 187.
  - on fragments of, e 4754.
- instructing hypothesizing facts must include all, e 4785.
  - not supported by, manslaughter in third degree, self defense, e 4659.
  - should be based on, 199, e 4256.
- intent, assault and battery, 2339.
  - facts showing, 3051.
- interest of witnesses may be considered in determining credibility, 338.
- intimations of an attempt at settlement improper, 102.
- intoxicating liquor, that some men could drink the liquor without feeling it, no defense, e 4769.
- introduction of, Chapter VIII, 102-123.
- inviolability of person, 148-149.
- irreconcilable conflict in, 2772.
- judges as witnesses, 142.
- juror allowing jury to view premises in discretion of court, 125.
  - may ask for evidence, 125.
  - should not seek information for himself out of court, 125.
  - bound to take testimony for their sole guide, 400.
- need not believe all, 411.
- jury*,
  - may disregard testimony of impeached witness, 378.
    - of witness who has willfully sworn falsely, 349.
    - willfully false, 344.
  - may distrust evidence of witness who testifies falsely, 347.
  - must decide question of guilt from, murder in first degree, e 4632.
  - need not disregard testimony of impeached witness, 378.
  - should be guided by, 404.
    - decide by and not by unsupported arguments of counsel, 405.
    - find only upon evidence offered in the case, 400.
    - view premises in a body, 125.
  - sole judges of the credibility of, 334.
  - to decide whether true, not whether just or not, e 3388
  - to look to for facts, 402.
- justification must be proved by defendant, e 3347.
- keeping a gambling house, what must be proved, 3277.
- lack of, may raise reasonable doubt, e 4460.
- larceny*,
  - felonious intent, fraud, artifice, false pretenses, threats, 3212.
  - name of person injured must be proved, 3228.
  - of person having possession, necessary, 3227.
  - recent unexplained possession, 3244.
  - that money is genuine, 3224.
  - value must be proved, 3218.
  - what is necessary to prove, 3217.
- limited to that of prosecutrix, bastardy, 2795.
- may be given under oath affirmation or dying declaration in homicide cases, 115.
  - orally or by deposition in civil cases, 114.
- malicious prosecution, discharge, prima facie, e 3709.
- malice, willful overstatement in affidavit, e 3714.
- marriage, record as evidence of, 703.
- material allegation is question of law for court, 253.
- contradictory statements, 376.

[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE—Continued.**

- measure of damages,*
  - eminent domain, e 3564.
  - personal injury, damages must be based on evidence, form of verdict, e 3609.
  - proof necessary of money expended in attempt to be cured, e 3584.
- mere preponderance sufficient to maintain action of assault and battery, 352.
- minutes of stenographer not competent, 128.
- and transcript of stenographer who is dead, 128.
- most favorable inferences deducible on motion to direct, 257.
- motion to strike out, if improper, after answer, proper method, 132.
- motive in homicide, 3077.
- must be basis of reasonable doubt, e 4434.
- corroborated, when, 349.
- given in open court in criminal cases, 114.
- must "clearly establish" insanity to overcome presumption of sanity, 2596.
- mutilated limb may be offered in evidence, 123.
- necessarily leading to a conclusion of guilt, not sufficient to convict, e 4451.
- necessary for recovery on negotiable instrument, 2135.
- negative compared with affirmative, 336.
- negligence must be proven by preponderance of, 561.
- negotiable instruments, amount necessary to overcome presumption of good faith in assignment, 2173.
- number of witnesses,*
  - on certain point can be limited, 224.
  - should be considered in determining preponderance, 354, e 3340.
  - to accident cannot be limited, 224.
- oath of witness not conclusive, 370.
- objections to,*
  - must be made at the trial, 132.
  - before answer, 132.
  - particular ground should be stated, 129.
  - question as leading must be specifically stated, 129.
  - secondary should specifically state that proper foundation has not been laid, 129.
  - should not be waived, 133.
- obstructing highway, what sufficient, 3289.
- obtaining information outside of court during trial, 124.
- of agency, conversion, demand made by agent, 2340.
- of alibi,*
  - caution and care in examining, 2440.
  - must account for whereabouts of defendant during the whole period, 2437.
  - should be subjected to rigid scrutiny, 2439.
- of conspiracy,*
  - instructing that it is usually circumstantial, e 4585.
  - what facts tend to show, 2909.
- of conversion,*
  - demand not necessary, 2341.
  - refusal to deliver up property of another on demand, 2339.
- of declarations by defendant,* e 4372.
- expectancy of life, measure of damages, negligence causing death, mortality tables not conclusive, e 3614.
- gift of note, possession by payee at death, held not to be, 2133.
- of guilt,*
  - flight as, voluntary surrender for trial, e 4327.
  - defendant insane, 2459.
  - explained by defendant, 2460.
  - forgery, unexplained possession of forged instrument, e 4606.
  - inculcating circumstances, 3243.
  - possession and claiming under forged deed, 2948.
  - whether flight considered as, motive, 2461.

[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE—Continued.**

- of killing of another person than the one named in the charge not to be considered, 2967.
- of innocence*,
  - arson, lack of motive, silence when accused, e 4799.
  - failure to flee not, 2463.
- of insanity*,
  - doubt of motive not, e 4399.
  - suicide not necessarily, 2603.
- of insolvency*, return of officer not conclusive, negotiable instruments, 2188.
  - lack of premeditation, intoxication, e 4414.
- of malice*,
  - homicide, how proven, 3065.
  - necessary, malicious mischief, 3280.
  - self defense, whether defendant's previously arming himself is, e 4719.
  - whether death of deceased is, e 4665.
- of murder*, accidental shooting of bystander not to be considered as, e 4612.
  - ownership, personal property, possession, 2193.
  - parties, Chapter XIX, 363-372, e Chapter CVII, 3349-3352.
  - penitentiary sentence, as affecting reputation as a good citizen, e 4348.
  - personal malice, not necessary where injury done willfully for purpose of gain, 3283.
  - physician appointed by court, e 3378.
  - proposed settlement not considered as admission, 676.
  - seduction, birth of child, e 4531.
  - Supreme Court opinion in argument improper, 128.
  - title, trover, possession, 2328.
  - value of property should be given in order to measure damages for taking for public use, e 3545.
- offer of evidence before ruling is made*, 130.
  - should contain substance of what he expects to prove, 130.
  - statement by counsel, 130.
- offered but stricken out should not be considered by jury*, 405.
- offered provisionally*, 108.
  - not to be commended, 108.
  - not to be stricken out on court's own motion, 108.
- on cross-examination counsel need not state object*, 108.
- opening statement of counsel not binding*, e 3369.
- oral admissions regarded as weak*, 385.
  - where there is written contract, e 3483.
- order of introducing*, 105.
- palpably false may be disregarded*, 343.
- part of forged writing in same handwriting as balance*, 2950.
- particular ground of objection should be stated*, 129.
- parties as witnesses*,
  - Illinois rule, 144.
  - may be considered by jury, 145.
  - subject criticism, 144.
- party*
  - by bald admission cannot shut out legal evidence, 131.
  - has right to have evidence heard even though facts are admitted, 131.
  - himself may be witness, and attorney, 143.
  - may be required to testify before witnesses, 87.
  - not bound by statements of own witness, 389.
  - vouching for credibility of his own witnesses, e 3358.
- perjury*
  - more than one witness required, 3258.
  - of authority of officer administering oath, 3265.
  - of materiality necessary, 3262.
  - that accused was sworn, 3256.
  - when material, 3263.



[References are to sections; e refers to Erroneous Instructions.]

# **EVIDENCE—Continued.**

- when one witness sufficient, 3259.
- personal examination, general rules discussed, 151.
- plaintiff in action for loss of goods may show similar articles, 146.
- prior force of conduct in alighting from street car, not admissible, e 4154.
- pleadings*,
  - although not signed, may be used as admissions by opposite party, 119.
  - although withdrawn may be used as evidence by opposite party, 120.
  - considered as admissions, 119.
  - need not be offered as a whole, 120.
  - of a party as conclusive evidence against him, 120.
  - of former suit may be used as admissions, 119.
- power to compel exhibition of body against party's will, 147-148.
- prejudicial, waived, 104.
- presiding judge as a witness, 142.
- presumptive, of illegal sale of intoxicating liquor, public resort, finding liquor, 3204.
  - when keeping is, 3188.
- presumption of innocence a matter of, 2637.
- previous disclosure of evidence, 111.
  - reputation for peace and quietude, homicide, 2484.
- prima facie*,
  - definition of, in connection with possession of goods as evidence of burglary, e 4569.
  - flight to avoid arrest, homicide, 2458.
  - killing with deadly weapon, not of murder in first degree, e 4631.
  - malicious prosecution, want of probable cause, dismissal of case, burden of proof, e 3710.
  - neglect to ring bell, etc., stock injured at crossing, 1984.
- probabilities and speculations, not admissible, e 3317.
- professional standing of experts may be considered, 394.
- proof beyond reasonable doubt, 2979.
  - required to establish adverse possession, 432.
- proving a negative, 1263.
  - case as alleged in declaration, e 3345.
  - material allegations, e 3344.
- provocation for homicide, past conduct of deceased, 3092.
- purpose of impeaching testimony, e 3353.
- quality an erroneous term, e 3342.
- quantum to be produced by defendant, burden of proof, 2474.
- questions of arrest and indictment improper, 140.
- rape, testimony of prosecutrix, 2819.
- reading of books to the jury, 128.
- reasonable certainty not required, e 3336.
- reasonable doubt*
  - arising from part, after consideration of whole, 2692.
  - arising from part, does not acquit, e 4459.
  - must arise from, and be substantial, 2685.
  - must be on whole, sale or gift of intoxicating liquor, e 4774.
  - within, 2696.
  - not necessary to put finger on particular, e 4431.
  - not required in civil cases, e 3341.
  - of each link not necessary, e 4437.
- reasonable expert testimony, 392.
- reasonableness of charges, attorneys, e 3451.
- rebuttal evidence given upon direct, 105.
- receipts as, embezzlement, 2938.
- reconciling with indictment, seduction, compromise cannot bar prosecution, 2837.
- record should contain all the evidence, 307.
- referring competency of, to jury, dying declaration, e 4688.
- refusal to exhibit body to jury, penalties, 149.
- rejecting, perjured witness, 2767.

[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE—Continued.**

- religion no disqualification, 115.
- replevin, burden on plaintiff, 2242.
- defendant's possession not prima facie evidence of ownership, e 4238.
- reputation*
  - of drunkard, credibility of witnesses testifying to, e 4342.
  - of witness for truth and veracity, 374.
  - relative weight where positive or circumstantial evidence is relied on, 2485.
- required to convict, reasonable doubt, 2679.
- rules prescribed by law must be followed, e 4495.
- saying "there is some", belittling defense of intoxication, e 4419.
- scientific and medical books as evidence, 128.
- self defense*,
  - assumption that deceased was aggressor must rest upon, e 4722.
  - as to who was aggressor, threats, 3149.
  - equally balanced, acquits, 3176.
  - procurement of arms as affecting motive, e 4721.
  - quarrelsome disposition of deceased, 3143.
  - threats as indicating state of feeling or who was aggressor, 3150.
  - uncommunicated threats, admissible when, 3152.
  - what sufficient and what insufficient, 3105.
  - when threats of deceased not admissible, e 4734.
- set-offs, when should be offered, 106.
- singling out, life insurance, e 3677.
- slight preponderance sufficient, 358.
- should not be offered piece-meal, 107.
- showing required to admit former testimony, 117.
- statement of counsel not, 2567.
- defendant satisfactory as, 2519.
- prosecuting attorney not based on, 2754.
- submitting injuries to jury in discretion of court, 146.
- subsidiary, doctrine of reasonable doubt does not apply, 2691.
- sufficiency of to be considered on motion to direct, 258.
- to convict, may be introduced by either side, e 4457.
- to satisfy, e 3337.
- telling defendant to put shoe in track, or foot-print, not error in North Carolina, 150.
- test of contradictory statements is not whether former testimony is true or that made at the trial, 377.
- testamentary capacity, jury must determine, 2388.
- testimony of parties, Chapter XIX, 363-372, e Chapter CVII, 3349-3352.
- testimony*
  - as to actions of deceased at time of injury, e 3747.
  - of impeached witness, credible even when uncorroborated, e 3355.
  - plaintiff consistent with both diligence and negligence of defendant, e 3350.
- that has been excluded will not be considered by the jury, 403d.
- to prove insanity, need not be direct, 2599.
- transcript of stenographer, unless testified to by him, not competent, 128.
- uncontroverted testimony of credible witness, 340.
- unless palpably false jury may consider, 343.
- value as, confessions of guilt, 2513.
- verbal admissions to be received with great caution, 384, e 3362.
- confessions, how considered by jury, 2531.
- verdict of coroner's inquest as to cause of death, 1213.
- vicious dog, dog's reputation not competent, 2348.
- view and inspection by the jury, Chapter X, 146-152.
- by jury of scene of accident as evidence of negligence, 1350.
- disregarding testimony, e 3379.
- vulgar words need not be repeated, 102.
- want of, reasonable doubt may arise from, 2695.
- weapon used by accused may be shown jury, 146.

[References are to sections; e refers to Erroneous Instructions.]

**EVIDENCE—Continued.**

*weight of,*

comment on, burglary, reasonable and credible account for possession of stolen goods, e 4570.

credibility of witnesses, e 3300.

how determined, 334.

invasion of province of jury, e 3363.

verbal and written admissions, e 3361.

to be given more intelligent and better informed witnesses, e 3309.

testimony of child, 368.

of employes, 367.

what considered, witnesses who testified in commitment court dead, 2770.

what hypothetical questions should state, 127.

may be admitted in to show a want of probable cause, 1264.

considered in determining weight of, 411.

should be considered in determining preponderance, 335.

should be given on rebuttal, 105-106.

should be given on direct examination, 105-106.

when conflicting, how jury determines truth, 329.

weight determined, 329.

evenly balanced, 355, 356, 361.

exhibition of injuries unseemly or dangerous to health, may be refused, 146.

it preponderates in favor of plaintiff, though but slightly, 358b.

may be given at close of argument, 109.

after close of case, 109.

offered provisionally may afterwards be stricken out, 108.

prima facie case sufficient, 106.

statements of one defendant admissible against co-defendants, 2527.

where evidence conflicting court may refuse to direct verdict, 250.

witness testifies falsely to material fact, 347.

without conflict court may direct verdict, 251.

witnesses testify opposite each other, how reconciled, 331.

whether material allegation or declaration is proven, question of law, 253.

presumption of innocence is, e 4423.

to be given in chief or rebuttal, within the Court's discretion, 103.

which weighs more, e 3338.

who may testify, 115.

will not be reviewed where bill of exceptions does not contain certificate that contains all, 307.

willfully false in a material fact may be distrusted, 345.

testimony—may be disregarded unless corroborated, 346.

*witness*

intentionally, corruptly, willfully, and knowingly swears falsely to material point, 348.

must testify under oath or equivalent, 115.

need not give exact words, 118.

testifying falsely on material fact need not be believed, 344.

who intentionally exaggerates may be disregarded, when, 350.

knowingly testifies falsely need not be believed, 342d.

X-Ray, personal injuries, 149.

**EVIDENCE, CIRCUMSTANTIAL—See CIRCUMSTANTIAL EVIDENCE.**

**EVIDENCE, CREDIBILITY OF—See CREDIBILITY.**

**EVIDENCE, PREPONDERANCE OF—See PREPONDERANCE OF EVIDENCE.**

**EXACT WORDS—**

must be proved in slander and libel, e 4264.

**EXAGGERATED STORIES—**

insanity from blow on head, commenting on evidence, e 4408.



[References are to sections; e refers to Erroneous Instructions.]

**EXAGGERATION—**

willful and knowing, e 3330.

**EXAMINATION—**

of property by purchaser suing for fraud, 1113.

witnesses and introduction of evidence, Chapter VIII, 102-128.

**EXAMINERS—**

medical, certificate from, and also a diploma not required to entitle to practice, e 4809.

**EXAMINING—**

duty of, architect, e 3435.

part of goods does not prevent proof of bad condition, e 3485.

**EXCAVATION—**

falling into, when risk is assumed, 1456.

in street, automobile running into, e 3925.

**EXCEPTIONS—**

must be specifically taken to instructions erroneous in form, 300.

necessity for making, 300.

**EXCEPTION—**

none as to place, carrying concealed weapons, in own house, e 4804.

parties joining in, 306.

should be taken to ruling of court excluding evidence, 130.

to charges should show errors complained of, 300.

refusal to give instructions, must point out error, 300.

**EXCESSIVE—**

force in case of assault, 526.

use of intoxicants, life insurance, e 3675.

**EXCITED—**

defendant in homicide, immaterial, 2977.

**EXCITEMENT—**

frenzy, irresistible impulse to avenge, no defense, 2580.

killing through, manslaughter, e 4648.

passion and revenge distinguished from insanity, 2579.

**EXCLUSION—**

of relatives from share in estate, power of testator as to, e 4285.

lesser offense, rape, e 4519.

every hypothesis but that of innocence, reasonable doubt, e 4467.

**EXCLUSIVE—**

possession necessary to be adverse, e 3406.

of stolen goods, burglary, e 4566.

sale of property, assuming broker has, e 3464.

use of house by defendant, larceny, necessary to raise presumption from possession, 3248.

**EXCURSION—**

liability of passenger while upon connecting line, 1751.

**EXCUSABLE—**

homicide, defined, state must prove homicide a crime, 3172.

killing by accident, 2972.

**EXCUSE—**

and justification, defendant not required to prove, 2468-69.

for crime,

intoxication may be, where intent a necessary element of crime,

e 4411.

intoxication, when, e 4410.

voluntary drunkenness, considered with reference to intent, e

4553.

not good, 2606.

only applies to murder in first degree, 2617.

*for non-delivery*

of note upon demand made, e 4210.

sale refusal to accept, 2260.

homicide without, malice, 3063.

insanity or drunkenness, burden of proving on defendant, e 4332.

[References are to sections; e refers to Erroneous Instructions.]

**EXCUSE—Continued.**

intoxication producing insanity, 2613.  
murder in first degree must be without, e 4630.

**EXCUSED—**

from answering incriminating question, 2764.

**EXECUTION—**

levy of, no bar to right to possession under mortgage, entry by mortgagee, e 3728.  
lien of, 1324.  
mixture of goods, levy on whole lot when inseparable, 1093.  
of conspiracy, crimes not within probable, conspirator not liable, e 4580.  
negotiable instrument, burden of proof, 2143.  
upon mistake of fact, e 4201.  
will, burden of proof, e 4286.  
proved, burden of proof on contestant, insanity alleged, e 4291.  
what is sufficient proof of due, e 4288.  
proof of, negotiable instruments, prima facie case, e 4193.  
proved, wills, insanity, burden of proof, 2369-2371.

**EXECUTOR—**

having funds in bank of which he is president—appropriating same to his own use—bank not chargeable, 494.  
not required to give bond for supersedeas, 325.

**EXECUTORY SALE—**

resale by vendor, trover maintainable, 2331.  
subject matter destroyed, title where, 2255.

**EXEMPLARY DAMAGES—**

actual damages very small, personal injuries, 943.  
alienation of affection, e 3502.  
defined, 738.  
ejection of passenger, 1827.  
given by way of punishment, 738.  
in action against saloon keeper for selling intoxicating liquors, 1223.  
in malicious prosecution, 1284.  
in trespass—measure of, 821.  
master and servant, 960.  
*may be allowed*  
against railroads for failure to run trains according to schedule, 1770.  
for maliciously or vexatiously suing out garnishment, 743.  
wrongful sequestration, e 3504.  
in action of assault, 965.  
for fraud and deceit, 830.  
for malicious prosecution, 787, 790.  
of trespass, 821.  
in suit against corporation, 823.  
for selling intoxicating liquors causing death, 778.  
when act is malicious or wanton, 965.  
negligence may be so gross and reckless as to imply intent for purpose of allowing, 944.  
no proof of actual, 945.  
personal injuries, 935, 942-945, 950.  
slander—when may be given, 815.  
trespass, "evident disregard of plaintiff's rights, e 4272.  
when may be allowed for injuries received from vicious dog, 827.  
sale of intoxicating liquors, 779.  
trespass on land, 822.

**EXEMPTIONS—**

debtor may sell or give away, 546.  
from charge of bigamy, prior marriage, 2797.  
not subject to attachment, 546.  
replevin, debtor selling property and retaining possession, e 4239.  
given to head of family, e 4244.

[References are to sections; e refers to Erroneous Instructions.]

**EXISTENCE OF DANGER—**

assuming, self defense, defendant's belief in danger, e 4694.

**EXORBITANT PRICE—**

as proof of fraud, 1119.

**EXPECTANCY OF LIFE—**

action for damages by wife for death of husband, negligence causing death, 971.

mortality tables not conclusive, e 3614.

not left entirely to discretion of jury, e 3615.

personal injury, mortuary tables, e 3580.

**EXPEDITION, MILITARY—**

knowledge of accused that it is, 3292.

transporting men and arms, 3291.

**EXPELLING—**

person from car, negligence, railroads, 1944.

**EXPERIENCE—**

knowledge and observation of jury in business affairs of life, 937.

**EXPERIMENT—**

surgical, disinterring dead bodies for, intent, proof required, 3284.

**EXPENSE—**

of attempt to be cured, measure of damages, personal injury, specific proof necessary, e 3584.

trial, remarks of court to the jury, 93.

witness, payment of, credibility, e 3311.

**EXPERT TESTIMONY—Chapter XXII, 126, 391-307, e Chapter CX, 3373-3379.**

as to value of services, e 3377.

by physicians appointed by court, e 3378.

capacity to make wills, discrediting, e 4300.

competency must first be shown to the court, 126.

definition of, 391.

entitled to equal weight with other evidence, 126.

how jury should consider, 391.

opinions of witnesses are to be considered, 395.

to be weighed by jury, 393.

jury must decide from all the evidence, 395.

to judge same as other evidence, 396.

not bound to accept opinions of experts, 394.

not binding—weight to be given, 394.

to exclude other testimony, 395.

opinions merely advisory, 396.

professional standing of witness to be taken into consideration, 393.

reason for, 392.

should not be discredited, 126, e 3374.

given undue prominence, 126.

subject to same rules as other testimony, 393.

to be considered with other testimony, 395.

value dependent on hypothetical question, e 3376.

view of jury, e 3379.

weak and unsatisfactory, e 3375.

weight of, for jury, e 3372.

to be given, 394.

when admissible, 126.

wills, insanity, 2389.

**EXPERT WITNESSES—**

hypothetical case put to, insanity, 2605.

number may be limited, 69, 86.

to be judged as any other, e 3373.

**EXPLANATION—**

of flight, evidence of guilt, 2460.

of possession of stolen goods,

must be reasonable, 2886.

need only raise reasonable doubt, need not be satisfactory, e

4788.

of self defense, must be given to jury, e 4693.



[References are to sections; e refers to Erroneous Instructions.]

**EXPLAINING—**

his conduct, by defendant, statements should not be called confessions, e 4371.

**EXPLOSION—**

of boiler, manslaughter, negligence, 3045.

on street car, contributory negligence, passenger injured trying to escape, 2075.

negligence, passenger injured through panic created, 2033.

**EXPRESS AGREEMENT—**

principal and accessory, concert of action need not be by, 2738.

**EXPRESS COMPANIES—**

duty and liability of, 1691, 1743.

only relieved from responsibility of delivery when prevented by act of God or Public Enemy, 1743.

duties and liabilities of, 1743.

**EXPRESS CONTRACT—**

excludes implied, e 3490.

may be varied by custom and usage, 637.

**EXPRESS MALICE—**

and implied, 2629.

defined, 2630.

difference between it and implied or constructive, 2631.

homicide, embraces implied, may be proved though not charged, 3061.

need not be, homicide, murder, e 4664.

**EXPRESSED WARRANTY—**

recovery on, or implied, e 4254.

**EXPRESSING OPINION—**

as to what has been proved, e 4484.

duty to convict, 2760.

may amount to warranty, purchaser guilty of contributory negligence, e 4253.

**EXPULSION—**

unlawful, from mother's house, resisting, self defense, 3159.

**EXTENDING—**

equal rights and privileges in restaurants, e 4818.

**EXTENSION OF TIME—**

for delivery, oral evidence, e 3483.

negotiable instruments, 2180.

guarantor or surety released, 2186.

**EXTENT—**

and degree of proof required, libel, exact words, not clear preponderance, e 4264.

**EXTENUATING CIRCUMSTANCES—**

burden of proof on defendant, 2472.

conviction on circumstantial evidence, homicide, 2504.

must be proved by defendant, murder in first degree, intent inferred, e 4629.

**EXTORTION OF MONEY—**

by threat of attachment, e 3444.

criminal prosecution, for keeping bawdy house, 2801.

**EXTRA WORK—**

must be ordered, e 3494.

omitting element of damage, e 3517.

ordered will not justify indefinite delay in finishing building, e 3492.

**EXTREME AND REPEATED CRUELTY—**

ground for divorce, 1006.

**EYE-WITNESS—**

need not be produced by state, may rely on dying declaration, e 4690.

to care of party injured by railroad not essential, negligence, 1949.

killing of person by railroad train, presumption as to due care when none exist, 1936.

[References are to sections; e refers to Erroneous Instructions.]

**FABRICATION—**

of evidence, used against accused, 2563.  
testimony by defendant, 2562.

**FACTORY—**

maintenance a nuisance, residence neighborhood, 2194.

**FACTS—**

admitted by withdrawing the plea of the general issue, slander and libel, justification, e 4268.  
amounting to manslaughter, 3026.  
and circumstances, not necessary that all should be in evidence, e 4471.  
assuming, warranty, instruction must be based on evidence, e 4256.  
inference from, circumstantial evidence, 2512.  
jury sole judges of, qualified, e 3380.  
the judges of, 401.  
malice aforethought, question of, 2628.  
material, reasonable doubt as to, e 4440.  
mistake of, execution or payment of negotiable instrument upon, e 4201.  
tending to show conspiracy, 2909.

**FAILURE—**

of *consideration*,  
false representation, 627.  
negotiable instruments, 2154.  
where there is no fraud, 626.  
of defendant to testify, court should not mention, e 4390.  
memory, capacity to make wills, e 4297.  
party to testify, 371.  
person to stop, look and listen at crossing, 1911.  
prosecutrix to make complaint, rape, 2811.  
to make outcry, rape, 2812.  
state to prove case, defendant relying upon, e 4428.  
state to prove motive, homicide, argumentative, e 4671.  
to heed watchman's signal to stop, negligence, 1924.  
keep in repair, of tenant, action for repairs, measure of damages, e 3695.  
make complaint, rape, presumption, e 4526.  
object, account of partnership presented, settlement, e 4229.  
prove intent, assault with intent to kill, does not mean that defendant should be acquitted, e 4550.  
motive, homicide, 3076.  
put revenue stamp on negotiable instrument, e 4198.  
select the best place to stop, look and listen, 1912.  
supply water, damages against irrigation company, e 3512.  
testify, defendant's, not to be taken against him, rule in various states, 2556-60.

**FAIR PREPONDERANCE—**

of the evidence, 357.

**FAITH—**

good, necessary, attachment, e 3448.

**FALLING—**

of party wall, duty of owner to protect and maintain, 2224.

**FALSE—**

appearances turning out to be, self defense, may act upon, nevertheless, 3111.

**FALSE IMPRISONMENT—1285-1288.**

arresting without warrant, when it may be done, 1286.  
damages—measure of, 786-796, e 3351, 3532.  
defendant obtaining release does not waive claim for damages, e 3717.  
not necessary to use violence or force to constitute, 1285.  
probable cause, defendant must have caused arrest, e 3716.  
submission to threats is not a consent to restraint, 1287.  
trespass on land of another, 1288.

[References are to sections; e refers to Erroneous Instructions.]

**FALSE IMPRISONMENT**—Continued.

what constitutes, 1285.

jury may consider in assessing damages, 791.

**FALSE PRETENSES**—2939-2940, e 4603.

intent to cheat or defraud necessary, e 4603.

knowledge and intent, 2940.

larceny, showing felonious intent, 3212.

some property must have been obtained, 2939.

**FALSE REPRESENTATIONS**—Chapter LII, 1095-1135, e Chapter CXXXVI, 3637-3658.

see **FRAUD**.

as to value of goods, 831.

by real estate agent, 492.

in contract, 627.

obtaining signature to composition agreement, 677.

knowledge of falsity is material, e 4816.

must be made knowingly, with intent to deceive, e 3645.

not mere matter of belief, e 3637.

of financial standing, fraud against creditors, assignment void,

knowledge of assignee, e 3631.

omission to correct though innocently made, e 3649.

to commercial agency, fraudulent intent presumed, commission merchant, e 3644.

**FALSE STATEMENTS**—

in procuring insurance policy, 1185.

**FALSE SWEARING**—See **SWEARING FALSELY**.

**FALSITY**—

knowledge of, material in prosecutions for fraudulent representations, e 4816.

**FALSUS IN UNO**—

falsus in omnibus, 344, e 3327-3328.

**FAME**—

ill, house of, accessory, 2802.

**FAMILY**—

care of, measure of damages, negligence causing death, pecuniary loss, e 3611.

head of, exemption given to, replevin, e 4244.

services of infant in, e 3500.

slandering, provoking attack, self defense, e 4730.

suit between members, for services, e 3499.

**FAMILIARITY**—

undue, with female, assault, e 3443.

**FARE**—

street railroads, contributory negligence, payment in genuine coin, 2076.

**FARM**—

inconvenient cutting of, eminent domain, damages, e 3559.

**FARM CROSSING**—

and switches, railroads, 2007-2011.

duty of railroad to repair bridge, 2011.

railroads, less care required, 2009.

stock injured, 2010.

**FARM LABORER**—

lien of, 1328.

**FARMLANDS**—

measure of damages for right of way through, 867.

**FAST DRIVING**—

violation of ordinance on, 1681.

**FATAL**—

wound not necessarily, death from neglect, 2973.

**FATALLY WOUNDED**—

by striking with billiard cues, 3000.



[References are to sections; e refers to Erroneous Instructions.]

**FATHER—**

- defense of daughter by, e 4758.
- killing by son to protect, e 4757.
- not bound to pay daughter for work while living at home except by agreement—series, 731.
- purchasing real estate with children's money, title, 2226.

**FAULT—**

- about half and half, measure of damages, personal injury, e 3593.
- defendant at, self defense, cannot plead, 3131.
- in, self defense, abandoning the conflict, may plead, e 4724.
- freedom from, in bringing on difficulty, essential element of self defense, e 4692.
- of owner cannot cut off commission of broker, e 3470.
- reasonable freedom from, self defense, not enough, e 4723.

**FAVOR—**

- every reasonable doubt construed in defendant's, 2634.
- of defendant, duty of jury to construe evidence in, e 4424.
- resolution of reasonable doubt in, murder or manslaughter, 3035.

**FAVORABLE—**

- aspect of evidence, defendant not entitled to most, e 4425.

**FAVORING—**

- circumstantial evidence, e 4357.
- prosecution, particularizing witnesses, e 4496.

**FEAR—**

- confessions made under influence of, credibility, e 4370.
- consent to rape induced by, 2809.
- of death, abandonment of homestead by reason of, selling during temporary absence, e 4236.
- losing employment, credibility, e 3310.
- outcry prevented by, rape, 2813.
- robbery, retaking of one's own property, 2900.
- taking by putting in, 2899.
- self defense, defendant must have reasonable grounds for, e 4697.
- not sufficient, overt act necessary, what constitutes, 3147.

**FEATHER—**

- tar and, conspiracy to, 2917.

**FEDERAL COURT—**

- may certify questions to Supreme Court, 285-7.
- method of selecting juries, 11.
- not bound by methods of state courts in selecting juries, 11.

**FEDERAL RULE—**

- cross examination, 135-136.

**FEELING—**

- self defense, uncommunicated threats admissible to show, 3152.
- state of, self defense, threats as indicating, 3150.

**FEES—**

- of witnesses, forgery of names to get, verbal agreement to give defendant the fees, e 4604.

**FELLOW SERVANTS—1428-1443, 1554-1560, e 3799-3812, 3875-3880.**

- assumption of risk, of injuries by, e 3808.
- care required of master in selection of, 1434-1435.
- contributory negligence of, e 3880.
- defined, 1428-1433, 1554, e 3799.
- duty of master to dismiss incompetent employes, 1437.
- master to hire competent employes, 1437.
- railroads to employ competent servants, e 3876.
- elements necessary to constitute relationship of, 1429, e 3800.
- engaging in extra hazardous work, different from ordinary employment at command of fellow servant, 1441.
- failure of master to employ sufficient number of, e 3801.
- following orders of vice principal, 1545.
- foreman assumes risk of carelessness of employes subject to his control, 1389.

[References are to sections; e refers to Erroneous Instructions.]

**FELLOW SERVANTS—Continued.**

- incompetency of fellow servant, in mines, e 3807.
- right of servant to presume that master knows of incompetency, e 3876.
- knowledge of servants incompetency, subsequently acquired by master, e 3804.
- liability of master for incompetency of, e 3803.
- negligence of vice principals, e 3810.
- master not liable for acts of, 1376.
- negligence of, 1437.
- may be as to part of employment and not as to other part, 1430.
- mines, whether runner and helper on mining machine are fellow servants, e 3807.
- motorman of street car failing to reduce speed at dangerous places, injury to conductor, 1438.
- negligence of,*
  - bars recovery, e 3808.
  - defendant and of fellow servant, 1432, 1437.
  - in mines, e 3806.
  - master not liable for, 1428.
  - must be proximate cause, 1474.
- no liability of master for negligence of, e 3875.
- of mechanic on railroad, 1558.
- person charged with ventilation of mine, not fellow servant of miner, 1436.
- question of fact for the jury, 1431.
- repairing machinery, 1469.
- responsibility of master for incompetency of, 1435.
- right to assume that reasonable care has been used in selection of, e 3812.
- rule in Colorado, 1433.
- should be actually co-operating just before and at the time, 1429.
- superior authority does not always destroy relationship of fellow servants, 1442, e 3811.
- whether conductor and flagman are, e 3877.
- road-master is fellow servant of one working on track, e 3879.
- section foreman is, of labor, e 3878.
- servant is bound to inquire as to competency of, e 3805.
- who are, 962.
- a question of fact for the jury, e 3802.
- vice principals, e 3809.

**FELONIOUS—**

- assault on defendant need not have been, self defense, interfering in combat, 3173.
- taking need not be, embezzlement, gist of offense is conversion, 2928.

**FELONIOUS INTENT—**

- embezzlement,*
  - inferred from act, 2925.
  - necessary element, 2923, e 4592.
  - when not present, 2924.
- explanation of, larceny defined, 3210.
- larceny,*
  - fraud, artifice, false pretenses, threats, 3212.
  - taking must be with, 3211, e 4781.
- not necessary to constitute one the aggressor, self defense, e 4711.
- self defense, provoking quarrel without, e 4714.

**FELONY—**

- conspiracy to escape, 2916.
- larceny, turning mare loose does not divest of character of, 3234.
- murder committed while engaged in committing, e 4622.

**FEMALE—**

- abusive language in presence of, 3295.
- undue familiarity with, assault, e 3443.

**FENCES—**

- agreement as to line, adverse possession, e 3462.

[References are to sections; e refers to Erroneous Instructions.]

**FENCES—Continued.**

- defective, railroad, contributory negligence, 1968.
- stock escaping, 1969.
- division, defects in, trespass by cattle, 2321.
- line agreed upon by mistake, 585.
- wanting, trespass by cattle, 2320.
- for shaft of coal mine, duty of owner to furnish, 2126.
- line agreed upon as boundary, 584.
- disputed, trespass, settlement by arbitration, 2319.
- obligation to fence, railroads, not limited to adjoining owner, 1966.
- rail, deceased striking father of defendant with, manslaughter in second degree, Missouri, e 4658.
- railroads, casual breach, 1964.
- cattle guards, 1967.
- trespass, pasturing cattle on uninclosed lands, e 4274.
- unlawfully breaking, pulling down or injuring, 3298.
- wrongful removal of partition, measure of damages, 772.

**FENCING TRACK—**

- railroads, 1962-1969.
- cattle entering at point where fence not required, e 4084.
- getting on track from failure to lock gate in fence, e 4085.
- duty of railroad, burden of proof, e 4083.
- examination of defective gate by jury, e 4085.
- failure to comply with law, negligence per se, e 4081.
- killing cattle for failure to fence track, e 4082.
- negligence, benefit of children, 1970.
- obligation of railroad to fence right of way, e 4082.
- reasonable care, 1963.
- statute in reference to, 1962.
- stock unlawfully running at large, 1965.

**FIDELITY—**

- lack of, president or director of bank liable only for his own, e 3456.

**FIDUCIARY RELATIONS—**

- fraud against creditors, conveyance set aside, e 3634.
- guardian and ward, burden on guardian of showing good faith, e 3626.

**FIELDS—**

- creating irregular, eminent domain, damages, e 3550.

**FIELD NOTES—**

- when to govern in affixing boundaries, 587.

**FIGHT—**

- interfering in, provoking difficulty, e 4542.
- plea barred by defendant's agreeing to, 3132.
- proof beyond reasonable doubt that defendant began, 3136.
- retreat more dangerous than, unnecessary, e 4742.

**FILING PAPERS—**

- what constitutes, 2429.

**FILLING OF BLANK—**

- negotiable instruments, bona fide purchaser, e 4219.

**FINAL CERTIFICATE—**

- architect fraudulently refusing, 512.
- fraudulently withheld by architect, 513.

**FINANCIAL STANDING—**

- negotiable instruments, argumentative, e 4202.

**FINGER—**

- not necessary to put, on particular evidence causing reasonable doubt, e 4431.

**FINDING LOST PROPERTY—**

- intent to convert, concealing fact of finding, 3216.
- not larceny, duty to search or advertise for owner, 3215.

**FINDING STOLEN GOODS—**

- defendant's house used jointly with others, 3248.



[References are to sections; e refers to Erroneous Instructions.]

# **FIREARMS—**

use of, assault and battery, pointing gun or discharging same, 2850.

# **FIRES—**

apparatus to prevent escape, 1998.

burden of proof, e 4109.

burden of proof as to origin of fire, 1991, e 4098.

by sparks of coals escaping from engine, e 4096.

contributory negligence of land owner, e 4111.

damages to turf from which grass is burned, 2001.

danger from, may be considered in assessing damages against railroad, 861.

negligent operation of mill, 2128.

degree of care required of land owners, e 4110.

destruction by, negligence assumed, e 3535.

of premises by, liability of tenant for rent, 1235.

dry weeds and grass, 2000.

duty of land owner, 2002.

railroad in unusual and extraordinary weather, e 4106.

to keep track and right of way free from dry grass and weeds, e 4103.

effect of failure to use most approved apparatus to prevent escape, 1999.

using proper spark arrester, e 4100.

elements of negligence, railroads, 1994.

eminent domain, danger from may be considered in assessing damages, 861.

engine omitting unusual quantity of sparks, 1995.

injury by, prima facie case, 1988.

from sparks, rule in Texas, 1992.

not conclusive evidence, 1989.

in street car, contributory negligence, passenger injured trying to escape, 2075.

measure of damages for loss, e 2536.

negligence in setting, injury to trees, 2129.

no recovery for injury where origin conjectural, 1990.

origin of fire not to be left to conjecture, e 4097.

plaintiff's building on right of way, 2003.

power of railway company to foresee consequences of, e 4108.

precautions to be taken in dry or windy weather, e 4104.

presumption of negligence from sparks escaping from engine, e 4098.

production of screens for inspection of jury, e 4101.

providing engine with approved apparatus for preventing escape of sparks, e 4098-4099.

reasonable care to prevent escape of sparks, 2004.

spreading of, 1997.

right of adjoining land owner to stack straw near right of way, e 4112.

rule in South Carolina as to injury, 1993.

sparks from engine, what the jury may consider in determining negligence, e 4096.

of unusual size and number being carried an unusual distance, e 4105.

speed of engine, e 4096.

threatened, insurance, cost of renewal, e 3664.

to cotton, engine running at excessive speed, 410

# **FIRE ENGINES—**

crossing track at street crossing, 2095.

# **FIRE INSURANCE—See INSURANCE.**

# **FIREMEN—**

assumed risk, 1569.

injury to, from side rod on engine breaking, railroads, 1514.

# **FIRING—**

first, self defense, defendant's right, e 4749.

till safe, self defense, right of, 3169.

to scare another, self defense, e 4736.

[References are to sections; e refers to Erroneous Instructions.]

**FIRM—**

dealing with after dissolution but without notice, e 4224.  
dissolution of, partnership note, knowledge of by payee, e 4196.  
how far bound by act of partner, 2204.  
indebtedness, amount of, whether individual or partnership funds, 2210.  
name, partner signing, borrowing money, 2205.  
note given for personal indebtedness, e 4222.

**FIST—**

blow with, homicide, presumption as to intent, 3053.  
striking deceased with, manslaughter, does not make defendant liable for killing by another, e 4656.

**FIT—**

for special purpose intended, implied warranty, samples, e 4251.

**FIXED—**

reasonable doubt must be, 2683.

**FIXTURES—**

whether they are real or personal property, 2217.

**FLAGMAN—**

backing train without, 1850.  
duty of railroad to maintain at crossing, 1891.  
signal of, does not excuse want of ordinary care, 1906.  
when necessary for safety at crossing, 1892.  
whether negligence not to have at railway crossing, e 4046.

**FLANGEWAY—**

horse injured in, negligence, duty of railroad in constructing road across street, 1980.

**FLEE—**

no duty to, attacked in habitation, justifiable homicide, 3183.  
defendant not bound to, gun drawn by deceased, 3164.

**FLIGHT—See also ATTEMPT TO ESCAPE.**

as evidence of guilt, voluntary surrender for trial, e 4327.  
attempt to escape, 2456-2464.  
how considered, 2456.  
evidence of guilt, explained by defendant, 2460.  
failure to attempt, no evidence of innocence, 2463.  
from other reasonable motives than guilt, argumentative, e 4328.  
may or may not be proof of guilt, motive, 2461.  
no duty of, policeman making arrest, e 4743.  
when attacked without fault on public highway, e 4744.  
not presumptive evidence, but tending to prove guilt, e 4326.  
raises presumption of guilt, 2457.  
tending to show consciousness of guilt, insanity, 2459.  
to avoid arrest, prima facie evidence, homicide, 2458.

**FLOATER POLICY—**

of insurance, 1186.

**FLOODING LAND—**

changing of watercourse, 2361.  
railroad building bridge over watercourse, e 4282.  
right to dam water, liability, what constitutes a stream, e 4279.

**FLORIDA—**

reasonable doubt defined, 2652.  
statute relating to instructions, 153, p. 128.  
variance from statutory definition of murder in second degree, e 4640.  
weighing defendant's testimony, 2538, e 4378.

**FLOUR—**

sale of, diligence required of commission broker, e 4249.

**FLOWERS—**

injury to by escaping gas, damages, 798.

**FOOD—**

concealing inferiority of, adulteration, 3293.

**FORBEARING—**

suit on note, negotiable instruments, consideration, 2159.

[References are to sections; e refers to Erroneous Instructions.]

**FORCE—**

and arms, defined, trespass to real estate, 2304.  
 drunkenness occasioned by, e 4415.  
 ejection by, of trespassers on real estate, 2313.  
 in retaking property, assault, e 3439.  
 intent to use, rape, reasonable doubt, 2825.  
 necessary in assault with intent to commit rape, feeling or sense of shame insufficient, e 4523.  
 not an element of seduction, 2830.  
 rape, character of, e 4522.  
 intent to use, essential, 2824.  
*robbery,*  
 intending to use whatever necessary, 2893.  
 not necessary, 2891.  
 retaking of one's own property, 2900.  
 taking from person or in his presence, 2899.  
 self defense, may use more than necessary, what seems necessary, e 4709.

no more to be used than apparently necessary, 3121.  
 unreasonable, school teacher using, e 4539.  
 use of more than necessary, ejectment from street car, 2056.

**FORCIBLE ENTRY AND DETAINER—Chapter L, 1046-1053.**

entry by force or threats, essential, 1048.  
 without force but against consent and will of plaintiff, 1047.  
 forcible detainer and forcible entry are distinct, 1050.  
 obtaining entry by stealth or strategy, 1049.  
 real question in issue, 1046.  
 title not involved, 1046.  
 to constitute possession not necessary that land be resided upon, 1053.  
 what amounts to, 1050, 1051.  
 constitutes possession, 1052.  
 does not constitute possession, 1053.  
 involved, 1046.

**FORCIBLE TAKING—**

larceny, resistance necessary, 3221.

**FOREMAN—**

assumes risk of carelessness of employes subject to his control, 1389.

**FOREST PRODUCTS—**

whether in transit, taxation, 2431.

**FORFEITURE—**

fire insurance policy, not favored in law, e 3663.  
 for using premises for different purposes than leased for, 1239.  
 of lease, entry of landlord for condition broken, e 3693.

**FORGERY—2941-2952, e 4604-4606.**

attempt to utter or pass for personal gain must be proved, 2945.  
 drunkenness as a defense, 2951.  
 elements, assisting or encouraging another, 2942.  
 necessary to be proved, 2941.  
 intent to defraud must be proved beyond reasonable doubt, presumption from attempt to utter, 2943.  
 negotiable instruments, ratification of, waiver of fraud, e 4212.  
 who must prove, e 4207.  
 of name of deceased party to a deed of certain land, 2949.  
 possession and claim under deed, 2948.  
 uttering, venue, 2947.  
 lack of revenue stamp, invalid instrument, 1946.  
 presumption that one intends the natural consequences of his act, 2944.  
 promissory note, overstating maximum penalty, e 4605.  
 proof that part of forged writing was in same handwriting as balance, evidence of guilt, 2950.  
 signing names of witnesses to get their fees, verbal agreement to give defendant their fees, e 4604.  
 telegram, inducing girl to marry through, 2952.  
 unexplained possession of forged instrument as evidence of guilt, e 4606.



[References are to sections; e refers to Erroneous Instructions.]

- FORMS**—  
and requisites of instructions in general. Chapter XI.
- FORM OF VERDICT**—  
assault with intent to murder, 2871.  
furnishing, homicide, 2981.  
murder in first degree, 3003.  
    repeating, e 4630.  
murder in second degree, 3022.  
murder, manslaughter, 3046.
- FORMATION**—  
of conspiracy, intoxication at time of, e 4588.
- FORMED DESIGN**—  
does not bar plea of self defense, e 4727.  
not essential element of murder, Alabama statute, e 4615.
- FORMER ACQUITTAL**—  
as a defense, 2778.
- FORMER ASSAILANT**—  
killing on sight, not justified by, self defense, e 4718.
- FORMER CONVICTION**—  
burglary, not charged in indictment, added punishment instructed, e 4573.  
of defendant, 2779.
- FORMER DECISIONS**—  
instructions based on, 312.  
will not be re-examined, 312.
- FORMER OFFENSE**—  
conviction of, admitted to affect defendant's credibility, e 4391.
- FORMER TESTIMONY**—  
admissibility, former testimony of, 118.  
death sole condition for admissibility in criminal cases, 118.  
    formerly sole condition of admissibility, 118.  
showing required to admit, 117.  
witness need not give very words, 118.
- FORMER TRIAL**—  
record of, not sufficient, defendant's right to be confronted with witnesses, e 4792.
- FORNICATION**—  
charge of, slander and libel, e 4261.  
retraction, 2293.
- FOUNDATION**—  
for civil suit, arguments of counsel in criminal trial, 2757.  
for dying declarations, 3099.
- FOURTEEN YEARS**—  
male under, presumed incapable of committing rape, e 4529.
- FRAGMENTS OF EVIDENCE**—  
instructing on, self defense, e 4754.
- FRANCE**—  
trials in courts of, 94.
- FRATERNAL AND BENEFIT SOCIETIES**—1206-1216, e 3680-3684.  
burden of proof on defendant to show forfeiture, 1212.  
committing suicide in sane state of mind, no liability, 1208.  
default of sick member, notice of inability to pay, e 3680.  
delay in payment of premium, 1212.  
good health defined, 1211.  
if insured is able to do any work not liable under total disability clause, 1216.  
incapacity for manual labor, 1214.  
legal definition of suicide, must be sane in order to commit, 1207.  
misrepresentations as to use of liquors in application, 1206.  
no presumption of suicide, morphine or other narcotics, e 3682.  
notifying board before commencing suit, 1215.  
presumption of death from seven years' absence, 1210.  
    suicide, morphine or other narcotics, e 3682.

[References are to sections; e refers to Erroneous Instructions.]

**FRATERNAL AND BENEFIT SOCIETIES—Continued.**

reinstatement, 1212.  
restoring to membership, waiving validity of, e 3681.  
creditor may take payment or security in preference to others if suicide, coroner's verdict, e 3683.  
while sane or insane, provisions in policy as to, 1207.  
taking own life not proof of insanity, 1209.  
total disability, 1215.  
verdict of coroner's inquest is evidence of cause of death, 1213.  
waiver of forfeiture as to delay in payment of premium, 1212.

**FRAUD—Chapter LII, 1095-1135, e Chapter CXXXVI, 3637-3658.**

accepting draft upon false representations, 1126.  
actual knowledge not essential, 1109.  
agent's liability when exceeding authority, 1098.  
all false representations need not be proved, 1101.  
allowing property to remain in possession of another, obtaining credit thereon, 1125.  
attempt not sufficient, must succeed, e 3647.  
bad or losing bargain, 1102.  
bank president drawing funds as executor for personal use, 494.  
bill for cancellation of deed, 1134.  
burden of proof, 1054, 1122.  
burglary, entry must be by, or force or threats, e 4571.  
cancellation of deed, series, 1135.  
circumstantial evidence, e 3654.  
commercial agencies, furnishing fraudulent reports to for purpose of obtaining credit, 1098.  
condition of basement concealed, liability of tenant for rent, 1236.  
confidential relations, 1135.  
conspiracy as to, 1098, 1120.  
constructive, agent guilty of who buys principal's property, 466.  
contributory negligence, no bar to relief, e 3651.  
court speaking of "pretended sales," e 3652.  
damages for, performance after knowledge, e 3639.  
deceit, misrepresentation, damages measure of, e 3522-3524.  
deceived party must have been induced by false representations, 1106-1108.  
believed the misrepresentations to have been true, 1106.  
suffered damages, 1106.  
defect obvious and visible, 1113.  
defendant entitled to instruction as to presumption of innocence, 1133.  
must know representations were false, 1100-1101.  
defined, larceny, 3242.  
degree of proof, e 3656.  
distinguishing opinion from misrepresentation, 1103.  
drawing check without funds, 1126.  
elements of, 1095, 1096, 1101.  
embezzlement, obtaining possession by, 2927.  
every false affirmation not a fraud, 1100.  
examination of property by purchaser, 1113.  
exemplary or punitive damages may be allowed, 830.  
exercising ordinary care and skill in looking at property purchased, 1113.  
exorbitant price as proof of, 1119.  
expression of opinion, bragging, 1102.  
*false representations,*  
as to soundness of horse, 1122.  
burden of proof, 1097.  
by agent, 1096.  
defined, 1095.  
made but not relied on, 1115.  
must be made knowingly, with intent to deceive, e 3645.  
have knowledge of, reasonable cause to believe not sufficient, 1097.  
obtaining credit upon, 1098.

[References are to sections; e refers to Erroneous Instructions.]

**FRAUD—Continued.**

- preponderance of evidence, 1097.
- to commercial agency, intent presumed, commission merchant, e 3644.
- false statements not mere matter of belief, e 3637.
- fire insurance, degree of proof, e 3670.
- forgery of mother's name to telegram, 2952.
- fraudulent purchaser giving notes, 1116.
- purpose in making and receiving mortgage, 1313.
- goods taken in payment of debt, 1118.
- ground for questioning account stated, 417.
- rescinding sale, must be as to existing or past fact, e 3638.
- inadequacy of consideration, 1135.
- purchase price, 1119.
- inference of from concurrent facts, 1081.
- injury must be shown, 1108.
- innocent purchaser from fraudulent vendee, 1117.
- vendee from fraudulent vendor, 1118.
- instruction to find verdict must contain all the elements of the case, opportunity of knowing, e 3655.
- intent to defraud avoids insurance policy, 1163.
- defined, 573.
- must exist at the time of making mortgage, 1314.
- justifies rescinding extension of loan and demanding immediate payment, 1131.
- knowing himself insolvent, 1111.
- knowledge by inference, 1060.
- of agent perpetrating not imputed principal, series, 494.
- falsity is material, e 4816.
- and intent must appear from the evidence, 1109.
- land obtained by, trespass, entry upon, 2312.
- larceny, showing felonious intent, 3212.
- title and possession obtained by, 3241.
- law presumes every man intends necessary consequences of his acts, 1057.
- may be inferred from circumstances, 1082, 1122.
- proved by circumstances, 1099.
- measure of damages, 831, 1122, e 3522-3524.
- mental incapacity of vendee, 1134.
- misappropriation of funds, 1124.
- misrepresentation.*
  - elements of, 1106.
  - may be fraudulent even if not known to be untrue, 1110.
  - of value, 1103.
  - what must be proved, 1106.
  - of lessee concerning rent paid, 1121.
- money paid out through fraud or wrong of defendant, interest on, 1123.
- motive in making valid claim immaterial, e 3658.
- must be proven, 1082.
- have been deceived by, 1109, 1110.
- relied upon the false representation, 1109, 1110.
- suffered damages, 1109, 1110.
- negotiable instruments.*
  - may be waived, 2149.
  - mistake, unable to read, relying on another, 2146.
  - signature obtained by, 2147.
- never to be imputed, 1054.
- never presumed without evidence tending to show it, 536.
- no apparently good reason to believe representations were true, 1100-1101.
- not presumed but must be proven, 1054, 1061.
- proven by giving check not paid, e 3641.
- to be presumed from borrowing money, 1055.
- occasion of drunkenness, e 4415.
- of agent, principal liable, e 3426.



[References are to sections; e refers to Erroneous Instructions.]

**FRAUD—Continued.**

- architect who withholds certificate, 513.
- partner, when binds others, 2214.
- omission to correct false statement, innocently made, e 3649.
- opportunity for examination, 1102.
- or false representations not presumed must be clearly proven, 1099.
- mistake, conclusive in absence of, 421.
- on the part of architect, 511.
- will permit account stated to be opened, 420.
- party cannot sue in tort and recover in contract, 1132.
- defrauding liable whether he profited or not, 1120.
- pecuniary necessity compelling sacrifice of property, e 3653.
- per se, 1062.
- person alleging must prove by preponderance of the evidence, 420.
- deceived must act with reasonable and ordinary prudence and caution, 1100-1101.
- plaintiff must have been induced by fraudulent representations, 1100.
- sustained damages, 1100-1101.
- positive, transfer of real estate by married woman, e 3627.
- presumption of honesty, good faith between near relations, e 3646.
- prevents an account becoming an account stated, 419.
- promptness of rescission, 1129.
- purchase with intent not to pay, 1112.
- purchaser must exercise reasonable caution, 1114.
- raising check, 506.
- ratification of deed made while intoxicated, 1135.
- recklessly making false representation of which he knows nothing, 1110.
- release obtained by, 1369, e 3754.
- release of contract obtained by, 659.
- renders sale not void but voidable, 1127.
- representation*,
  - as to the law, 1105.
  - made to defrauded party only, e 3648.
  - must be made under circumstances calculated to deceive, 1100.
  - made with intent to defraud, 1100-1101.
  - of the past or present, not of future events, 1107.
  - must have been made with intent to deceive, 1108.
- rescission*,
  - be as to the whole contract, 1129.
  - of fraudulent contract, rights of vendor as against the attaching or execution creditor, 1130.
  - sale, elements necessary, e 3642.
  - return of consideration, 1129.
- return of property, 1128.
- right to affirm or disaffirm, 1128.
- sales procured by, 1116.
- secret agreement to pay one debtor more than another under composition agreement, 677.
- seeking information elsewhere, 1115.
- series, 1135.
- signing without knowledge of contents, e 3657.
- silence is not, when, 1104.
- statements made as to matters of which party has no knowledge must be shown to be false, e 3640.
- statute of limitations does not begin to run until after fraud is discovered, 1251.
- real estate, oral contract, 2227.
- sub-lessee paying excessive share, 1121.
- suffering from ailment at the time of delivery of insurance policy, 1192.
- trick or device to mislead purchaser, 1104.
- vendee's failure to notice defects, e 3650.
- victim need not prove actual intent, e 3643.
- vitiates contracts, limitation of liability by railroad, 1826.

[References are to sections; e refers to Erroneous Instructions.]

**FRAUD—Continued.**

- waiver of, by retaining policy, 1201.
- negotiable instruments, ratification, e 4212.
- what constitutes, 1095, 1096, 1101, 1106, 1109, 1110.
- is sufficient to sustain an action for, 1095.
- must be proved, 1100.
- jury must consider, 1100.
- when may be inferred when bank deposits bonds of exaggerated value, 573.
- whether ordinary care and diligence were exercised, question for jury, 1114.
- wills, not considered when testamentary incapacity proved, 2390.

**FRAUD AGAINST CREDITORS—Chapter LI, 1054-1094, e Chapter CXXXV, 3629-3636.**

- acts and declarations of assignor prior to transfer, 1061.
- adequacy of consideration immaterial, 1075.
- application of proceeds, 1073.
- assignment void, false representation of financial standing, knowledge of assignee, e 3631.
- assignor continuing in possession as agent, 1063.
- bailment or sale, rights of creditor, e 3636.
- bankruptcy, 1083.
- change of possession,*
  - must be outward, visible signs of, 1062.
  - real, actual and open, 1062.
- when articles are heavy or cumbersome, 1066.
- property is heavy or bulky, outward public delivering possession, 1063.
- consideration, 1060, 1061.
- continuing in possession of property fraudulent, 1063.
- conveyances between husband and wife, 1085.
- acting in good faith, 1080.
- not affected by knowledge, when, 1076.
- delivery of personal property necessary, assumption of ownership, 1067.
- fiduciary relations, conveyance set aside, e 3634.
- financial condition of assignor, 1061.
- fraud must be proven, 1082.
- fraudulent assignment, mixture of goods, 1093.
- intent, 1082.
- preference, 1083.
- good consideration, 1088.
- faith, 1060.
- husband may give to wife, when, 1085.
- innocent purchaser, 1072-1077.
- insolvency, 1060.
- debtor may select any creditor and pay him in full, 1081.
- defined, 1083.
- knowledge of by purchaser, 1077.
- of debtor proven, 1083.
- intent, 1057.*
  - as to change of possession of heavy article, 1063.
  - knowledge of by assignee, 1061.
  - grantees, 1060.
  - to defraud creditors, 1061.
- knowledge of fraudulent intent by assignee, 1073-1074.
- misrepresentation in obtaining composition agreement, 677.
- mixture of goods, levy on whole lot when inseparable, 1093.
- motive of assignor, 1061.
- must be a change of possession, 1062-1066.
- show fraudulent intent of assignor and knowledge of assignee, 1059.
- never presumed, must be proven, e 3630.
- notice of fraudulent intent, 1060.
- parties to transactions, relation of, 1061.
- passing of title by assignment, burden of proof, 1059.

[References are to sections; e refers to Erroneous Instructions.]

# FRAUD AGAINST CREDITORS—Continued.

- person indebted may sell his property, 1089.
- possession by agent, 1069.
  - of growing crops, 1070.
  - personal property evidence of ownership, 1065.
- preference of creditors*,
  - creditor violates no rule of law when he takes payment or security for his demand, 1080.
  - intent, 1081, 1082.
  - of an insolvent corporation, series, 1084.
  - paying creditor bona fide indebtedness, 1079.
  - payment of antecedent debt, 1081.
  - preferring wife as creditor, 1085.
  - when fraudulent, 1080.
- property in hands of vendee, right of vendor's creditors to attach, 1094.
  - in possession of third person, 1068.
- purchaser must be chargeable with notice or have knowledge of fraud, 1074-1075.
  - taking goods in good faith for payment of an honest debt, 1075.
- putting prudent man on enquiry, 1060.
- retaining possession presumptive evidence of fraud, 1062, 1064.
- rights of preferred creditors, 1087.
- right to prefer creditors, 1079-1084.
  - transfer property in payment of debt due, motive immaterial, e 3632.
- sale*,
  - not void for mere knowledge of vendee of fraudulent intent, e 3633.
  - of goods, levy and proceeds arising from sale, 1092.
  - on credit, 1078.
  - to hinder creditors, burden of proof, e 3629.
  - relatives not necessarily fraudulent, 1087.
- series, 1061.
- specific intent to defraud, 1058.
- sufficiency of property left to pay debts, 1090.
- symbolical delivery, 1068.
- taking possession of property by vendee, subsequent loan to vendor, 1071.
- title of personal property purchased in the name of another not subject to execution, 1091.
- value of the property transferred, 1061.
- vendee agreeing to pay vendor's debts, 1088.
- what is sufficient notice of fraudulent intent, 1072.
  - jury may consider in determining whether fraudulent intent exists, 1061.
- wife getting property from husband, 3635.

# FRAUDULENT CONVEYANCES—1054-1094.

- acts and declarations of assignors prior to transfer tending to show a fraudulent intent, 1061.
- assignor of sound mind at the time of transaction, 1089.
- between husband and wife, 1086.
- burden of proof, 1064.
- change of possession, 1062-1066.
  - when property is heavy or bulky, 1063.
- innocent purchaser, 1072.
- intent to defraud creditors, 1061.
- knowledge of purchaser, 1056.
- law presumes every man intends the consequences of his acts, 1057.
- mere suspicion not sufficient, 1056.
- must be with intent to defraud creditors, 1056b.
- person attacking assumes burden of proof, 1056.
- sale to relatives, 1087.
- sufficiency of property left to pay debts, 1090.
- what is sufficient notice of fraudulent intent, 1072.



[References are to sections; e refers to Erroneous Instructions.]

**FRAUDULENT CONVEYANCES—Continued.**

whether sheriff has the right to make levy upon property, 1061.  
with intent to defraud creditors, 1057.

**FRAUDULENT INTENT—**

attempt to utter forgery, 2943.  
embezzlement, presumed from act, not conclusive, e 4594.  
false pretenses, necessary element, e 4603.  
must be proven in attachment, 536.

**FRAUDULENT SECRETION OF MONEY—**

embezzlement, necessary element, e 4597.

**FREE—**

from influence, confession must be, of threats or promises, admissibility for court, e 4368.

**FREEDOM FROM FAULT—**

in bringing on difficulty, essential element of self defense, e 4692.  
self defense, "reasonable" not enough, e 4723.

**FREEDOM OF SPEECH—**

allowed in argument, 232.

**FREIGHT—**

duty of railroads as to delivery of, 1740-1741.  
money advanced for, need not be repaid before bringing action of replevin, e 4242.  
or mixed trains carrying passengers, risk assumed, 1750.  
person getting, negligence, railroads, personal injury, 1942.  
suit by carrier for, 1746.

**FREIGHT TRAIN—**

becoming passengers on at invitation of brakeman, e 3975.  
passengers on, degree of care required, e 3968.  
riding on by passenger, assumption of risk, e 3969.

**FRENZY—**

irresistible impulse to avenge, no defense, 2580.

**FRESHET—**

extraordinary, absence of negligence, act of God, 2362.

**FRIGHT—**

killing through, manslaughter, e 4648.

**FRIGHTENING ANIMALS—**

car operated in ordinary manner, 2090.  
car not operated in ordinary manner, 2091.  
negligence and wanton defined, 1874.  
unloading of cinders, 1876.  
ordinary noise, 1875.

**FRIGHTENING PERSON—**

near track, producing miscarriage, railroad, 934.

**FRUIT—**

damages for negligence in drying, curing, packing and handling, 796.

**FRUITS—**

of larceny recently committed, presumption from possession of, e 4786.  
robbery, possession of, 2901.

**FULFILLMENT—**

specific conditions, sales, before title passes, e 4247.

**FULLY SATISFIED—**

not the same as belief beyond reasonable doubt, e 4450.

**FUNCTION OF JURY—**

slander and libel, burden of proof as to damages, e 4258.

**FUNDS—**

application of, negotiable instruments, purchaser in good faith not bound to see to, e 4217.  
partnership or individual, amount of firm indebtedness, 2210.

**FUTURE—**

advances, giving mortgage for, 1321.

[References are to sections; e refers to Erroneous Instructions.]

**[FUTURE—Continued.**

delivery, privilege of buying or selling held gambling contracts, 608.  
injury, reasonably certain, measure of damages, railroad passenger injured, e 3591.  
payments, measure of damages, personal injury, e 3571.  
suffering, conjectural, measure of damages, personal injury, e 3573.  
reasonably certain, measure of damages, personal injury, e 3575.

**GAIN—**

attempt to pass forged note for, must be proved, 2945.

**GAME AND GAMBLING—608, 641, 3276-3278, e 4806-4608.**

action for money lost, 641.  
card playing, must show it was at a public house and that there was betting, e 4806.  
playing a trick or joke, e 4807.  
contracts, when board of trade transactions held to be, 608.  
defense to promissory note, options in grain, e 3473.  
defined, 3276.  
horse racing, betting booth, e 4808.  
keeping gambling house, what must be proved, 3277.  
lottery aiding and assisting, 3278.  
no justification for killing, 3140.  
premises leased for, e 3698.  
when board of trade transactions may become, 608.

**GARNISHMENT—**

action on bond, elements of damages, 743.  
damages, measure of, 739-743.  
loss of credit in business an element of damages, 743.  
of bank account, 545.  
vindictive damages may be allowed for malicious suing out, 743.

**GAS—**

death by inhalation of, life insurance, bodily injuries, e 3678.  
escape of, injury to flowers, damages, 798.  
explosion, in house, statement of agent, 799.  
illness caused by poisonous gases from excavation, 946.  
company, negligence of, break in gas pipe, 2124.  
pipe, whether deadly weapon a question for jury, 3068.

**GASOLINE—**

pouring on person and igniting, commenting on evidence, e 4483.

**GATES—**

down at railroad crossing, contributory negligence, 1918.  
duty of railroad to maintain at crossings, 1891.  
failure to lower at railway crossing, e 4049.  
open, railroads, negligence, 1893.  
highway crossing, backing railroad cars, 1894.

**GENERAL—**

agent, erroneous definition, e 3411.  
benefits, not to be considered in assessing damages for change in street grade, 871.  
deposit, embezzlement, 2933.  
instructions, measure of damages, personal injury, e 3605.  
issue, slander and libel, facts admitted by withdrawing plea, justification, e 4268.  
privileged communications, e 4269.  
reputation, impeachment, contradictory statements, e 3353-60.  
summary, homicide, 2982.  
verdict, inconsistent with special findings, 270.

**GENUINE—**

money must be proved to be, larceny, 3224.

**GENUINENESS—**

of note, forgery, who must prove, e 4207.  
of signature,  
negotiable instruments, bona fide holder, credibility of witnesses, 2144.

[References are to sections; e refers to Erroneous Instructions.]

**GENUINENESS—Continued.**

negotiable instruments, delay in payment, e 4208.  
receipt of payment, 2145.

**GEORGIA—**

contract made on Sunday, 643.  
jury judges of law as well as of the facts, 2622.  
reasonable doubt defined, 2653.  
statute relating to instructions, 153.  
unsworn statement of defendant, 2552.  
weighing defendant's testimony, unsworn statements of defendant,  
e 4389.

**GESTATION—**

period of, should not be fixed by court, bastardy proceedings, e 4513.

**GIFT—**

of note, possession by payee at death, no evidence, 2138.  
or sale of intoxicating liquor, reasonable doubt, must be on whole  
evidence, e 4774.

**GIST—**

of offense, embezzlement, conversion, 2928.

**GIVING—**

away intoxicating liquor is sufficient to convict, e 4770.  
undue prominence to evidence, self defense, threats of deceased,  
e 4732.

**GONGS—**

negligence in sounding, street railroads, 2085.

**GOOD AND LAWFUL—**

money, robbery, not necessary to be proved though so described in  
indictment, e 4576.

**GOOD CHARACTER—See also CHARACTER EVIDENCE.**

as against positive facts showing guilt, 2483.  
considered with all the other evidence may raise reasonable doubt,  
e 4334.  
evidence of may acquit, 2480.  
may overcome positive evidence of guilt, 2481.  
not sufficient to acquit, 2478.  
larceny, weight as affecting recent possession of stolen goods, e 4785.  
presumption from, malicious prosecution, 1281.  
proof of, requires stronger proof of malice, 2482.  
weight of evidence, whether depending on strength of other evi-  
dence, e 4335.

**GOOD CITIZEN—**

reputation as, penitentiary sentence as affecting, e 4348.

**GOOD CONSIDERATION—See CONSIDERATION.**

**GOOD FAITH—Between near relatives, fraud, presumption of honesty,  
e 3646.**

in living up to reconciliation, homicide, motive, previous troubles not  
considered, 3079.  
negotiable instruments, purchasing notes at discount, e 4209.  
presumption of, negotiable instruments, what is insufficient to amount  
to notice, e 4218.  
purchaser in, negotiable instruments, not bound to see to application  
of funds, e 4217.  
slander and libel, plea of justification, 2290.  
publication with, or with intent to injure, question for jury,  
2285-2286.  
taking up estrays in, subsequent to convert, 3231.  
title, purchase and possession, attachment, e 3448.  
valid claim of right relied upon in, trespass, e 4814.

**GOOD REPUTATION—**

no presumption of, e 4338.

**GOOD WILL—**

breach of contract for sale of, 664.



[References are to sections; e refers to Erroneous Instructions.]

**GOODS—**

- obtaining by fraud, giving check in payment, e 3641.
- stolen recently, possession of, burglary, when of effect as evidence, e 4563.
- used in retail trade, mortgagor retaining possession, e 3727.

**GOVERNMENT—**

- corners, exception to rule that monuments govern, e 3460.
- land, trespass, cattle grazing on, 2322.

**GRAND LARCENY—See LARCENY.**

**GRANTOR—**

- deed obtained without consent, 993.
- recording deed at request of, not conclusive proof of delivery, e 3620.
- who refers to plat in deed warrants land as described therein, 589.

**GRAPES—**

- sold to be resold, merchantable condition when loaded, 2265.

**GRASS—**

- and weeds, negligence, railroads, injury by fire, 2000.
- burned by fire from railroad, negligence, damages to turf, 2001.

**"GRAVER TRANSACTIONS OF LIFE"—**

- reasonable doubt same as doubt interposed in, e 4443.

**GRAZING—**

- on government land, trespass by cattle, 2322.

**GREAT BODILY HARM—See also DANGER, SELF DEFENSE.**

- larceny, obtaining property by threats of, 3223.

**GRIEF—**

- from contemplating injured body, measure of damages, e 3574.

**GRIP-MAN—**

- of street car, injury to, defective brake, 1426.

**GROSS NEGLIGENCE—**

- defined, 962, e 3738.

**GROUND—**

- defendant attacked on own, no duty of retreat, e 4746.

**GROUNDLESS SUSPICION—**

- not necessarily insane delusion, capacity to make wills, e 4298.

**GROWING CROPS—**

- title to, sale of land, 2220.
- trespass on, measure of damages, 824.
- when personal property, 2219.

**GUARANTORS AND SURETIES—2183-2193.**

- endorser negotiable instrument, Illinois rule, 2184.
- liable till note is paid, not released by delay, 2185.
- liability generally, 2183.
- released, extending time, 2186.
- who signs note in blank, authorizes filling in blank, 508b, 508c.

**GUARANTY—**

- acceptance of negotiable instruments, knowledge thereof, 2189.
- consideration for, 2187.
- of doctor as to cure, no diminution of actual value of services, e 3723.
- to give relief, malpractice, action for fees, burden of proof, e 3723.
- of truth, premonition of death not a, credibility of dying declaration for jury, e 4687.
- sales, burden of proof, 2278.
- sale by assignee, trust property, agreement to buy back, 2266.
- written, suit on special warranty instead of, e 4252.

**GUARD—**

- notice to put on, negotiable instruments, e 4216.
- over prisoner, escape, 2426.

**GUARDIAN—**

- suit against by ward, burden of proving good faith, e 3626.

**GUESS—**

- as to any ailment complained of in action of negligence, 1347.
- origin of fire from engine not to be left to, e 4097.

[References are to sections; e refers to Erroneous Instructions.]

**GUEST—**

in house may protect it from invasion, e 4764.

**GUILT—**

admission of, how considered, must be voluntarily made, 2518.

burglary, whether possession of stolen property evidence of, question for jury, e 4564.

circumstantial evidence, facts must be inconsistent with innocence, 2497.

proved beyond reasonable doubt, but not each circumstance, e 4353.

confessions of, when admissible, jury judges of degree of credit to be given, 2513.

conscientious belief of, not sufficient to convict, e 4445.

conviction of, must arise from evidence, not from lack of it, e 4461.

defendant guilty of some offense, instruction to acquit, e 4545.

defendant need not prove facts inconsistent with, to raise reasonable doubt, e 4456.

duty of jury to infer innocence rather than, 2641.

every ingredient must be proved beyond reasonable doubt to overcome presumption of innocence, 2640.

material element must be proven to overcome presumption of innocence, 2639.

*evidenced by flight,*

defendant insane, 2459.

explained by defendant, 2460.

depends on motive, 2461.

from other reasonable motives than, argumentative, e 4328.

not presumptive evidence of, but tends to prove, e 4326.

voluntary surrender for trial, e 4327.

high degree of probability of, will not justify conviction, e 4449.

information no evidence of, presumption of innocence, 2563.

insanity not necessarily inconsistent with, e 4400.

must be determined before fixing punishment, 2763.

of breaking and entering, not proved by possession of recently stolen property, larceny only, e 4565.

one fact proved inconsistent with, reasonable doubt, e 4438.

opinion of prosecuting attorney as to, not to be considered by jury, 2755.

positive evidence of, overcome by evidence of good character, 2481.

presumed from flight, 2457.

presumption of, not raised by indictment, e 4392.

shown by inculcating circumstances, when, 3243.

positive facts, evidence of good character, 2483.

strong evidence of, possession and claiming under forged deed, 2948.

suspicion or probability of, not sufficient to convict, 2675.

**GUILTY—**

accessory may not be, of same crime as principal, e 4481.

accomplice, as principal, 2728.

agent, doubt whether it was defendant or another, e 4466.

both parties, assault and battery, mutual combat, 2841.

each conspirator of crime committed, e 4579.

jury may find one or more, others not, joint trial, 2777.

no reason in whole evidence for not finding, not rule as to reasonable doubt, e 4435.

*of larceny,*

charge of burglary, 2882.

not proved by proof that defendant bought with knowledge of theft, 3249.

where stealing of certain animals is grand larceny, cannot convict of petit larceny, 3235.

of less offense, reasonable doubt as to degree of offense, 2706.

of murder, self defense, insufficient grounds for reasonable belief of danger, 3108.

only as to count proven, reasonable doubt, 2702.

[References are to sections; e refers to Erroneous Instructions.]

**GUILTY**—Continued.

plea of not, what in issue, 2776.

**GUN**—

discharging in air, homicide, 2970.

drawing of, by deceased, no duty of retreat, 3164.

pointing, or discharging, assault and battery, 2850.

shooting with, loaded with powder and leaden balls, 2969.

**GUNPOWDER**—

shooting by means of, murder in second degree, 3005.

**HABEAS CORPUS**—282.

**HABIT**—

of drunkenness, must exist at time of sale of intoxicating liquor, 3199.

sale of intoxicating liquor to person in, intent necessary, 3200.

to stop, look and listen at railroad crossings, 1913.

**HABITATION**—

defense of, what justifiable, homicide, 3183.

**HABITUAL**—

sexual intercourse, presumed from one act and residing of parties together, e 4509.

**HALF AND HALF**—

fault about, measure of damages, personal injury, e 3593.

**HALLUCINATIONS**—

charge caused by, reasonable doubt, 2715.

**HAND**—

slap with, provocation for homicide, when insufficient, 3091.

**HAND CAR**—

employee operating for private use, injury at crossing, 1901.

**HAND RAIL**—

street car, negligence, injury while in act of boarding, 2036.

**HANDWRITING**—

forgery, proof that part of forged writing was in same handwriting as balance, 2950.

**HARM, GREAT BODILY**—See DANGER, SELF DEFENSE.

**HAS**—2525.

**HASTENING DEATH**—

malpractice, acts or omissions, e 3724.

**HAWAII**—

nine jurors may render verdict, 264.

statute relating to instructions, 153, 129.

**HAZARD**—

fire insurance, increased, e 3660.

increased, knowledge of, 1170.

**HEAD**—

blow on, insanity, telling exaggerated stories, commenting on evidence, e 4408.

of family, exemption given to, replevin, e 4244

**HEADLIGHT**—

failure to provide street car with, e 4164.

**HEALER**—

"magnetic," action for libel by, e 4263.

**HEALTH**—

good, definition of, 1211.

state of, 1194.

**HEARING**—

defective, negligence, 1357.

giving warning of approach of engine that may be heard by person of ordinary hearing, 1534.

**HEARSAY EVIDENCE**—

acts or statements of intoxicated person, action for sale of liquor, e 3690.



[References are to sections; e refers to Erroneous Instructions.]

**HEAT—**

- of blood, homicide, provocation, cooling time, 3095.
- overwhelming passion, homicide, 3038.
- passion, killing in, murder in second degree, 3012.
- murder in second degree, determined with reference to ordinary men, 3014.

**HEATING—**

- of apartments, death of child by failure of, 1242.

**HEIRS—**

- interest in estate, measure of damages, negligence causing death, e 3616.
- notice of defect in title to real estate, facts calling for inquiry, 2228.

**HELPLESS—**

- person on railroad track, duty of railroad, 1853.

**HEREDITARY INSANITY—2601-2602.**

**HERITAGE—**

- dominant, watercourses, surface water, e 4284.

**HIGH DEGREE—**

- of probability of guilt will not justify conviction, e 4449.
- of proof, requiring too, on the part of the state, e 4442.

**HIGHWAYS—Chapter LIII, 1136-1154.**

*in general,*

- building on, assessment of taxes by city, adverse possession, equitable estoppel, e 4233.

*created by,*

- condemnation, 1136.
- dedication, 1136.
- prescription, 1136.

- defendant attacked on, self defense, no duty of retreat, e 4744.

- horse racing on, manslaughter, Alabama, e 4657.

- how created, 1136.

- laid out, 1137.

- monuments control courses and distances, 1138.

- ocean a public highway, 1152.

- prima facie evidence of location, 1140.

- trespass, cattle on, with attendant, not "at large," 2323.

- what would be the true line in case of difference from road surveyed and plat, 1139.

*dedication of,* 1141-1148.

- acceptance of may be inferred by travel by the public, 1136.

- acts of donor and public authorities must concur, 1141.

- binding on the owner and all claiming under him, 1147.

- by implication, 1143.

- sale of lots bounded on street, 1148.

- intent to dedicate by acts or words, 1142.

- intention of owner by open and visible acts, 1141.

- to appropriate the right to the general use of the public must exist, 1146.

- interruption of the enjoyment, 1142.

- must be accepted, 1146.

- intent to dedicate, 1142, 1145.

- made by the owner, 1144.

- no particular ceremony required, 1143.

- owner must manifest an intention to dedicate, 1143.

- of land must intend to give and give to constitute, 1141.

- right of purchaser of lot to have street remain open, 1148.

- time dedication takes place, 1145.

- what constitutes dedication, 1141.

- is evidence of, 1142.

- is meant by dedication, 1141.

*negligence—Chapter LXVII, 1678-1689.*

- allowing horse to stand unhitched, series, 1689.

- automobile running at greater speed than statutory rate, 1682.

[References are to sections; e refers to Erroneous Instructions.]

# **HIGHWAYS—Continued.**

- barb wire causing injury to horse, 1688.
- children riding on rear step of bus, duty of driver, e 3952.
- collision on, duty of driver, e 3951.
- constructing building near highway where snow and ice endanger traveler, 1683.
- contributory negligence, falling into man hole in sidewalk, 1685.
- of plaintiff as to barb wire, 1688.
- dangerous condition of, 1154, e 3955.
- dangerous pit adjoining, nuisance, liability of owner, 2196.
- degree of care of persons passing thereon, 1681.
- driving rapidly through a street of a city is not per se culpable negligence, e 3951.
- injury from falling barber pole through backing of wagon, e 3953.
- injury from runaway horse left unhitched, series, 1689.
- injury to child through bar of iron on recklessly driven wagon, 1687.
- jurisdiction over, effect of change from county to city, street railroads, 2014.
- liability of railroads, for failure to restore highway to its former condition, e 4065.
- obstruction of public way by ashes or cinders, 1679.
- by pile of cross-ties, 1680.
- pedestrian has right to presume that driver will observe ordinance, 1681.
- reasonable care defined, 1685.
- of person passing on sidewalk, 1685.
- relative rights of persons using the streets, e 4157.
- right of running automobile on highway, e 3954.
- of footmen and horsemen equal, 1681.
- sidewalks, excavations, 1684.
- falling into man-hole, 1685.
- liability for opening used for raising and lowering baggage, 1686.
- of person making excavations, 1684.
- snow and ice falling from building, 1683.
- obstructed by street railway causing water to flow on private property, municipality liable for, 1659.
- obstructing of by railroads, 2005.
- sufficient proof of, 3289.
- by construction of fence across road, 1673, e 3949.
- by horse and wagon, e 3950.
- prescription*, 1150, 1151.
- acceptance of inferred from repairs made by the public authorities, 1137.
- computation of, 1150.
- travel must be confined to a particular route, 1150.
- presumption from laying out and working, 1137.
- waiver, acquiescence by public, 1153.
- wild, unclosed, uncultivated land, 1151.

# **HIGHWAY CROSSING—**

- backing cars, after gate opened, 1894.
- care to be exercised toward watchman, 1897.
- duty of railroad in constructing road across street, horse injured in flangeway, 1880.
- to maintain gates or flagman, 1891.
- elements of negligence of railroads, 1872.
- failure of railroad servants to avoid threatened injury, 1896.
- greater caution required where much used, 1864.
- injury occurring through horse balking, 1898.
- reasonable care required at, 1863.
- safe condition of, 1862.
- safety not proved by proof that some persons crossed in safety, 1865.
- stock injured, failure to ring bell, etc., 1974, 1984.

[References are to sections; e refers to Erroneous Instructions.]

**HIGHWAY CROSSING**—Continued.

- train has preference, 1868.
- when flagman necessary, negligence, 1892.
- whistle blown at insufficient distance, 1887.
- need not be blown continuously, 1886.

**HOGS**—

- care required of carriers in shipment of, 1736.
- infected from following other hogs, negligence, 2133.

**HOLDING OUT**—

- as partner, liability to third persons, 2201.

**HOLDING UP TRAIN**—

- robbery, intent, 2894.

**HOMESTEAD**—

- abandonment, selling during temporary absence, fear of death, e 4236.
- use for other purposes, e 4235.
- in claim of adverse possession, 446.
- place of residence, ejectment, measure of damages, 2234.

**HOMICIDE**—Chapters XCVII-XCIX, 2953-3183, e Chapters CLXXVIII-CLXXX, 4607-4766—See MURDER and MANSLAUGHTER.

- accessory in, aiding and abetting, manslaughter, e 4477.
- instrumental in communicating poison, e 4478.
- accidental, e 4611.
- killing, burden of proof, e 4613.
- shooting of bystander as evidence of murder, e 4612.
- administering poison, necessary intent to constitute murder, 3057.
- attempt to escape, murder committed, 2998.
- blow with fist, presumption as to intent, 3053.
- burden of proof, 2466.
- cannot be willful, deliberate and premeditated, and still no crime, e 4675.
- causing death of child after its birth by beating mother before its birth, e 4609.
- circumstances from which to determine whether or not blow caused death, 3074.
- committed while escaping from prison, all who aid or abet are principals, 2745.
- concealment of body not conclusive proof of intent, 3055.
- consideration of insults by deceased not limited to time of killing, e 4621.
- conspiracy to kill, all equally liable, 2963.
- conviction on circumstantial evidence, extenuating circumstances, 2504.
- credibility of dying declaration for jury, premonition of death not a guaranty of truth, e 4687.
- criminal intimacy of deceased with defendant's sister, no defense, 3018.
- with defendant's wife, knowledge of, manslaughter, 3044.
- deadly weapon*, 3067-3075, e 4667-4768.
- defined, 3067, e 4667.
- large stone or piece of iron, 3001.
- malice presumed from use of, may be rebutted, 3072.
- possession of, by deceased, no defense, 3075.
- presumed to intend death, 3070.
- presumption from killing with, provocation, 3069.
- of malice, e 4668.
- previously formed design to use, 3071.
- question of fact, metallic knucks, gas pipe, 3068.
- deceased assaulting defendant, cooling time, 2992.
- having had illicit intercourse with defendant's wife, 2996.
- making first hostile demonstration, direct evidence not necessary, 2994.
- declaration under clear conviction of impending death, referring competency of evidence to jury, e 4688.
- defendant charged with killing one, evidence of killing of another not to be considered, 2967.



[References are to sections; e refers to Erroneous Instructions.]

# **HOMICIDE—Continued.**

- defense of death from other causes, 2975.
- definition of "willfully," "deliberately," "premeditatedly," and "malice aforethought," 3058.
- degree of, several defendants, 3036.
- deliberately shooting not necessarily a crime, e 4616.
- discharging gun into air, 2970.
- distinction between murder in first and second degrees, 2987.
- duel, assuming facts, argumentative, e 4623.
- dying declarations—See DYING DECLARATIONS.
- elements of, 3047-3100, e 4660-4689.
- essential elements to convict, reasonable doubt, 2979.
- excusable, defined, state must prove homicide a crime, 3172.
- facts showing killing to have been willful and malicious, 3051.
- fatally wounded by striking with billiard cues, 3000.
- flight to avoid arrest, prima facie evidence, 2458.
- form of verdict, 3046.
- furnishing forms of verdicts, 2981.
- general summary, 2982.
- identity of accused, larceny, 2446.
- immaterial whether defendant angry or excited, 2977.
- could see deceased or not, e 4618.
- importance of case, e 4626.
- in defense of property, shooting trespasser, e 4765.
- indictment for murder, verdict may be for manslaughter, 3034.
- insulting words, not necessarily guilty of murder, invading province of jury, e 4620.
- intent*, 3047-3058.
  - aggravated assault, e 4547.
  - distinguished from premeditated design, 3056.
  - instrument used to be considered, 3052.
  - presumption that one intends the natural consequences of his acts, 3047.
  - question for jury, weapons used, 3049.
  - specific, malice aforethought, e 4660.
  - time when formed, immaterial, 3054.
  - to be inferred by jury, from defendant's acts, 3050.
  - to kill not the criterion of murder, e 4662.
  - unlawful act, presumed to be done advisedly, malice aforethought, 3048.
- intoxication from liquor or morphine, temporary insanity, e 4416.
- jury to consider only unlawful, 2978.
- justifiable, defense of habitation, 3183.
- instructions in words of statute not always correct, e 4751.
- killing*,
  - by accident excusable, 2972.
  - by corporal punishment, 2959.
  - child by beating mother, murder in second degree, 3019.
  - policeman in pursuance of unlawful conspiracy, 2961.
  - servant or child by cruel treatment, 2960.
  - with depraved heart, regardless of human life, correct principle misapplied, e 4619.
  - with pistol in mutual combat not necessarily murder, e 4617.
- malice*, 3059-3066, e 4663-4666.
  - defined, 3059, e 4663.
  - deliberation necessary, though no period of time in particular, e 4666.
  - essential element of murder, manslaughter without, 3064.
  - express embraces implied, may be proved though not charged, 3061.
  - how proven, 3065.
  - necessary in murder in second degree, but will be implied, Texas, 3010.
  - need not be expressed, murder, e 4664.
  - not a necessary inference from killing with deadly weapon, 3073.

[References are to sections; e refers to Erroneous Instructions.]

**HOMICIDE—Continued.**

- presumed from killing, death by violence, 3060.
- proved by prior threats or seeking opportunity, 3066.
- whether death of deceased evidence of, e 4665.
- without justification or excuse, 3063.
- manslaughter*,
  - defined, 3023, 3024.
  - sudden conflict arising from quarrel, 3025.
  - distinguished from self defense, 3033.
  - facts amounting to, 3026.
  - in first degree, definition, 3028.
  - fourth degree, 3031.
  - second degree, definition, 3029.
  - third degree, in heat of passion and without design to kill, Missouri, 3030.
  - killing in attempt to procure abortion, 3043.
  - knowledge of intimacy of deceased with defendant's wife, 3044.
  - malice and intent not essential, 3041.
  - negligence causing boiler explosion, 3045.
  - sheriff killing one who attempts to release prisoner, 3042.
  - slight or trivial provocation not sufficient, 3040.
  - voluntary, what constitutes, 3027.
- mere threats not sufficient provocation, e 4682.
- mitigating circumstances need not be proved beyond reasonable doubt, e 4470.
- motive*, 3076-3079, e 4669-4671.
  - failure to prove, 3076.
  - how determined, 3077.
  - misdirection as to importance of lack of, e 4669-4670.
  - proof not necessary to convict, 3078.
  - reconciliation in good faith lived up to, previous troubles not considered, 3079.
- murder*
  - and manslaughter distinguished, 2988.
  - and voluntary manslaughter distinguished, 3032.
  - committed while engaged in robbery, e 4622.
  - defined in various states, 2953-2957.
  - distinction between first and second degree, 3006.
  - error to prevent verdict in lesser degree, e 4625.
  - formed design not essential, Alabama statute, e 4615.
  - no defense that life might have been saved, 2974.
  - or manslaughter, reasonable doubt as to which, resolved in favor of defendant, 3035.
- murder in first degree*,
  - definition, in perpetration of robbery, 2997.
  - form of verdict, 3003.
  - metal knucks or means unknown, stabbing with knife, 3002.
  - order in which jury may consider issues, New York code, 2991.
  - or second degree, series, 2983.
  - poison, essential facts, 2995.
- murder in second degree*,
  - defined, revolver, 3005.
  - elements of, 3004.
  - elements to consider, California statute, 3007.
  - form of verdict, 3022.
  - heat of passion, determined with reference to ordinary men, 3014.
  - in violent passion from offensive language used, 3013.
  - killing before cooling time had elapsed, 3012.
  - must be malicious, reasonable doubt, Alabama, 3009.
  - mutual combat, deadly weapon suddenly snatched up, 3017.
  - need not be planned and deliberated upon, but must be malicious, Wyoming, 3011.
  - North Carolina, 3008.
  - presumed, burden of proof, 3020.

[References are to sections; e refers to Erroneous Instructions.]

**HOMICIDE—Continued.**

- presumed from killing with billiard cues, 3021.
- sudden transport of passion, without adequate cause, deadly weapon, leather belt, 3016.
- under such passion as to deprive defendant of power to form intent to kill, 3015.
- mutual threats, carrying deadly weapons, 2968.
- opportunity for deliberation not equivalent to fact, e 4674.
- passion provocation, sudden and uncontrollable, 3038.
- peacemaker should be acquitted, 2971.
- policeman, when not justified in killing citizen, 2960.
- premeditated design, mutual combat, 3082.
- premeditation*, 3080-3085, e 4672-4676.
  - definition, 3080.
  - distinguishing characteristic of murder in first degree, 3083.
  - knowledge of identity of person killed not essential, e 4676.
  - need not take any particular time, 3081.
  - no presumption of, 3085.
  - sedate and deliberate mind, Texas, 3084.
- what amounts to, deliberation, e 4672.
- preventing escape of prisoner, 2962, e 4608.
- previous relations of parties, 2965.
- reputation for peace and quietude, 2484.
- provocation*, 3086-3096, e 4677-4685.
  - and passion must concur, 3039.
  - cooling time, facts constituting, question of law, 3096.
  - hostile acts, e 4685.
  - whether a question of fact or of law, e 4684.
  - discovery of wife in adultery not sufficient, e 4678.
  - heat of blood, cooling time, 3095.
  - insufficient, manslaughter, 3090.
  - insulting words to defendant's wife, other relatives, 3087.
  - jury to determine adequacy, 3093.
  - mere words not sufficient, e 4681.
  - necessary to reduce grade of crime, acting in self defense, e 4680.
  - passion aroused by provocation, insulting conduct, e 4683.
  - past conduct of deceased as evidence, 3092.
  - slap with hand, when insufficient, 3091.
  - specifying what acts constitute, e 4677.
  - standard for determining sufficiency, 3094.
  - threats not sufficient, 3088.
  - violent passion, insulting words, may reduce grade of homicide, 3089.
  - words not sufficient, 3086.
- reasonable doubt, 2720.
- reckless driving of horses, 2964.
- recommending a person to mercy, 2980.
- referring to great provocation as slight, e 4679.
- revolver, assuming facts, argumentative, e 4614.
- right to carry arms, e 4624.
- seeking quarrel with deceased with expectation of shooting him, 2993.
- self defense—See also SELF DEFENSE.
- shooting at one man, killing another, 2966.
- shooting with gun or pistol, loaded with powder and leaden balls, 2969.
- specific intent deliberately formed, ignoring lower degree of homicide, e 4661.
- state failing to prove motive, e 4671.
- state may rely on dying declarations, need not produce eye-witnesses, e 4690.
- sudden passion, arising at time of killing, passion and adequate cause defined, 3037.
- time required to constitute premeditation, e 4673.
- turbulent disposition of deceased, 2976.
- unlawful, may be reduced to manslaughter if arrest was illegal, e 4235.



[References are to sections; e refers to Erroneous Instructions.]

**HOMICIDE—Continued.**

- various elements, series, 2984.
- voluntary intoxication will not excuse except murder in first degree, 2617.
- what constitutes murder in first degree, 2985.
  - duration of deliberation, 2986.
- when allowable to prevent intrusion on defendant's premises, e 4763.
- whether killing justifiable or manslaughter, e 4610.
- while attempting to commit rape, 2999.
- wife caught in adultery, 2958.
- wound not necessarily fatal, death from neglect, 2973.

**HONEST—**

- belief in danger*,
  - in danger of life or great bodily harm, 3120.
  - necessary element, 3113.
  - not enough, must be reasonable, e 4696.
- belief of ownership, larceny, intent, reasonable doubt, burden of proof, e 4779.
- witness, credibility, interested witness may be as honest as another, e 3306.

**HONESTLY—**

- relying upon a valid claim of right, trespass justified, e 4814.

**HONESTY—**

- presumption of, fraud, good faith between near relatives, e 3646.

**HOPE—**

- confessions made under influence of, credibility, e 4370.

**HORSE—**

- agent selling as own property, embezzlement, 2936.
- allowing same to stand unhitched, series, 1689.
- balking, injury at railroad crossing, 1898.
- frightening, negligence and wanton defined, 1874.
- railroads, negligent unloading of cinders, 1876.
  - ordinary noise, 1875.
- injured in flangeway at railroad crossing, duty of railroad in constructing road across street, 1980.
- injured on railroad track, negligence, reasonable care, 1977.
- injury by, knowledge of vicious character by party injured, master and servant, e 4278.
  - from runaway, series, 1689.
- killed on railroad track, negligence, failure to keep lookout, 1976.
- larceny, turning loose, no defense, 3234.
- reckless driving of, death caused, 2964.

**HORSE-RACING—**

- betting booth, e 4808.
- on public highway, manslaughter, Alabama, e 4657.

**HORSE-STEALING—**

- larceny, intent, 3213.
- what necessary to convict of larceny, 3214.

**HOSTILE—**

- acts, evidence as to cooling time, homicide, e 4685.
- adverse possession must be, e 3403.
- demonstration, deceased making first, murder, direct evidence not necessary, 2994.

**HOTEL KEEPER—**

- care due from, in operation of elevator, toward servants, 1842.

**HOUSE—**

- bawdy, extorting money by threats of criminal prosecution, 2801.
- carrying concealed weapons in own, place not excepted, e 4804.
- disorderly—see **DISORDERLY HOUSE**.
- expulsion from, unlawful, resisting, self defense, 3159.
- keeping a gambling, what must be proved, 3277.
- of ill fame, accessory, 2802.
  - occasional illicit acts do not constitute living in adultery, e 4508.
- stolen goods left at, without owner's knowledge, 3255.

[References are to sections; e refers to Erroneous Instructions.]

# HOUSEBREAKING—

what constitutes, burglary, 2878.

# HUSBAND AND WIFE—

See ALIENATION OF AFFECTION.

CRIMINAL CONVERSATION.

DIVORCE.

action by husband for injuries to wife, damages, 948, 979, e 3587.

wife for death of husband, negligence causing death, damages, expectancy of life, 971.

with wife, measure of damages, personal injury to wife, e 3588.

admissions as affecting the other, 386.

consent to conveyance of wife's personal estate, e 3628.

conveyances between, whether fraudulent, 1086.

domestic relations, 1013-1016.

domicile of husband that of wife, 1031.

husband can act as agent of wife in management and control of personal property, 1024.

creditors of when wife's estate may be liable for, 1027.

has right to select residence, 1030.

liable for necessities while living together, 1013.

liable for necessities suitable to position of wife, 1013.

may act as agent of wife, 1024.

illegal sale of liquor to husband release by wife, e 3686.

must instigate prosecution for adultery, 2790.

necessaries defined, 1013.

not liable for necessities furnished wife when she lives apart without cause, 1015.

property insured in wrong name, 1180.

provocation of wife for leaving, abusive language, 1002.

reasonable doubt, larceny, 2721.

separation by mutual consent, 1002.

striking in defense of wife, self defense, e 4759.

undue influence, wills, 2408, e 4305.

weight to be given testimony for wife, 367.

when proceeds of wife's farm belong to husband, 1026.

where wife lives apart without her fault husband liable for necessities, 1014.

wife agent of husband to buy necessities, 1013.

getting property from, fraud against creditors, e 3635.

may ratify act of husband, 1025.

living apart from husband without cause, 1015.

without her fault, 1013.

what necessary to charge husband, 1016.

suing physician for malpractice damages, 1303.

seller of intoxicating liquors for death of husband, 1217.

# HYPOTHESIS—

excluding every reasonable circumstantial evidence, 2494.

exclusion of every, but that of innocence, reasonable doubt, e 4467.

expert testimony, must be true, capacity to make wills, e 4300.

insufficient, agent suing for commissions, e 3417.

must include all the evidence, e 4785.

*of innocence,*

circumstantial so strong that it is incompatible with, e 4352.

criminal conversation, e 3431.

duty of jury to adopt, 2709.

every reasonable excluded, reasonable doubt, 2708.

must be excluded by circumstantial evidence, 2500.

proof must be inconsistent with, 2710.

reasonable doubt, every reasonable, should be excluded in circumstantial evidence, e 4436.

reconciliation of testimony with, e 4469.

# HYPOTHESIZING—

instructions on part of the evidence, e 4754.

# HYPOTHETICAL CASE—

insanity, put to experts, 2605.

[References are to sections; e refers to Erroneous Instructions.]

#### HYPOTHETICAL QUESTION—

- all elements embraced should be correctly stated, 127.
- defined, 397.
- expert opinion depends for value upon, e 3376.
- if material facts omitted, should be specifically objected to, 127.
- in cross-examination must be based on facts in evidence, 127.
- may embrace all or part of supposed facts, 127.
- value of in expert testimony, 392.
- when proper, 127.

#### ICE AND SNOW—

- accumulation of, liability of municipal corporations, e 3922.
- duty of street car company to remove from track, e 4161.
- riparian owners entitled to middle of stream, 868.
- slippery condition of sidewalk from, e 3932.

#### IDAHO—

- statute, murder in first degree, 2990.
- relating to instructions, 153, p 130.

#### IDENTIFICATION—

- of defendant, 2447.
- of property taken by trespasser not necessary, value of property taken, e 4812.

#### IDENTITY—

- of accused, 2446-2448.
- doubt as to defendant or somebody else, 2448.
- homicide, larceny, 2446.
- defendant, established by independent circumstances, reasonable doubt, 2699.
- parties to conspiracy, not disclosed, e 4583.
- person killed, knowledge of, not essential to premeditation, e 4676.

#### IDIOCY—

- must be clearly proved, requisites, 2591.

#### IGNITING—

- gasoline and turpentine, poured on person, commenting on evidence, e 4483.

#### IGNORANCE—

- of character of officer, killing in, self defense available, 3157.

#### IGNORING—

- doctrine of escape, self defense, acting upon mere threats or appearances, e 4698.
- issue of ratification, agency, e 3420.
- lower degree of homicide, specific intent deliberately formed, e 4661.
- part of the evidence, assaulting trespasser, e 4543.
- theory of conspiracy, to commit burglary, e 4587.
- self defense, e 4753.

#### ILLEGAL—

- arrest, may reduce unlawful homicide to manslaughter, e 4325.
- consideration, negotiable instruments, 2157, e 4215.
- sale of intoxicating liquor*,
  - found in public resort, presumptive evidence, 3204.
  - keeping or using place for, 3203.
  - local option, 3209.
  - on prohibited days, 3206.
  - to husband, release by wife, e 3686.
  - when keeping is presumptive evidence of, 3188.

#### ILL FAME—

- house of accessory, 2802.
- occasional illicit acts do not constitute living in adultery, e 4508.

#### ILLICIT—

- acts, occasional, do not prove living in state of adultery, 2789.
- do not constitute living in adultery, intention to continue, house of ill fame, e 4508.
- cohabitation, presumed from one act of sexual intercourse and residing of parties together, e 4509.



[References are to sections; e refers to Erroneous Instructions.]

**ILLICIT—Continued.**

intercourse, deceased having had with defendant's wife, murder in first degree, 2996.  
not necessarily seduction, 2829.

**ILLINOIS—**

abstract of record rules of Supreme Court, 316.  
common carriers, rule as to conditions in receipt for shipment of goods, 1714-1715.  
rule as to losses and injuries on connecting line, 1702.  
contract made on Sunday, 642.  
court has no power to compel examination of personal injuries, 152.  
embezzlement by banker, 2937.  
essential elements of murder, 2955.  
instructions both civil and criminal must be in writing, 158.  
judge of Appellate Court may certify questions to Supreme Court, 285.  
judges of Appellate Court may issue certificate of importance to Supreme Court, 285.  
jury judges of law as well as of the facts, 2623.  
reasonable doubt defined, 2654.  
rule as to burden of proof, capacity to make wills, e 4292.  
as to personal examination before jury, 151.  
for passing upon credibility of witness, 348.  
in, imputable negligence, street railroads, 2111.  
statute relating to instructions, 153, p. 131.  
weighing defendant's testimony, 2539, e 4379.  
when endorser of negotiable instrument becomes guarantor, 2184.  
wills, insanity, burden of proof, due execution, 2371.

**ILLNESS—**

becoming ill after application and before delivery of insurance policy, 1196.  
delivery of certificate by agent of company knowing insured is sick at time, amounts to waiver of, 1197.  
lasting for brief period, application for life insurance, 1190.  
nature of, question for jury, insurance, 1193.  
suffering from at time of delivery of insurance policy, fraud, 1192.

**ILLUSTRATING—**

character of confessions, may be of satisfactory character or very weakest kind, e 4363.

**ILL WILL—**

little weight to testimony because of, e 4500.  
self defense, abuse, threats, 3145.

**IMAGINARY—**

reasonable doubt must not be, 2683.

**IMMATERIAL—**

self defense, appearance and strength of deceased, if danger is actual, e 4707.  
whether defendant could see deceased or not, e 4618.

**IMMEDIATE—**

delivery of note, excuse for failure to make, upon demand made, e 4210.  
personal injury, self defense, reasonable cause to apprehend, 3104.  
presence, taking from, robbery, does not necessarily mean from the immediate view, 2895.

**IMMINENT—**

danger must be, must be shown by overt acts, e 4700.

**IMMINENT PERIL—**

defendant must believe himself in, e 4695.  
must be left to jury, e 4703, 4708.

**IMMUNITY—**

promise of, confessions made under, e 4369.

**IMPANELING THE JURY—Chapter II-III-IV, 16-62.**

challenges for cause, 38-56.  
completed by oath, 63.

[References are to sections; e refers to Erroneous Instructions.]

**IMPANELING THE JURY—Continued.**

- de meditate linguae, 62.
- how struck jury may be obtained, 61.
- juror may be asked as to interest in casualty company, 57.
- method of striking jury, 60, 61.
- omission of oath error, 63.
- peremptory challenges, 56, 57, 58.
- standing jurors aside, 62.
- struck juries, 60.
- time of administering oath, 63.

**IMPEACHING TESTIMONY—**

- purpose of, e 3353.

**IMPEACHING WITNESSES—**

- contradictory statements, 69, 2766, e 3359.

**IMPEACHMENT—Chapter XX, 373-380, e Chapter CVIII, 3353-3360.**

- as to character, questions as to specific acts, 140.
- attorney talking to witness does not discredit, 380.
- based upon law and evidence in case, e 3360.
- by general reputation for truth and veracity, 373.
- contradictory statements*, 373-380.
  - a method of, 376.
  - at previous trial, 374.
  - must be on material issues, 376.
  - out of court, 374, e 3359.
  - tending to impeach, 374.
- entire testimony when willfully false in a material fact should be distrusted, 345.
- evidence as to reputation for truth and veracity, 347.
  - of arrest and indictment improper, 140.
  - expulsion from church not admissible, 140.
  - witness whose reputation for truth and veracity is bad, 373.
- falsus in uno, falsus in omnibus, 344.
- if witness deliberately testifies falsely, jury may reject the whole, 347.
- in general, 141.
- interest of witness swearing falsely, 342.
- jury may disregard entire testimony of witness willfully sworn falsely, unless corroborated, 341, 346, 378.
- jury need not disregard entire testimony of impeached witness, 378.
- must be as to a material matter, 376, e 3356.
- palpably false testimony may be disregarded, 343.
- province of the jury to determine weight of impeached witness, 378.
- reputation for truth and veracity in the neighborhood where he resides, 373.
  - method of, 373.
- test of contradictory statements, 377.
- testimony of witness who willfully exaggerates may be disregarded unless corroborated, 350.
  - should be discredited unless corroborated by other evidence, 346.
- weight of contradictory statements is for the jury, 375.
  - to be given contradictory statement at former trial, 375.
  - testimony of false witness, 341.
- when witness must be corroborated by other credible evidence, 348.
- where reputation for truth and veracity is bad testimony may be disregarded unless corroborated, 373.
- witness giving full faith and credit to impeached, e 3354.
  - swearing falsely, Missouri Rule, 341.
  - who intentionally, corruptly, willfully and knowingly swears falsely to material point, 348.
    - testifies falsely may be distrusted as to all testimony, 347.
    - willfully and knowingly exaggerates, 350.
    - testifies falsely in a material matter may be disregarded, 347.

**IMPENDING—**

- danger, contributory negligence, 1359.

[References are to sections; e refers to Erroneous Instructions.]

**IMPENDING**—Continued.

death, declaration under clear conviction of, referring competency of evidence to jury, e 4688.

**IMPLEMENTS**—

furnishing of safe and suitable—See **APPLIANCES**.

**IMPLICATED**—

improperly used in reference to prosecutrix, rape, e 4527.

**IMPLIED**—

agreement, tenancy at will, e 3701.

authority, fire insurance agent, estoppel, e 3661.

contract cannot be proved where there is an express contract, e 3490.

for services, e 3497.

services rendered with defendant's knowledge, e 3501.

*malice*,

and express, 2629.

assault with deadly weapon, 2667.

difference between it and express, 2631.

homicide, embraced in express, may be proved though not charged, 3061.

malicious mischief, 3279.

murder in second degree, Texas, 3010.

*warranty*,

fit for special purpose intended, samples, e 4251.

recovery on, or expressed, e 4254.

sale of machine, waived by acceptance, 2273.

manufactured article, 2275.

whether malice is, libel, from publication, privileged communications, e 4265.

**IMPORTANCE OF CASE**—

homicide, e 4626.

**IMPORTANT AFFAIRS OF LIFE**—

conduct in, reasonable doubt compared to, 2686.

most, reasonable doubt, juror must exercise all the judgment used in, e 4444.

**IMPOSING**—

too great a burden on state, presumption of innocence, e 4420.

**IMPOSITION**—

negotiable instrument, must use reasonable care to avoid, 2148.

**IMPRESSION**—

amounting to moral certainty, reasonable doubt, e 4464.

**IMPRISONMENT**—

negotiable instruments, abuse of criminal process, duress, 2152.  
threats of, 2151.

**IMPROPER**—

evidence objected to entitles opposing party to offer equally improper evidence, 133.

reference to importance of case, e 4626.

remarks, objections to, 244.

speech in argument, Chapter XII.

**IMPROVEMENTS**—

eminent domain, damages, leasehold interest, e 3556.

in value of land, eminent domain, damages, e 3552.

tenant agreeing to stay if made, e 3692.

**IMPULSE**—

defendant acting under, not enough to establish insanity, e 4401.

insane, overcoming will power, 2578.

**IMPULSE, IRRESISTIBLE**—See **IRRESISTIBLE IMPULSE**.

**IMPUTED NEGLIGENCE**, 1363, 1364.

parent and child, 1931, 2113, e 4079.

street railroads, rule in Illinois, 2111.

rule in Wisconsin, 2112.



[References are to sections; e refers to Erroneous Instructions.]

**IMPUTING—**

commission of crime, libel, whether malice implied, privileged communications, e 4265.  
dishonesty in business, libel, e 4262.

**INABILITY—**

to retreat, burden of proof on defendant, e 4333.

**INADEQUACY—**

of purchase price as evidence of fraud, 1119.

**INATTENTION—**

to business, service, e 3498.

**INCAPACITY—**

for manual labor, insurance, 1214.  
to commit rape, presumed in male under fourteen years of age, e 4529,  
to contract other marriage when living in common law marriage,  
e 3496.

**INCENDIARISM—**

by insured, 1184, 1185.  
representations as to in applications for insurance, 1176.

**INCEST, 2803-2804, e 4517-4518.**

definition, consent of both parties not essential, 2803.  
relationship, admission of competent evidence, 2804.  
testimony of accomplice, e 4518.  
whether admission of relationship, uncorroborated, will warrant conviction, argumentative, e 4517.

**INCLINATION—**

adulterous, criminal prosecution, 2787.

**INCLUDING—**

too much law in one instruction, injury to cattle, e 3530.

**INCOMPATIBILITY—**

with hypothesis of innocence, circumstantial evidence, e 4352.

**INCOMPETENT—**

proof of other attempts to bribe, attempt to bribe juror, 3271.

**INCOMPLETENESS—**

of will, e 4286.

**INCONSISTENT—**

acts, construed according to presumption of innocence, e 4426.  
and contradictory statements, 2530-2765.  
fact, circumstantial evidence, sufficient to acquit, 2499.  
sudden passion and malice not, manslaughter, e 4646.  
with guilt, insanity not necessarily, e 4400.  
one fact proved, reasonable doubt, e 4438.  
proof of facts, not necessary to raise reasonable doubt, e 4456.

**INCONVENIENCE—**

eminent domain, damages, conjectural, e 3558.  
from cutting of farm, eminent domain, damages, e 3559.

**INCREASED HAZARD—**

fire insurance, e 3660.

**INCREASING—**

danger, self defense, duty of retreat, when possible without, 3162.  
peril, self defense, retreat necessary unless danger of, e 4741.

**INCRIMINATING—**

questions, admissions in former civil suit, 2517.  
question, witness excused from answering, 2764.

**INCUPLATING—**

circumstances, to show guilt when, 3243.

**INCUMBRANCE—**

warranty as to amount of in application for insurance, 1172.

**INCURRING—**

liability for new indebtedness, corporation note given for previous indebtedness, distinction, e 4194.

[References are to sections; e refers to Erroneous Instructions.]

**INDEBTEDNESS—**

of partnership, amount of, whether individual or partnership funds, 2210.  
personal, firm note given for, e 4222.  
previous, note of corporation given for, liability of directors, e 4194.

**INDEPENDENT—**

action of two persons causing injury, trespass, e 4276.

**INDEPENDENT CONTRACTOR—**

municipal corporation liable for negligence of, 1625.  
trespass to real estate, when defendant liable for act of, 2314.

**INDIANA—**

admission of other crimes, 2564.  
contracts made on Sunday, 643.  
jury judges of law as well as facts, 2624.  
should give instructions respectful consideration, 2625.  
personal examination as evidence not allowed, 151.  
reasonable doubt defined, 2655.  
statute relating to instructions, 153, p 131.  
time for requesting instructions, 160n.  
weighing defendant's testimony, 2540, e 4380.

**INDIAN TERRITORY—**

statute relating to instructions, 153, p 132.  
weighing defendant's testimony, 2540.

**INDICTMENT—2566-2568.**

as principal or as accessory cannot be convicted as the other, e 4567.  
does not raise a presumption of guilt, e 4392.  
for murder, verdict may be for manslaughter, 3034.  
instruction varying from, killing by poison, murder in first degree, e 4634.  
not charging former conviction, burglary, added punishment instructed, e 4573.  
not evidence, 2566-2567.  
of one of several parties interested in larceny, e 4789.  
of principal and accessory jointly, 2729.  
only allegations of, need be proven beyond reasonable doubt, 2703.  
reconciling evidence with, compromise cannot bar prosecution, seduction, 2837.  
robbery, instruction should be confined to property described in, e 4577.  
sufficiency of, not for jury, e 4393.  
two counts in, duty to consider all evidence, 2774.  
what to be alleged in, principals, all persons concerned in commission of felony, 2725.

**INDIVIDUAL—**

jurors, appealing to, reasonable doubt, 2689.  
use of money loaned to limited partnership, e 4230.

**INDIVIDUALS—**

equal standing with corporations, 365.

**INDUCING—**

deceased to assault defendant by latter, self defense, 3128.

**INDUCEMENT—**

means to detect crime must not amount to, 2780.

**INEVITABLE ACCIDENT—**

or act of God, carrier's duty towards perishable goods when damaged, 1728.  
common carriers not liable for delay caused by, 1724.

**INFANTICIDE—**

character evidence, previous disposition toward children, 2487.

**INFANT—**

claim for support, not forfeited by voluntary absence from home, e 3625.  
liability on board of trade contract, e 3474.  
measure of damages, personal injury, earnings, e 3590.

[References are to sections; e refers to Erroneous Instructions.]

**INFANT**—Continued.

- services of, in family, e 3500.
- services rendered parent while parent was working for defendant, e 3501.
- statute of limitations does not run against, 1255.
- tax sale, adverse possession, e 3408.
- trespasser, care due from street car company, 2080.
- trespassers on street car, negligence of company, slowing down to put them off, 2089.

**INFECTION**—

- hogs contracting, negligence, from following other hogs, 2133.

**INFER**—

- duty of jury to, innocence rather than guilt, 2641.

**INFERENCE**—

- from fact, circumstantial evidence, 2512.
- from failure of party to testify, e 3352.
- homicide, malice not a necessary, from killing with deadly weapon, 3073.
- invasion of province of jury, e 3385.
- of fact, court drawing, murder, concealment of body, e 4652.
- fact, for jury, negotiable instrument, e 4198.
- felonious intent, embezzlement, from act, 2925.
- intent from killing, murder in first degree, e 4629.

**INFERENCES**—

- or presumptions necessarily arising only, should be considered in circumstantial evidence, 2503.

**INFERIORITY**—

- of food, concealing, adulteration, 3293.

**INFERRING**—

- intent, homicide, from defendant's acts, 3050.

**INFLUENCE**—

- legitimate, wills, 2404.
- of hope and fear, confessions made under, credibility, e 4370.
- of newspaper accounts on jury, e 3387.
- undue—See **UNDUE INFLUENCE**.

**INFLUENCING**—

- opinion or action, bribe must be given for purpose of, to constitute bribery, e 4801.

**INFORMATION**—

- mere formal accusation, no evidence of guilt, presumption of innocence, 2568.
- of injury, negligence, street railroads, 2015.
- witnesses having more, credibility, weight to be given, e 3309.

**INGREDIENTS**—

- of guilt, must all be proven beyond reasonable doubt to overcome presumption of innocence, 2640.
- of larceny, whether felonious intent essential, e 4781.

**INHABITANTS**—

- of town, driving persons out of town, e 4541.

**INHALATION**—

- of gas, life insurance, bodily injuries, e 3678.

**INHERENT**—

- qualities, of goods in warehouse. defined, 838.

**INHUMAN MANNER**—

- killing, manslaughter not always, e 4643.

**INJUNCTION**—

- bond, dissolution, compensation of attorneys, e 3452.
- wrongfully issued, damages, e 3525.

**INJURY**—See **PERSONAL INJURY** and **NEGLIGENCE**.

**INJURIES**—

- at highway crossings—See **HIGHWAY CROSSINGS** and **CROSSINGS**.
- by vicious animal—See **VICIOUS ANIMALS**.



[References are to sections; e refers to Erroneous Instructions.]

# INJURIES—Continued.

- caused by independent action of two persons, trespass, e 4276.
- caused by sale of intoxicating liquor.*
  - degree of intoxication immaterial, e 3688.
  - must prove intoxication caused injury, e 3687.
  - need not be sole cause, must contribute, e 3689.
- caused by more than one libelous publication, e 4266.
- failure of railroad servants to avoid, 1896.
- malicious mischief, done willfully for purpose of gain, personal malice need not be shown, 3283.
- penalties for refusing to submit injuries to jury, 149.
- plaintiff cannot be compelled to submit to X-ray, 149.
- to passenger through fall of elevator, 1842.
- property, measure of damages, e 3533-3537.
- roadway, overflowing lands, measure of damages, e 4283.
- trespasser getting on moving railroad train, 1858.
- when court may compel submission to jury, 148.

# INJURING—

- another's fence unlawfully, 3298.

# INMATES—

- admissions of, as to character of disorderly house, e 4515.
- of insane asylum, confessions by, e 4375.

# INQUIRY—

- negotiable instruments, duty to make, e 4216.

# INNOCENCE—

- circumstantial evidence, facts must all be inconsistent with, 2497.
- no reasonable theory of must be possible, 2498.
- defendant's, jury must acquit if evidence consistent with, reasonable doubt, 2711.
- defendant not required to prove, placing obstruction on railroad, e 4819.
- duty of jury to infer, rather than guilt, 2641.
- every reasonable hypothesis of, must be excluded by circumstantial evidence, 2500.
- should be excluded where circumstantial evidence is relied on, e 4436.
- evidence of, arson, lack of motive, e 4799.
- hypothesis of, criminal conversation, e 3431.
- duty of jury to adopt, 2709.
- proof must be inconsistent with, 2710.
- every reasonable excluded, reasonable doubt, 2708.
- excluded by circumstantial evidence, e 4352.
- exclusion of every other hypothesis, reasonable doubt, e 4467.
- reconciling testimony with, e 4469.
- mere possibility of, not sufficient to acquit, must be a substantial doubt, 2635.
- not proved by failure to flee, 2463.
- possibility of, will not warrant acquittal, 2693.
- presumption of—See PRESUMPTION OF INNOCENCE.
- probability of, reasonable doubt, 2697.
- rational possibility of, not the measure of reasonable doubt, e 4448.

# INNOCENT—

- not alone to be protected by law as to reasonable doubt, e 4432.
- policy of the law to protect, argumentative, e 4493.

# INNOCENT PURCHASER—

- endorsement before maturity, 2176.
- fraudulent vendee, 1117.
- fraudulent vendor, 1118.
- genuineness of signature, 2144.
- negotiable note taken in payment of existing debt, 2172.
- presumptions in favor of, 2134.
- security for pre-existing debt, 2171.
- what constitutes, 2168.
- is sufficient notice of fraudulent intent, 1072.

[References are to sections; e refers to Erroneous Instructions.]

**INNOCENT PURCHASER**—Continued.

vitiates a note in his hands, 2169.

who takes note signed in blank after being filled up, 508.

**INSANE ASYLUM**—

confessions of inmate, e 4375.

**INSANE DELUSION**—

distinguished from erroneous conclusion, 2588.

when a sufficient defense, 2587.

**INSANE IMPULSE**—

overcoming will power, 2578.

**INSANITY**—

AS A DEFENSE TO CRIME, 2569-2609, e 4394-4409.

ancestors', evidence admissible only in corroboration, 2601.

as a defense to arson, 3270, e 4800.

as a means to evade the law, should be examined with care, 2571.

as an excuse, burden of proving on defendant, e 4332.

at time of trial, jury not to determine, 2600.

burden of proof, Alabama statutory plea, 2598.

on defendant, 2473.

calling attention to absence of apparent motive, homicide, e 4670.

children poisoned by mother of suicidal tendency, 2604.

defendant must establish by preponderance, 2597.

need only raise reasonable doubt, e 4406.

defined, burden of proof on defendant, e 4394.

delirium tremens, 2611, e 4417.

distinguished from excitement, passion and revenge, 2579.

distinguishing right from wrong, 2573.

matters which acquit stated conjunctively, e 4397.

doubt of motive no evidence of, e 4399.

embezzlement from distracted person, consent, 2926.

emotional, defined, 2585.

excitement, frenzy, irresistible impulse to avenge, no defense, 2580.

from blow on head, telling exaggerated stories, commenting on evidence, e 4408.

from use of drugs, requisites, burden of proof, 2590.

how determined by jury, 2572.

hypothetical case put to experts, 2605.

intoxication not amounting to, no defense, presumption, 2612.

intoxication not inconsistent with premeditation, 2615.

*irresistible impulse*,

defendant able to distinguish but not to choose between right and wrong, e 4404.

essential elements of, 2583.

from voluntary drunkenness no defense, 2609.

when no defense, e 4403.

knowledge of right and wrong, 2574.

must be "clearly established" to overcome presumption of sanity, 2596.

need not be proven beyond reasonable doubt, e 4405.

by direct evidence, 2599.

not enough that defendant "acted under" impulse, e 4401.

not necessarily inconsistent with guilt, e 4400.

not the immediate effect of intoxicants, 2610.

obliterating sense of right and wrong, 2575.

of defendant fleeing, evidence of guilt, 2459.

of defendant's mother, must be considered, 2602, e 4409.

offense must be direct consequence of, 2592.

once shown presumed to continue, 2593.

or idiocy, must be clearly proved, requisites, 2591.

or irresponsibility, must be proven beyond reasonable doubt.

2675.

partial, laboring under mental delusion, 2586.

permanent and temporary distinguished, delirium tremens, 2589.

power to intend but not to deliberate, e 4398.

[References are to sections; e refers to Erroneous Instructions.]

**INSANITY—Continued.**

- presumption as to continuance, e 4407.
- burden of proof, 2569.
- of sanity, burden of proof does not shift in criminal cases, e 4395.
- overcome by showing insanity to be probable, e 4396.
- prisoner need only create reasonable doubt to cast burden on state, 2595.
- produced by intoxication, an excuse, 2613.
- reasonable doubt acquits, 2714.
- reasonable doubt as to sanity of defendant acquits, 2594.
- suicide not necessarily evidence of, 2603.
- temporary*,
  - intoxication from liquor or morphine, homicide, e 4416.
  - produced by intoxicating liquors, mitigation, murder, 2614.
  - when no defense, e 4402.
- test of criminal responsibility, 2570.
- uncontrollable impulse, 2581.
- whether mere weakness of mind may amount to, 2584.

**As AFFECTING CAPACITY TO MAKE WILLS, 2367-2392, e 4289-4300.**

- burden of proof on contestants where due execution proved, 2369-2371, e 4291, 4292.
- drunkenness, 2380.
- expert testimony, 2389.
- failure of memory, e 4297.
- groundless suspicion, 2383, e 4298.
- intoxication producing, 2381.
- issue to be tried, 2367.
- jury must determine from whole evidence, 2388.
- partial, monomania, 2376, e 4294.
- presumption against, 2368.
- previously expressed purpose, 2386.
- settled, presumed to continue, 2378, e 4296.
- will as evidence of, 2387.

**CONTRACTS,**

- burden of proof on one alleging, 612.
- degree of, necessary to relieve from confidence, 613.
- does not necessarily prevent making contract, 613.
- insane delusions, 616.
- mental powers impaired by age, weakness or bodily infirmity, 614.
- partial, contracts entered into by reason thereof, 617.
- person possessing requisite mental faculties to transact necessary affairs of life, 613.
- when a man is held to be of sound mind, 615.

**FRAUD,**

- mental incapacity of vendee, 1134.

**INSURANCE,**

- committing suicide in sane state of mind no liability for insurance, 1208.
- not proof of, 1209.
- must be sane in order to commit suicide, 1207.

**INSOLVENCY—1060.**

- by assignor, knowledge of by purchaser, 1077.
- defined, 1083, e 4312.
- how proven, 1083.
- knowledge by bank of another's e 3454.
- negotiable instruments, how proved, return of officer not conclusive, 2188.
- of corporation, preference of creditors, series, 1084.
- of purchaser, whether fraud, 1111.
- payment of antecedent debt, 1081.
- person indebted may sell his property, 1089.
- preference of creditors, 1081.

**INSOLVENT—**

- bank receiving deposit while, e 3458.
- debtor, collusion between attaching creditor, 540.



[References are to sections; e refers to Erroneous Instructions.]

# INSPECTION—

- duty of, by railroads in regard to handholds of cars, e 3849.
- cars received from other roads, 1501, e 3846.
- character of business should be considered, 1412.
- railroads to supervise, examine and test engines, 1513.
- of appliances by master at proper intervals, 1411-1412.
- premises, by jury, eminent domain, damages, e 3554.
- screens by jury, injury by fire, e 4101.
- mines, 1399-1400, e 3778.
- street railroad vehicle, negligence, 2030.
- tools and appliances, by servants, e 3789.

# INSTALLMENTS—

- consideration paid in, agreement of sale, 2249.
- payment in, sale intended, whether considered as rent or not, 2254.

# INSTRUCTING—

- jury to disregard certain evidence, 187.

# INSTRUCTIONS—

- in general, forms and requisites, Chapter XI, 153-219.
- abstract legal propositions calculated to mislead jury, 179.
- action on completed sale error to instruct on executory contract, 171.
- additional may be given when jury disagree, 211.
- Alabama, statute, 153, p 126.
- all asked, given or modified should be included in the record, 307.
- although inaccurate, may not reverse, 313.
- argument through, erroneous, 177.
- argumentative, not ground for reversal, 189.
- Arizona, statute relating to instructions, 153, p 126.
- Arkansas, statute relating to instructions, 153, p 127.
- assuming facts and illustrations, 163.
- attorney should not be permitted to interrupt while reading, 87.
- based on former decisions, 312.
- bill of instructions should show objections to, 309.
- burden on appellant to show evidence did not justify, 310.
- California, statute relating to instructions, 153, p 127.
- cautionary by court, 327.
- chain of circumstantial evidence should not be used, 184.
- Colorado, statute relating to instructions, 153, p 127.
- common law practice, 153.
- complained of should be set out in abstract, 322.
- conceded facts may be assumed as true, 164.
- conflicting, 311.
- Connecticut, statute relating to instructions, 153, p 128.
- containing correct propositions, refusal of will not always reverse, 190.
- contraverted facts should not be assumed, 164.
- correct will not cure incorrect instructions, 315.
- court can not give peremptory instruction of guilty in criminal cases, 263.
- cannot give unless requested in Mississippi, 157.
- emphasize importance of the case to the jury, 406.
- give own instructions in place of those requested, 209.
- instruct orally as to amount where written were not requested, 211.
- limit evidence by instruction, 187, 188.
- limit time for requesting instructions, 160.
- recall all instructions and direct verdict, 260.
- need not instruct jury unless so requested, 155.
- should inform jury that they are the sole judges of the facts, 327.
- instruct jury whether requested or not, 155.
- not indicate opinion as to weight of evidence, 166.
- intimate any opinion of the facts, 327.
- intimate what verdict should be, 327.
- magnify importance of case, 176.
- should refer to issues involved, 170.

[References are to sections; e refers to Erroneous Instructions.]

# INSTRUCTIONS—Continued.

- will not express an opinion of the facts or of credibility of witnesses, 405.
- contradictory statements in, e 3916.
- discretion of court as to giving further, 210.
- discretionary with court to give instructions not presented in time, 160.
- duty of court to interpret and give the legal effect of indictment, 180.
- trial judge to give when requested, 157.
- effect of evidence should not be given by court, 182.
- jury's refusal to follow, 206.
- error in will not always reverse, 190.
- to give additional in absence of a party, 211.
- to refuse proper, 209.
- erroneous cured by withdrawal, 315.
- excessive verdict may be cured by remittitur, 315.
- given to correct improper evidence by appellant will not reverse, 313.
- in form must be specifically excepted to, 300.
- facts not controverted may be assumed in instructions, 165.
- faulty instructions may be cured by others, 173.
- favorable ones cannot be complained of on appeal, 314.
- Florida, statute relating to instructions, 153, p 123.
- form of cautionary instruction, 200.
- Georgia, statute relating to instructions, 153, p 129.
- govern as to law and evidence as to facts, 401.
- Hawaii, statute relating to instructions, 153, 129.
- having tendency to mislead jury, will reverse, 191.
- hypothetical state of facts not sufficient in their support, 199.
- Idaho, statute relating to instructions, 153, p 130.
- if as a whole state law correctly, one or more erroneous will not reverse, 173.
- Illinois, statute relating to instructions, 153, p 131.
- immaterial matter not error unless party is prejudiced thereby, 204.
- importance of jurors duties may be emphasized by court, 406.
- improper remarks cured, 243.
- to single out particular evidence for comment, 188.
- in the absence of the statute held to be discretionary with the court, 157.
- in writing with motion must be presented directing verdict, 261.
- Indian Territory, statute relating to instructions, 153, p 132.
- Indiana, statute relating to instructions, 153, p 131.
- indicating opinion as to weight of evidence improper, 194.
- instructing orally error, 158.
- Iowa, statute relating to instructions, 153, p 132.
- judge should not assume certain facts, 182.
- jury are judges of law and fact in criminal cases, 181.
- are the exclusive judges of the facts, 200, 327.
- bound to follow instructions, 206.
- can say on oaths that they know the law better than the court and have right to do so, 181.
- may be instructed relative to arguments of counsel, 203.
- be told they are at liberty to assess damages, 199.
- come in for further, 212.
- must be governed by them alone as to law, 400.
- need not be instructed to consider all the evidence, 203.
- told in each sentence to believe from the evidence, 198.
- should be brought into court for additional, 96.
- determine facts from the evidence and apply the law from the instructions, 402.
- their verdict from the law as given them by the court and the evidence as heard upon the trial, 403.
- give respectful consideration, Indiana, 2625.
- look to for the law and to the evidence for the facts, 402.
- Kansas, statute relating to instructions, 153, p 133.
- Kentucky, statute relating to instructions, 153, p 133.
- Louisiana, statute relating to instructions, 153, p 133.

[References are to sections; e refers to Erroneous Instructions.]

# INSTRUCTIONS—Continued.

marking same modified, 161.

given, 161.

refused, 161.

Massachusetts, statute relating to instructions, 153, p 133.

may presume what the law presumes, 167.

may be given in the language of the statutes, 202.

may be taken by the jury upon retirement, 213.

Michigan, statute relating to instructions, 153, p 133.

Minnesota, statute relating to instructions, 153, p 134.

Mississippi, statute relating to instructions, 153, p 135.

Missouri, statute relating to instructions, 153, p 135.

modified at party's request cannot be complained of as party's error, 314.

Montana, statute relating to instructions, 153, p 135.

*motion to direct verdict,*

how to be rendered, 261.

must be made at close of plaintiff's case, 259.

renewed at close of defendant's case, 259.

should be separate, 255.

must be accurate and pertinent, 172.

construed in connection with the evidence, 191.

marked given, refused, or modified, 161.

prejudicial to be complained of, 313.

prejudicial to be reversible error, 204.

must not prejudice or favor either party, 196.

Nebraska, statute relating to, 153, p 136.

Nevada, statute relating to, 153, p 136.

New Mexico, statute relating to, 153, p 137.

New York, statute relating to, 153, p 137.

not applicable to evidence, e 3928.

not error to refuse when already included, 209.

not included in record presumed to be correct, 310.

North Carolina, statute relating to, 153, p 137.

North Dakota, statute relating to, 153, p 138.

number may be limited by court, 210.

objections to will not be considered unless exceptions are taken, 300.

Ohio, statute relating to, 153, p 139.

omitting important circumstances in proof objectionable, 176.

on credibility of witnesses, 335.

on defenses not involved, e 4330.

one instruction may be limited by others, 175.

Oregon, statute relating to, 153, p 139.

parent and child, 1017-1021.

party cannot complain of opponent's instruction if he requests a similar one, 314.

estopped from urging objection where similar one was urged at his request, 314.

may assume any reasonable hypothesis, 168.

not always entitled to in form requested, 208.

offering several containing same principle cannot complain if one refused, 314.

Pennsylvania, statute relating to, 153, p 139.

peremptory, how presented, 261.

may be waived, 259.

presumption in favor of, 310.

proper even if no direct testimony, 193.

record must show exceptions to on appeal, 309.

referring jury to pleadings as to negligence alleged, 1344.

to facts should refer to all, 197.

issues involved in case, 170.

prior trials, 176.

refusal of correct instruction not cured—when, 315.

correct one when harmless, 315.

court to instruct jury to consider interest of parties, reversible error, 145.

jury to follow, cause for reversal, 206.



[References are to sections; e refers to Erroneous Instructions.]

INSTRUCTIONS—Continued.

- refusal of those containing correct propositions, 190.
- refusal to give must be signed as error on appeal, 300.
- refused should be pointed out in briefs, 322.
- repeating same proposition held error, 186.
- repeating statement that juror must be satisfied beyond a reasonable doubt held error, 186.
- repetition in same case, 186.
- reversible error not to instruct jury to consider interests of parties, 145.
- Rhode Island, statute relating to, 153, p 140.
- right to see those requested by opponent, 207.
- same weight for both state and defendant, adoption by court of instructions, criminal trial, 2621.
- should apply to matters of law exclusively, 182.
- should be clear, accurate and concise, 201.
  - clear, concise, comprehensive, and without prejudice, 154.
  - comprehensive and cover the case in dispute, 156.
  - confined to issues being tried, 171.
  - considered together, 173.
  - correct in law and pertinent, 172.
  - equally fair to both sides, 197.
  - given where there is any evidence, 192.
  - harmonious, 174.
  - included in the record on appeal, 307.
  - limited in number, 201.
  - numbered, usually, 162.
  - regarded as a whole, 173.
- should direct jury to believe from evidence alone, 197.
  - give the jury the law clearly and pointedly, 156.
  - not assume facts not admitted, 163.
- should not be argumentative, 195.
  - argumentative or equivocal, 201-202.
  - contradictory, 202.
  - considered disconnectedly, 173.
  - expressed in abstract terms, 178.
  - given upon immaterial matter, 204.
  - repeated, 177.
  - underscored, 177.
- should not charge jury with respect to matters of fact, e 4192.
  - compromise between liability and amount of damages,—form, 205.
  - ignore proven facts, 196.
  - refer to pleadings, 169.
  - single out certain facts ignoring others equally important, 176.
  - single out evidence for jury to follow, 187.
  - submit questions of law to jury, 180.
- single erroneous instruction may reverse, 191.
- singling out facts and evidence, e 3742.
  - on which defendant relies to escape liability, e 3746.
- South Dakota, statute relating to, 153, p 139.
- statutory modifications, 153.
  - provisions for various states, 153.
- Texas, statute relating to, 153, p 141.
- that jury must find for the plaintiff, 178.
  - mislead the jury should not be given, 178.
  - plaintiff has made out case as laid in declaration, 178.
- those requested cannot be complained of on appeal, 314.
- to be based on evidence, 199.
  - considered as a single series, 173.
  - by jury as a series, 405.
- undertaking to summarize facts must direct attention to both parties, 197.
- undue prominence to any fact, 176.
- use of metaphors and Latin words, 184.
  - words "alleged in declaration" sufficient, 1755.

[References are to sections; e refers to Erroneous Instructions.]

**INSTRUCTIONS—Continued.**

- Utah, statute relating to, 153, p 142.
- verdict of jury should follow, 274.
- Washington, statute relating to, 153, p 142.
- weight and sufficiency of evidence should not be commented upon by court, 182.
- when cured by subsequent instructions, 315.
  - do not obviate erroneous instructions, 185.
  - erroneous, held not prejudicial, 189.
  - will not be ground for reversal, 313.
  - will not mislead jury, 315.
- error in, will reverse, 191.
- inadequate, further instructions should be asked, 156.
- modified appellant may complain, 311.
- not cured by subsequent instructions, 315.
- not objectionable to refer to declarations, 178.
- when peremptory comes too late, 260.
- instructions should not be given, 258.
- pleadings may be referred to, 169.
- same is erroneous, party may complain, 311.
- where all material allegations are proved, 178.
- conflicting party cannot complain of refusal, 311.
- court and parties assume certain facts, appellant cannot complain, 313.
- wherever facts are close, must be accurate, 172.
- which call special attention to particular evidence objectionable, 176.
- Wisconsin, statute relating to, 153, p 143.
- written instructions mandatory, 158.
  - should be presented to court before argument, 156.
  - may be waived, 159.
- Wyoming, statute relating to, 154, p 143.

**INSTRUMENT—**

- alteration of, leaving blank spaces, e 3434.
- construction of, memorandum notes, e 4203.
- forged, unexplained possession of, as evidence of guilt, e 4606.
- homicide, to be considered in judging intent, 3052.
- signing without knowledge of contents, fraud, e 3657.
- whether deadly weapons a question of fact, metallic knuckles, gas pipe, 3068.

**INSTRUMENTAL—**

- in communicating poison, accessory, e 4478.

**INSUFFICIENT—**

- evidence, as to self defense, 3105.
- grounds, for belief in danger, self defense, guilty of murder, 3108.
- premises, manslaughter, e 4651.
- provocation for homicide, slap with hand, when, 3091.
  - homicide, manslaughter, 3090.
- replevin bond, liability of officer for taking, e 4245.

**INSULTING CONDUCT—**

- provocation for homicide, e 4683.

**INSULTING WORDS—**

- assault and battery, adequate cause, 2863.
- no bar to plea of self defense, 3139.
- not necessarily guilty of murder, invading province of jury, e 4620.
- provocation for homicide, to wife of defendant, other relatives, 3087.
  - may reduce grade of homicide, 3089.

**INSULTS—**

- by deceased, homicide, consideration of, not limited to time of killing, e 4621.
- justification for assault and battery, 2845.

**INSURABLE INTEREST—1205.**

**INSURANCE—**

- ACCIDENT,
  - against, 1493.

[References are to sections; e refers to Erroneous Instructions.]

**INSURANCE—ACCIDENT—Continued.**

agreement between employers and employes, 1493.  
proof of accidental death, 1204.  
suicide, 1204.

**FIRE—Chapter LIV, 1156-1186, e Chapter CXXXVII, 3659-3671.**

agreement to renew, 1178.  
alterations of premises, increased risk, 1170.  
amount of insurance must be definitely fixed, 1155.  
application is made a warranty, 1171.  
authority of adjuster, 1160, 1180.  
benzine on premises, amount of, e 3666.  
*burden of proof*,  
    on defendant charging plaintiff with destroying building, 1184.  
    to prove items of property, 1183.  
    on plaintiff of showing waiver, 1183.  
cancellation of policy without return of premium, failure of consideration, e 3665.  
cash value defined, 1185.  
condition as to other insurance, 1174.  
    of forfeiture, not favored in law, e 3663.  
    requiring action to be commenced within six months, 1183.  
destruction defined, 1156.  
duration of the risk must be agreed upon, 1155.  
duty of the court to interpret the policy, 1167.  
elements of contract of, 1155.  
estoppel by uniform course of business, 1169.  
false statements in procuring policy, 1185.  
    in proofs of loss, 1163.  
    touching any matter, e 3668.  
floater policy, 1186.  
fraud, degree of proof, e 3670.  
furnishing proofs of loss, 1157.  
    waiving prompt compliance, 1159.  
house falling over, fire commencing at the time or after its fall, 1181.  
if defendant denies liability plaintiff not obliged to furnish further proof, 1161.  
if jury cannot find market value of goods destroyed to find for defendant, 1182.  
implied authority of agent, estoppel, e 3661.  
increased hazard, knowledge of, 1170, e 3660.  
incumbrance, written consent of insurance company, 1172.  
intent to defraud avoids policy, 1163.  
inventory, proof of loss, weight of testimony, *burden of proof*, e 3671.  
liability for failure to renew, 1178.  
measure of damages, 832, 833, 1185, e 3526-3527.  
    for injury to merchandise, 832.  
    injury to premises by fire, 833.  
mere silence not enough to infer waiver of policy, 1162.  
misstatements in application, knowledge of agents knowledge of company, 1173.  
    made in good faith, 1185.  
non-compliance with conditions, 1177.  
non-payment of premium, 1168.  
    tender of, e 3659.  
oral understanding does not waive condition, e 3667.  
other insurance known to the company, 1175.  
ownership of property, 1177.  
parties must agree upon company in which insurance is to be placed, 1155.  
premises becoming unoccupied renders policy void, 1164-1165.  
    temporarily vacant, 1166.  
premium, waiving prompt payment of, 1168.  
proof of loss as measure of damages, e 3526.



[References are to sections; e refers to Erroneous Instructions.]

**INSURANCE—FIRE—Continued.**

- may be furnished by agent, 1157.
- not in exact conformity with terms of policy, waiver of by company, 1158.
- should be made in accordance with the terms of the policy, 1157.
- property insured in wrong name, husband and wife, 1180.
- reconstruction of the premises, 1170.
- removal of property as affecting risk, 1179.
- representations as to incendiarism, 1176.
- right to change conditions of property temporarily, e 3662.
- series, 1185-1186.
- showing authority of adjuster to waive breaches of policy, 1160.
- sprinklers, negligence of employe, e 3669.
- suit to be brought within twelve months, 1167.
- threatened fire, cost of removal, e 3664.
- unoccupancy of premises, conditions under which plaintiff can recover, 1165.
- what is within the meaning of the law, 1164.
- urging one ground of invalidity all other known forfeitures, 1160.
- waiver of conditions, 1172.
- proofs of loss, 1158.
- waiving conditions as to other insurance, 1174
- warranty as to amount of incumbrance, 1172.
- as to title, 1171.
- what proofs of loss should contain, 1157.
- to consider in determining the cash value, 1185.
- LIFE—Chapter LV, 1187-1216, e Chapter CXXXVIII, 3672-3684.**
- abandonment of rights under policy, 1203.
- assignment of policy, series, 1205.
- becoming sick after application and before delivery of policy, 1196.
- bodily injuries, inhalation of gas, e 3678.
- brother dying of consumption, 1195.
- burden of proof as to illness, 1193.
- on defendant to show forfeiture, 1212.
- cancellation of policy, 1201.
- committing suicide in same state of mind, no liability, 1208.
- concealing state of health, 1194.
- conditions and application in policy amounting to warranty, 1188.
- default of sick member of fraternal order, notice of inability to pay, e 3680.
- delay in payment of premium, 1212.
- delivery of certificate by agent of company knowing insured to be sick at the time is a waiver of such sickness, 1197.
- dying of certain diseases within one year, burden of proof, when on defendant, e 3674.
- excessive use of intoxicants, e 3675.
- giving note for premium, 1201.
- notice before beginning suit, 1215.
- good health defined, 1211.
- habitual drunkard, 1198.
- if insured is able to do any work not liable under total disability clause, 1216.
- incapacity for manual labor, 1214.
- insurable interest, 1205.
- legal definition of suicide, must be sane in order to commit, 1207.
- maximum amount specified in certificate recoverable, e 3527.
- misrepresentation*,
  - as to occupation, knowledge of agent, 1189.
  - as to use of liquors in application, 1206.
  - by insured or beneficiary, 1195.
  - knowledge of agent, e 3673.
- must furnish proof of death before suit is begun, company to furnish blanks, 1187.
- nature of sickness question for, 1193.

[References are to sections; e refers to Erroneous Instructions.]

**INSURANCE—LIFE—Continued.**

- policy is non-negotiable, 1205.
- premium, receipt, singling out evidence, e 3677.
- presumption of death from seven years' absence, 1210, e 3684.
- provisions of policy construed against company, e 3672.
- questions and answers in applications do not concern disorders and ailment lasting only for brief period, 1190.
- reinstatement, 1212.
- retention of policy by applicant waiver of fraud, 1201
- return of premium upon cancellation of policy, 1202.
- series, 1205.
- strong drinks taken for medicinal purposes, 1199.
- suffering from an ailment at the time of the delivery of the policy, fraud, 1192-1194.
- suicide, burden of proof, e 3676.
- coroner's verdict, e 3683.
- while sane or insane, provisions in policy as to, 1207.
- taking own life not proof of insanity, 1209.
- tender of premium, 1200.
- total disability, 1215.
- verdict of coroner's inquest is evidence of cause of death, 1213.
- waiver of forfeiture as to delay in payment of premium, 1212.
- waiving errors in application for reinstatement, 1191.

**INSURANCE, FRATERNAL AND BENEFIT SOCIETIES—See FRATERNAL AND BENEFIT SOCIETIES.**

**INSURERS—**

- railroads, not insurer against accident to passenger, 1747, 1748.

**INTELLIGENCE—**

- all systems of healing disease must appeal to, e 4263.

**INTELLIGENT WITNESSES—**

- weight to be given to, e 3309.

**INTERCOURSE—**

- illicit, deceased having had with defendant's wife, murder in first degree, 2996.
- not necessarily seduction, 2829.
- proof of, not sufficient to convict of rape, 2806.
- sexual, with other men about time bastard was begotten, 2793.
- with others, seduction, e 4533.

**INTEREST—**

- added to value of goods at time of conversion in measuring damages, e 3521.
- after offer to pay note, deception as to ownership, 2163.
- allowed on damages for breach of contract, e 3506.
- wrongful levy, 2425.
- credibility, in result of trial, e 3304.
- interested witness may be as honest as another, e 3306.
- of party, in other similar litigation, e 3305.
- in the result, e 3349.
- jury must compute for themselves, 736.
- leasehold, eminent domain, damages, improvements, e 3556.
- may be allowed for wrongful seizure of mortgaged goods by sheriff, 808.
- on attorney's services after demand, 552.

**INTEND—**

- power to, insanity, but not to deliberate, e 4398.

**INTENT—**

- abortion*,
  - determines whether abortion causing death is murder or manslaughter, 2785.
- adultery*,
  - agreement to live in adultery not sufficient, e 4511.
  - intention to continue illicit acts, living in adultery, house of ill fame, e 4508.
- adverse possession*, e 3404.

[References are to sections; e refers to Erroneous Instructions.]

INTENT—Continued.

- assault and battery*,
  - definition must show, e 4537.
  - incapable from drunkenness, 2861.
  - may be shown by writing of valentine, 2860.
  - what to be considered, 2359.
  - whether intent proved, 2858.
- assault with intent to kill*,
  - accessory, 2747.
  - circumstantial evidence, 2870.
  - deliberation not a necessary element, e 4552.
  - elements state must prove, misplacing burden of proof, e 4546.
  - essential element, e 4548.
  - failure to prove, does not mean that defendant must be acquitted, e 4550.
  - if the crime would be manslaughter if death had ensued, e 4554.
  - included crimes, reasonable doubts, acquits, 2869.
  - must be proven, 2856.
  - reasonable doubt must be as to all evidence, not only as to intent, e 4557.
  - using word "shoot" instead of kill, e 4555.
- assault with intent to kill or murder*,
  - definition, 2854.
  - form of verdict, 2871.
  - how proven, 2857.
  - malice and deliberation, malice defined, 2865.
  - what lesser crimes included, 2855.
- bigamy*,
  - presumed from doing prohibited act, 2798.
- bribery*,
  - essential element of bribery, drunkenness as defense, e 4802.
  - essential, series, 3273.
- burglary*,
  - how manifested, sound mind and discretion, 2877.
  - presumed, prima facie case, 2876.
  - to steal, necessary element, 2875, e 4560.
- carrying concealed weapons*,
  - apprehensive of attack, e 4803.
- conspiracy*,
  - intoxication as affecting, e 4588.
- conversion*,
  - finding lost property, concealing fact of finding, 3216.
  - subsequent to taking up estrays in good faith, 3231.
  - wrongful, must be proven, 2333.
- dedication*,
  - owner must manifest intention to dedicate, 1142, 1143, 1145.
  - to dedicate may be manifested by acts or words, 1142.
- disinterring dead bodies for surgical experiment*, proof required, 3284.
- embezzlement*,
  - as shown by proof of other embezzlement, comment on weight of evidence, e 4593.
  - felonious, inferred from act, 2925.
  - necessary element, 2923, e 4592.
  - when not present, 2924.
  - ownership of property, 2922.
  - presumed from act, not conclusive, e 4594.
  - treasurer pledging bonds in security for his note, 2932.
- endorsement*, negotiable instruments, liability, 2177.
- facts and circumstances tending to show*, 1061.
- false pretenses*,
  - necessary element, 2940, e 4603.
- forgery*,
  - must be proved beyond reasonable doubt, presumption from attempt to utter, 2943.



[References are to sections; e refers to Erroneous Instructions.]

# INTENT—Continued.

## *fraudulent,*

by assignor, 1075.

to defraud creditors, 1074.

conveyance between husband and wife, 1086.

may be established by inference, 1084.

not necessary to justify rescission of sale, e 3642.

preference of creditors, 1082.

presumed from making false representations to commercial

agency, commission merchant, e 3644.

*homicidal, aggravated assault, e 4547.*

*homicide, 3047-3058.*

blow with fist, presumption as to intent, 3053.

deliberate, to kill, malice aforethought, act presumed to be done advisedly, 3048.

distinguished from premeditated design, 3056.

facts showing killing to have been willful and malicious, 3051.

instrument used to be considered, 3052.

lacking, killing accidentally in resisting assault, self defense, e 4716.

not conclusively proven by concealment of body, 3055.

presumption that one intends the natural consequences of his acts, 3047.

question for jury, weapons used, 3049.

right to carry arms, e 4624.

*specific, deliberately formed, ignoring lower degree of homicide, e 4661.*

malice aforethought, e 4660.

time when formed, immaterial, 3054.

to be inferred by jury, from defendant's acts, 3050.

*how proven, 2839.*

*intoxicating liquor,*

criminal, necessary, illegal transfer of, 3201.

material, to minor, 3195.

to person in habit, necessary, 3200.

*intoxication,*

as affecting, larceny, 2616.

preventing formation of, intent necessary element of crime, e 4412.

*knowledge of assignee in fraudulent conveyance, 1061.*

*larceny,*

failure to prove, e 4790.

felonious, e 4781.

explanation of, larceny defined, 3210.

honest belief of ownership, reasonable doubt, burden of proof, e 4779.

horse-stealing, 3213.

intoxication as affecting, 2616.

taking must be with felonious, 3211.

*libel,*

as an element in libel, presumption of intent, e 4260.

*manslaughter,*

to kill, not necessary to constitute manslaughter, Alabama, e 4644.

to kill, necessary to constitute manslaughter, Texas, e 4645.

not essential, 3041.

*murder,*

not necessary, murder committed while committing robbery, accomplice guilty, 2746.

to kill, not the criterion of murder, e 4662.

premeditated design need not be proven, e 4551.

*murder in first degree,*

element of, e 4630.

inferred from killing, e 4629.

must be deliberate and premeditated, e 4628.

[References are to sections; e refers to Erroneous Instructions.]

**INTENT**—Continued.

- question for jury, murder in first degree, taking deceased to se-  
cluded place, e 4635.
- murder in second degree*,
  - to kill, passion depriving defendant of power to form, 3015.
- necessary part of crime, intoxication may be excuse, e 4411.
- negotiable instruments, illegal consideration, degree of proof re-  
quired, e 4215.
- partnership, sale of partnership interest, misrepresentation, e 4227.
- payment of antecedent debt, 1081.
- preference of creditors, 1081.
- presumption of, burden of disproving, 2471.
- principals and accessories, consent to criminal act, soaking person  
with turpentine, e 4480.
- provoking quarrel without felonious, self defense, e 4714.
- purchaser intending not to pay, whether fraud, 1112.
- rape*,
  - reasonable doubt as to intent to use force, 2825.
  - to use force essential, 2824.
- receiving stolen property*,
  - criminal intent must exist at instant of receiving, 3253.
- robbery*,
  - essential element of robbery, e 4574.
  - holding up train, 2894.
  - to use whatever force necessary, 2893.
- self defense, felonious, not necessary to constitute one the ag-  
gressor, e 4711.
- specific, intoxication as affecting, e 4413.
  - not necessary, assault with intent to kill, e 4549.
- to carry out threats, acts indicating, as justifying self defense, 3148.
- to commit rape*,
  - assault with, abandonment of purpose, 2823.
  - essential elements, 2822.
  - definition of rape, 2828.
- to commit voluntary manslaughter, assault with, 2668.
- to defraud*,
  - avoids policy, 1163.
  - conspiracy, reasonable doubt, e 4590.
  - false representations must be made knowingly, e 3645.
  - must appear from the evidence, 1109.
    - exist at the time of making mortgage, 1314.
    - in action of fraud, 1108.
  - necessary to recover in action for fraud, 1100.
  - need not be proved by victim, e 3643.
  - what is sufficient notice of fraudulent intent, 1072.
- to injure, embracing woman, assault and battery, 2853.
  - provoke difficulty, does not bar plea of self defense, e 4715.
- sell without license, one sale sufficient to constitute peddling  
without license, 3288.
- trespass, mere happening of accident does not justify award of dam-  
ages, e 4275.
- voluntary drunkenness as affecting, e 4553.

**INTENTION**—

- board of trade transactions, e 3475.

**INTENTIONAL**—

- deliberate, and unlawful burning, arson, malice presumed, e 4798.

**“INTENTIONALLY”**—

- embezzlement, used in conjunction with “willfully,” e 4595.
- willfully, corruptly, and knowingly swearing falsely, 348.

**INTEREST**—

- may be allowed when money is withheld an unreasonable time, 671,  
737.
- where there has been unreasonable and vexatious delay, 506.

[References are to sections; e refers to Erroneous Instructions.]

**INTEREST—Continued.**

- of heirs in estate, measure of damages, negligence causing death, e 3616.
- of witnesses, 338.
- on amount agreed, settlement of account, e 3400.
- partnership, sale of, misrepresentation, fact or opinion, 2212.
- when reckoned from, sale, time of payment, 2262.
- should be allowed in assessing damages, computation of, 736.

**INTERESTED—**

- witnesses, hired detectives different from others, e 4498.

**INTERFERENCE—**

- undue by court, during trial, 94.

**INTERFERING—**

- in combat, self defense, assault on defendant need not have been felonious, 3173.
- fight, provoking difficulty, e 4542.
- with drainage, eminent domain, damages, railroad constructing embankment, e 3561.

**INTERPRETATION—**

- of insurance policy, 1167.

**INTERROGATORIES—**

- suggestive, in charge, e 4502.

**INTERVENING CAUSE—**

- causing intoxication, 1221.

**INTIMACY—**

- criminal, of deceased with defendant's sister, no defense, murder in second degree, 3018.
- of deceased with defendant's wife, knowledge of, manslaughter, 3044.
- with others, seduction, e 4534.

**INTOXICANTS—See INTOXICATING LIQUORS.**

- excessive use of, life insurance, e 3675.

**INTOXICATING LIQUORS—**

- CIVIL, Chapter LVI, 1217-1226, e Chapter CXXXIX, 3685-3691.
- action by wife, for wrongful sale to husband, loss of support, 781.
- acts or statements of intoxicated person, value as evidence, e 3690.
- aggravating circumstances in selling, exemplary damages, 778.
- damages for sale of, when exemplary damages may be given, 779, e 3528.
- degree of intoxication, 1219.
- suit by widow, 778.
- immaterial, need only prove intoxication caused injury, e 3688.
- enforcement of law on statute books, 1218.
- exact date of sale not required, 1222.
- exemplary damages, 779, 1223.
- injured in means of support by sale of, 1218.
- intoxication need not be sole cause of injury, must contribute, e 3689.
- liability for sale to drunkard, e 3685.
- of owner of premises where illegal sales of liquor are made, 1224.
- saloonkeeper for illegal sale to husband, release by wife, e 3686.
- loss of support element of damages for wrongful sale, 781.
- measure of damages, 779-781, e 3528-3530.
- under dram shop act, e 3528.
- mental suffering not an element of damages in action for wrongful sale, 780.
- mere sale or gift not sufficient, intoxication must be shown, e 3687.
- new or intervening cause, 1221.
- pecuniary loss can only be considered in assessing damages for wrongful sale, 780.



[References are to sections; e refers to Erroneous Instructions.]

# **INTOXICATING LIQUOR—CIVIL—Continued.**

- permission to defendant by wife to sell liquors to husband occasionally not bar to action, 1223.
- poverty of plaintiff, when considered, e 3691.
- preponderance of evidence sufficient in civil cases, 1222.
- proximate cause, 1221.
- setting aside and annulling license, 1226.
- sufficient if liquor sold contributed to intoxication, 1220.
- suit against saloonkeeper and owner of building jointly, 1225.
- by widow for causing death of husband, 778, 1217.

# **CRIMINAL—Chapter C, 3184-3209, e Chapter CLXXXI, 4767-4774.**

- assuming a trick or evasion unjustifiably, e 4772.
- authority of bartender in making sales, no presumption of law either way, 3190.
- burden of proof as to license, 3187.
- as to written order, 3197.
- dealer responsible for acts of bartender, even without knowledge and against orders, e 4771.
- definition, 3184.
- drunkenness defined, 3198.
- evidence that some men could drink the liquor without feeling it, no defense, e 4760.
- habit of getting drunk must exist at time of sale, 3199.
- illegal sale, dwelling house a public resort, finding liquor there, 3204.
- local option, 3209.
- intoxicating within the meaning of the law, 3185.
- keeping for sale in club house without license, 3205.
- when presumptive evidence of illegal sale, 3188.
- or using place for illegal sale, 3203.
- place for sale of, agent, clerk, servant or principal, 3193.
- knowledge or criminal intent necessary, 3201.
- liability for act of servant, 3192.
- not necessary that defendant be legal owner of liquor, e 4767.
- one sale delivered at different times, 3194.
- open on prohibited days, unlawful sales in side or rear rooms, 3206.
- order by agent, not a sale, 3207.
- place of sale is material, receiving profits would constitute a sale, e 4768.
- presumption that bartender has authority to make only lawful sales, 3191.
- residence district, what constitutes, 3208.
- sale by druggist, 3189.
- purchased for medicinal purposes but diverted to other uses, e 4773.
- sale in prohibition limits, what constitutes, 3202.
- or gift, reasonable doubt must be on whole evidence, e 4774.
- selling or giving away is sufficient, e 4770.
- to person in habit, intent, 3200.
- sold to minor, knowledge and intent, material, 3195.
- knowledge of minority immaterial, 3196.
- what constitutes sale within state, 3186.

# **INTOXICATION—See DRUNKENNESS.**

## **CIVIL,**

- as contributory negligence, 1356, 2103, e 3940, 4075, 4155.
- carrier may refuse to receive intoxicated persons as passengers, 1821.
- death from, suit by widow, exemplary damages, 778.
- definition of habitual drunkard, 1198.
- misrepresentation as to use of liquors in application for insurance, 1206.
- must be cause of injury to recover damages for sale of intoxicating liquor, e 3687.
- of servant, as contributory negligence, 1481.

[References are to sections; e refers to Erroneous Instructions.]

# **INTOXICATION—CIVIL—Continued.**

ratification of deed, 1135.  
strong drinks taken for medicinal purposes, 1199.  
wife may recover damages for wrongfully causing, 781.  
wills, producing insanity, 2381.  
when incapacitates, 2379.

# **CRIMINAL, 2606-2619, e 4410-4419.**

and specific intent, e 4413.  
as affecting intent, larceny, 2616.  
as showing lack of premeditation, e 4414.  
at time of committing crime, and when conspiracy was formed, e 4588.  
belittling defense of, saying "there is some evidence," e 4419.  
defense to bribery, of juror, intent essential, e 4802.  
to conspiracy, 2919.  
delirium tremens, e 4417.  
evidence in relation to, must not be taken from jury, e 4418.  
must raise a reasonable doubt as to mental capacity, 2619.  
from liquors or morphine, temporary insanity, homicide, e 4416.  
getting drunk with view of committing crime, 2607.  
may reduce from murder to manslaughter, 2618.  
not amounting to insanity, no defense, presumption, 2612.  
inconsistent with premeditation, 2615.  
sufficient, must be insane, 2610.  
procured by artifice of deceased, not voluntary, 2608.  
producing insanity, an excuse, 2613.  
temporary insanity, mitigation, murder, 2614.  
so that intent required by law cannot be formed, e 4412.  
voluntary drunkenness no excuse, 2606.  
irresistible impulse from, no defense, 2609.  
will not excuse any grade of homicide except murder in first degree, 2617.  
when excuse for crime, degree of, e 4410.  
where intent necessary part of crime, may be excuse, e 4411.

# **INTRODUCING—**

buyer to seller, broker, e 3467.

# **INTRODUCTION—**

of evidence, 102-128.

# **INTRUSION—**

on premises, killing to prevent, e 4763

# **IOWA—**

contract made on Sunday, 643.  
reasonable doubt defined, 2656.  
sealed verdict equivalent to recording, 278.  
statute on abstracts of record, 316.  
relating to instructions, 153, p 132.  
weighing defendant's testimony, 2541.

# **INVADING PROVINCE OF JURY—**

admissions, e 3364.  
difference between slander and libel, e 4259.  
homicide, insulting words, not necessarily guilty of murder, e 4620.  
inference, conjecture, e 3385.  
little weight to testimony, because of ill will, e 4500.  
presumption from sale of property alleged to be stolen, e 4783.  
specifying what acts constitute provocation, e 4677.  
testimony of wife of accomplice to be received with caution, e 4492.

# **INVASION OF HOUSE—**

protection from, by guests, e 4764.

# **INVENTORY—**

fire insurance, burden of proof of loss, e 3671.

# **INVITATION—**

to cross railroad track, open gate, 1893.

# **INVOLUNTARY—**

consent, rape, induced by fear, 2809.  
partnership, cannot be formed, 2202.

[References are to sections; e refers to Erroneous Instructions.]

- INVOLVED**—  
instruction on reasonable doubt, e 4473.
- IRON**—  
murder by striking with piece of, deadly weapon, 3001.
- IRRECONCILABLE**—  
conflict in evidence, 2772.
- IRREGULAR**—  
appearance of note, bona fide purchaser, e 4219.
- IRRESISTIBLE IMPULSE**—  
defendant able to distinguish but not to choose between right and wrong, e 4404.  
essential elements, 2582-2583.  
from voluntary drunkenness, no defense, 2609.  
to avenge, no defense, 2580.  
weakness of mind, 2584.  
when no defense, e 4403.
- IRRESPONSIBILITY**—  
must be proven beyond reasonable doubt, 2675.
- IRRIGATION COMPANY**—  
damages for failure to supply water, e 3512.
- ISSUES**—  
matter material to, perjury, swearing must be to, e 4793.  
order in which considered, New York code, murder in first degree, 2991.  
other offenses not in, keeping disorderly house, 2800.  
of ratification, ignoring, agency, e 3420.  
two submitted in one instruction, e 3413.  
what facts in, plea of not guilty, 2776.
- ITEMS**—  
presumed to be all included in account stated, burden of proving contrary, e 3399.
- JAIL**—  
releasing prisoners from, by delivering tools, 2464.
- JEOPARDY**—  
twice putting in, correcting error by new trial, e 4504.
- JERK OF TRAIN**—  
causing injury, e 3863-3864.
- JOINT**—  
and several liability, trespassers to real estate, 2303.  
offense, trespass, e 4811.  
defendants, arson, what must be proved, e 4796.  
indictment, of principal and accessory, 2729.
- JOINT LIABILITY**—  
civil action of conspiracy, e 4311.  
does not necessarily follow joint ownership, e 3488.  
municipal corporations with other defendants, e 3921.  
negligence, street railroads, 2082.  
and third person contributing to injury, e 4159.  
negotiable instruments, 2137.  
of several assailants in case of assault, 535.  
parties to action from negligence, 1365.  
suit against saloonkeeper and owner of building selling intoxicating liquors, 1225.
- JOINT TRIAL**—  
jury may find one or more guilty, others not guilty, 2777.
- JOKE**—  
playing, with cards, place where liquor is sold, e 4807.
- JUDGE**—  
absence of must be objected to, 83.  
against for issuing marriage license, e 4315.  
cannot delegate judicial functions, 84.



[References are to sections; e refers to Erroneous Instructions.]

#### JUDGE—Continued.

- conversing with witness, 94.
- falling asleep during trial, 85.
- may inquire on what ground a verdict was found, 96.
- whether jury will be able to reach a verdict, 96.
- of election refusing to receive vote, e 4817.
- of probate court prohibited from acting as attorney, 549.
- powers and duties of*, 86-89.
  - asking questions of witness in suspicious way, 88.
  - criticisms of counsel, 88.
  - erroneous remarks by the court in presence of the jury, 88.
  - expression of impatience a waste of time, 88.
  - indorsement of witness' respectability, 88.
  - may allow latitude in criminal cases in argument, 89.
  - may correct erroneous remarks of counsel, 89.
  - may not do in presence of jury what may properly be done at other times, 89.
  - may stop misstatements of counsel, 89.
  - ordering arrest of witness for perjury in presence of jury, 89.
  - remarks to the jury on the expense of trial and necessity of agreeing, 93.
  - required to be present at trial, 83.
  - should be present during argument, although not reversible error, 83.
  - should not display anger and ridicule, 97.
  - should not go to jury room during deliberation, 96.
  - should not hold conference with jurors, 95.
  - should not make remarks to defendant in criminal cases affecting his credit, 89.
  - should not remark on credibility of witness, 88.
  - should not remark on weight of testimony, 88.
  - to be present and preserve order, 86.
  - to avoid criticising or interrupting counsel, 86.
  - to avoid offensive language to counsel, 86.
  - to avoid prejudice or favor to witness or jury, 86.
  - to check all abusive language or offensive personalities by counsel, 86.
  - to check all undue demonstration in court, 86.
  - to control times of sittings of court and adjournment, 86.
  - to limit number of witnesses on single point, 86.
  - to pass upon all questions of law that may arise, 86.
  - to prevent interruptions while reading instructions, 86.
  - to prevent intimidation of witnesses by counsel, 86.
  - to punish infractions by fine or contempt, 86.
  - to punish offenders by contempt, 86.
  - to regulate the order of introducing evidence, 86.
  - to supervise conduct of jury, 86.
  - undue interference by court during the trial, 94.
  - when presiding judge may be a witness, 142.

#### JUDGING—

- defendant, self defense, from his standpoint, 3122.

#### JUDGMENT—

- assignment of, amount paid, 624.
- by consent not appealable, 297.
- by default can be appealed from, 297.
- creditors, chattel mortgage as against, 1310-1311.
- creditors, mortgage must be acknowledged and recorded as to, 1311.
- default and satisfied judgment not appealable, 298.
- erroneous if rendered upon verdict of jury when any member disqualified, 33.
- ground for reversal, 299.
- juror must use all used in the most important affairs of life, reasonable doubt, e 4444.
- lien of, and chattel mortgage, priority between, 1310, 1311, 1315.
- rendered where member of jury disqualified, not void but erroneous, 33.

[References are to sections; e refers to Erroneous Instructions.]

**JUDGMENT**—Continued.

to be appealable, merits of case must be involved, 297.  
when will be reversed, 299.

**JUDICIAL FUNCTIONS**—

cannot be delegated, 84.

**JUMPING FROM CAR**—

to avoid danger, negligence, street railroads, high rate of speed, 2026.

**JURISDICTION**—

over highway, negligence, street railroads, effect of change from county to city, 2014.  
what not appealable, 297.

**JUROR**—

absconding of, ground for new trial, 101.  
acceptance of is waiver of objections, when, 34.  
accused cannot complain of court's discretion in excusing, 26.  
alienage as ground for challenge, 40.  
appealing to individual, reasonable doubt, 2689.  
attempt to bribe, proof required, other attempts to bribe incompetent, 3271.  
being under influence of intoxicating liquors, 24.  
bribery of, drunkenness as defense, intent essential, e 4802.  
cannot doubt as, if they believe as men, usually error, e 4446.  
challenges for cause—Chapter III.  
character considered as qualification for, 40.  
common knowledge and intuition, 5.  
consanguinity or affinity ground for, 40.  
conscientious scruples grounds for discharge, 24.  
court may discharge at its own instance, 24.  
doubting as, what one believes as a man, 2705.  
error to require examination without full panel, 58 n 5.  
evidence in support of challenge, 35.  
examination, by whom conducted, 37.  
    on voir dire should be complete, otherwise question will be deemed to be waived, 33.  
failure to raise known objection waived after verdict, 33.  
grounds for challenges for cause, age, 38.  
    discharge by court, 24.  
having case pending at same term of court, 40.  
having formed or expressed an opinion, ground for challenge, 54.  
if a juror becomes ill, place should be filled and trial proceed *de novo*, 265.  
if single one has reasonable doubt, cannot convict, e 4462.  
ignorance of English language ground of challenge, 24, 42.  
impartial jury sufficient, 25.  
inquiry not made on voir dire examination deemed waived, 33.  
intimate friendly relations with the opponent or his family will disqualify, 44.  
    knowledge of material issues involved, ground for challenge, 43.  
manner of exercising struck juries, 61.  
may be asked questions concerning his general opinion of his duties, *contra*, in Illinois, 33.  
    discharged by court when previous verdict shows them unfit, 26.  
    when biased or prejudiced, 25.  
    excused when wanted as a witness, 26.  
may not be asked their opinion as to state of facts, 32.  
    discharged in felony case without consent, 25.  
members or shareholders of corporation, tax-payers, ground for challenge, 47.  
membership in society or church association, ground for challenge, when, 46.  
mental unsoundness ground for challenge, 40.  
must be governed by instructions alone as to law, 400.  
must exercise all the judgment used in the most important affairs of life, reasonable doubt, e 4444.

[References are to sections; e refers to Erroneous Instructions.]

# JUROR—Continued.

- must not be witnesses, 7.
- not being qualified elector ground for, 40.
- number of peremptory challenges allowed, 59.
- objection to competency may be made after verdict, 33.
- should be made when sworn, 33.
- on examination counsel should not be permitted to ask concerning law, 33.
- may be asked if he has formed an opinion, 32.
- opinions formed from reading newspapers, when ground for challenge, 55.
- rumor or hearsay ground for challenge, 56.
- parties entitled to full panel in box while examining, 58.
- have no vested right in any particular jury, 25.
- peremptory challenge after acceptance of jury error, 58.
- general observation, 57.
- personal afflictions ground for challenge, 25.
- exemption, 38.
- knowledge of, 5.
- must not affect their ability to be fair and impartial, 6.
- reasons for excusing, 26.
- prejudice against circumstantial evidence, ground for, 51.
- class of litigants ground for challenge, 51.
- plea of insanity or limitation, ground for challenge, 50.
- race or religion, ground for challenge, 51.
- subject matter, ground for challenge, 49.
- prejudice, partiality or bias, ground for challenge, 48.
- previous conversation with one of the parties, ground for challenge, 53.
- prior service ground of challenge, 39.
- questions affecting impartiality, when proper, 32.
- questions on the voir dire, importance of the examination, 33.
- reasonable doubt of one, will prevent conviction, 2690.
- re-examination after acceptance, when, 36.
- relationship of duty or obligation ground for challenge, 45.
- to parties ground of challenge, 24.
- right to parties to have unprejudiced, 24.
- scruples against capital punishment, ground for challenge, 52.
- separation of, with and without consent, 101.
- should consider evidence of both parties to suit in determining credibility, 335.
- should not be asked questions anticipating instructions, 33.
- be asked questions of law, 32.
- prejudicing the case, 32.
- which purpose their disgrace, 33.
- make memoranda of evidence, 217.
- should receive the law from the court on examination, 33.
- speaking of testimony to other jurors vitiate verdict, 7.
- verdicts must be unanimous, 265.
- what questions may be asked as to qualifications, 37.
- when acceptance of not a waiver of objections, 34.
- may be discharged by court after being sworn, 25.
- discharged without consent of parties, 25.
- witnesses as to collateral facts, 7.
- may not be discharged without consent, 25.
- opinions formed from reading newspapers is ground for challenge, 55.
- not ground for challenge, 55.
- peremptory challenge may be made after jury has been accepted, 58.
- right of peremptory challenge must be exercised, 58.

# JURY—

- duties and powers, Chapter XXIII, 398-414, e Chapter CXI, 3380-3397.
- admonishing as to conduct during separation, 98.
- advised to agree, e 3390.
- are the sole judges of the amount of damages, 199.



[References are to sections; e refers to Erroneous Instructions.]

**JURY—Continued.**

- are to believe as jurors what they would believe as men, 410b.
- attitude of, elements to consider in arriving at verdict, 410.
- belief in forming verdict should be reasonable, 410.
- belief of, must be limited to evidence, larceny, e 4777.
- cannot be left to determine what allegations in pleadings are **ma-**  
**terial**, e 3384.
- refer question of law to, e 3383.
- resort to conjecture, possibilities, suppositions or imaginings, 400.
- cautionary instructions as to duties and power, 398.
- cautioning against argument of counsel, e 3321.
- challenge to the array, 21.
- common sense and experience, observation, e 3386.
- communications with the court, 96.
- compelled to bear presumption of innocence in mind, 2643.
- court may allow separation, when, 100.
- amend verdict even where jury has been discharged, 277.
- directing method of arriving at verdict, e 3393.
- discretion of court in excusing for public policy, 26.
- duties and powers, 398.
- adopt hypothesis of defendant's innocence, 2709.
- construe evidence in defendant's favor, e 4424.
- decide according to the weight of the evidence under the law as  
given by the court, 405b.
- infer innocence rather than guilt, 2641.
- each juror should be governed by his own conscience, 408.
- each juror should give consideration to the views of his fellow juror,  
408.
- enlightened consciences of in considering damages, 905.
- error to refuse to allow them to be polled, 249.
- evidence should not be taken from, in regard to intoxication, e 4418.
- form of verdict, 414.
- function of, slander and libel, burden of proof as to damages, e 4258.
- have no right to disregard testimony without cause, 333.
- homicide, intent a question for jury, 3049.
- right to infer intent from defendant's acts, 3050.
- how evidence should be considered, 400.
- to determine credibility, 332.
- motive, homicide, 3077.
- question of insanity, 2572.
- to weigh and consider evidence, 400.
- impaneling of, 16-62.
- importance of case may be emphasized by the court, 406.
- juror's duties may be emphasized by the court, 406.
- inspection of premises by, eminent domain, damages, e 3554.
- invading province of,*
- difference between slander and libel, e 4259.
- homicide, insulting words, not necessarily guilty of murder,  
e 4620.
- inference, e 3385.
- little weight to testimony, because of ill will, e 4500.
- presumption from sale of property alleged to be stolen, e 4783.
- specifying what acts constitute provocation, e 4677.
- irregularities in drawing, 17.
- judge may inquire whether the jury will reach verdict, 96.
- judges of law and facts in criminal cases, 181, 2620-2625.
- latitude of examination on voir dire, 31.
- law knows no creed, condition, color or nationality, 399.
- leaving mind of, in state of confusion, reasonable doubt, e 4455.
- lengthy and argumentative instruction, e 3396.
- may be cautioned by the court and advised to agree, 407.
- be cautioned by court as to expense of mistrial, 407.
- come in for further instructions, 212.
- consider evidence from their own view of the premises, 690.
- find one or more guilty, others not guilty, joint trial, 2777.
- take instructions upon retiring, 213.

[References are to sections; e refers to Erroneous Instructions.]

**JURY**—Continued.

- take pleadings upon retirement, 214.
- method of drawing and selecting a venire, 16.
  - drawing at common law, 20.
  - exercising peremptory challenges, 58.
  - standing, allowed to state only, 62.
- must be left to determine imminence of peril, self defense, e 4708.
  - be oblivious of outside pressure or suggestions, 398.
  - follow rules of evidence prescribed by law, e 4495.
- necessity of agreeing, remarks of court, 93.
- need not be of race of accused on trial, 27.
  - consist of twelve, 265.
  - disregard all testimony of witness who testifies falsely in part, 347.
- no right to disregard statement of law, e 3382.
- not judges of sufficiency of indictment, e 4393.
- not to arrive at verdict by chance, e 3740.
  - compromise between question of liability and the amount of damages, 3740.
  - consider opinion of prosecuting attorney as to guilt of defendant, 2755.
  - decide what is sufficient provocation, assault and battery, e 3441.
  - determine question of insanity at time of trial, 2600.
- not required to believe as jurors what they would not believe as men, 410.
- object to obtain the truth, 399.
- of white men may try negro unless fraud is shown, 27.
- officer selecting, 17.
- order in which issues considered, New York code, murder in first degree, 2991.
- power to amend or correct verdict, 278.
- question for—See QUESTION OF FACT.
- questions, object of which to aid in peremptory challenges, improper, 31.
- rape, to decide whether statement of prosecutrix a complaint or confession, e 4525.
- referring to onlookers as lobby, e 3394.
  - probabilities and circumstances not in the case, e 3395.
- refusal to render verdict when directed by court, 247.
- remark of bailiff having no effect on verdict not erroneous, 95.
- restraint on, in reaching verdict, e 3391.
- right to an impartial, is fundamental, 31.
  - disregard testimony, e 3381.
  - have drawn from vicinage, 20.
  - list of, 19.
- sending back for further deliberation, e 3392.
- separation of, ground for new trial, 101.
  - with consent, of defendant, in criminal cases, 101.
  - without consent, ground for new trial, 101.
- should act as they would in the most important affairs of life, 409.
  - act from deep and confident conviction, 181.
  - alone decide on guilt or innocence of prisoner, 181.
  - arrive at a common understanding, 408.
  - be governed by the law and the evidence, 403.
  - be guided by the evidence, 404.
  - be left to form their own opinion of evidence, 182.
  - consider only injuries established by a preponderance of the evidence, 400.
  - consider the whole of the evidence and render verdict according to weight of same, 332a.
  - decide the case under the law and the evidence, 406.
  - employ all the reason, prudence, judgment, discrimination and caution they possess, 409.
  - exercise common sense, 410.
  - find facts from the evidence and take law from the instructions of the court, 401, 402.

[References are to sections; e refers to Erroneous Instructions.]

# JURY—Continued.

- find on what count the defendant is guilty, 413.
- give instructions respectful consideration, 2625.
- give prisoner benefit of all reasonable doubt, 181.
- look to evidence for facts and the court for law, 402.
- should not act with prejudice or sympathy, 366.
- be actuated by sentiment in arriving at verdict, 409.
- influenced as to the facts by statements of counsel unless sustained by evidence, 405.
- influenced by newspapers, e 3387.
- sympathy or passion, 403.
- led by sympathy, 366.
- prejudiced against corporations or individuals, 366.
- by their verdict attempt to keep cases out of court, 404.
- consent to verdict which does not meet with his approval, e 3740.
- consider costs of the trial, 404.
- guess or conjecture at ailment complained of, 361d.
- take law books to jury room, 215.
- should only accept statements of counsel so far as corroborated by law given by court, 405.
- receive law from court, criminal trial, 2620.
- reconcile conflicting testimony, 332.
- weigh evidence carefully and altogether, 411.
- sit as individuals, but make up verdict as a whole, 408.
- sole judges of the credibility of the witnesses and the weight of the evidence, 327.
- of the facts, qualified, e 3380.
- statutory methods of drawing, 16.
- provisions for selecting liberally construed, 17.
- submitting to, question of what constitutes a wrongful taking, e 4240.
- system, change in modern practice, 8.
- origin of, 8.
- taking declaration to jury-room, measure of damages, personal injury, e 3604.
- to consider only unlawful homicides, 2978.
- decide intent, slander and libel, 2285-2286.
- whether evidence is true, not whether it is just, e 3388.
- determine adequacy of consideration for homicide, 3093.
- draw inferences of fact, negotiable instruments, e 4198.
- judge of credibility of confession, to be considered as a whole, e 4367.
- look to the evidence for the facts and the court for the law, 402.
- take law from the court, 183.
- told they "should" instead of "might" consider certain facts, e 3319.
- usurping powers of, motives of witnesses to be considered, e 4499.
- verdict signed by foreman and read in court valid, 272.
- less than twelve, e 3389.
- view and inspection of premises, 146-152.
- of premises by, 690.
- weight to be given in assessing damages, 863.
- what not to be considered by, 398.
- to consider in determining their verdict, 411.
- when case should not be taken from, 258.
- may separate in civil cases, 99.
- in criminal cases, 99.
- method for selecting, ground for challenge, 18.
- not ground for challenge, 18.

# JURY TRIALS—

- definition of, 14.
- for crimes involving hard labor, 13.
- for petty offenses, 13.
- tests of right to, 13.
- usual number of jurors, 14.
- waiver of, 15.
- when may be waived, 15.
- not be waived, 15.



[References are to sections; e refers to Erroneous Instructions.]

**JUST COMPENSATION—**  
defined, 841.

**JUSTICE OF THE PEACE—**  
liability for act of special officer, attachment, e 3449.  
perjury, authority must be shown, 3265.

**JUSTIFIABLE—**  
conviction not, by high degree of probability of guilt, e 4449.  
force in retaking property, assault, e 3439.

**JUSTIFIABLE KILLING—**  
burden on defendant of showing, e 4330.  
defense of habitation, 3183.  
distinguished from manslaughter, e 4610.  
in defense of property, when, landlord and tenant, 3182.  
instructions in words of statute not always correct, e 4751.  
of citizen by policeman, when not, 2960a.

**JUSTIFICATION—**  
*assault and battery,*  
burden of proving, 2862.  
ejecting trespasser, 2842.  
insults, 2845.  
keeping order in religious meeting, 2843.  
one assault does not justify another, e 4540.  
retaking stolen property, 533.  
defendant charged with crime not required to prove, 2468, 2469.  
discharging pistol, accident defined, e 4538.  
fear not sufficient, overt act necessary, what constitutes, 3147.  
homicide without, malice, 3063.  
malicious prosecution, for beginning criminal proceedings, e 3712.  
murder in first degree must be without, e 4630.  
must be proved by defendant, e 334'.  
shooting with intent to kill and murder, erroneous or inadvertent statement, e 4754.  
*slander and libel,*  
anger never, 2288.  
facts admitted by withdrawing plea of general issue, e 4268.  
how proved, 2289.  
plea in good faith, 2290.  
not an aggravation of damages, 2291.  
threats not sufficient, overt act necessary, 3146.  
trespass on personal property, burden of proof on defendant, 2299.  
valid claim of right honestly relied upon in good faith, e 4814.  
unlawful occupation immaterial, 3140.

**KANSAS—**  
reasonable doubt defined, 2657.  
statute relating to instructions, 153, p 133.

**KEEPING—**  
a gambling house, what must be proved, 3277.  
house of ill fame, occasional illicit acts do not constitute living in adultery, e 4508.  
intoxicating liquors, in club house, without license, 3205.  
when presumptive evidence of illegal sale, 3188.  
place for illegal sale of intoxicants, 3203.  
for sale of intoxicating liquor, as agent, clerk, servant or principal, 3193.

**KENTUCKY—**  
court should not mention defendant's failure to testify, e 4390.  
reasonable doubt defined, 2658.  
statute relating to instructions, 153, p 133.

**KEYS—**  
giving up by tenants, 1244.

**KICKING CARS—**  
not negligence per se, 1589.  
while switching, 1592.

[References are to sections; e refers to Erroneous Instructions.]

# **KILL—**

- intent to, homicide, time when formed immaterial, 3054.
- necessary to constitute manslaughter, Texas, e 4645.
- not necessary to constitute manslaughter, e 4644.
- not the criterion of murder, e 4662.
- using "shoot" instead of, e 4555.

# **KILL, ASSAULT WITH INTENT TO—See ASSAULT WITH INTENT TO KILL.**

# **KILLING—**

- accidental or justifiable, burden of proof on defendant, e 4330.
- accidentally in resisting assault, self defense, e 4716.
- while preparing for self defense, e 4717.
- another man than the one shot at, 2966.
- bringing on difficulty for purpose of, self defense, e 4713.
- burden of proving accidental, e 4613.
- by accident, excusable, 2972.
- another, defendant not liable for, because he struck deceased first with his fist, e 4656.
- corporal punishment, 2959.
- poison, murder in first degree, instruction varying from indictment, e 4634.
- policeman making arrest, manslaughter, e 4654.
- son to protect father, self defense, e 4757.
- charge on, not required in case of assault with intent to kill, e 4556.
- child by beating mother, murder in second degree, 3019.
- circumstances attending, proof of murder by, 2509.
- consideration of insults by deceased not limited to time of, e 4621.
- conspiracy for, all equally liable, 2963.
- probable and natural consequence of an unlawful purpose, e 4584.
- defendant charged with killing one man, evidence of killing of another not to be considered, 2967.
- encouraged by another, accessory, 2743.
- former assailant on sight, not justified as self defense, e 4718.
- in attempt to procure abortion, 3043.
- in defense of domicile, self defense, e 4762.
- person or property, self defense, 3181.
- property, not limited to force actually necessary, e 4766.
- property, shooting trespasser, e 4765.
- sister, need not be proven "necessary," self defense, e 4760.
- son, self defense, 3180.
- in making arrest, plea of self defense not necessarily barred, e 4738.
- revenge, self defense, after repelling assault, 3125.
- self defense, not manslaughter in third degree, e 4659.
- violent passion from offensive language used, murder in second degree, 3013.
- intent inferred from, murder in first degree, e 4629.
- malice presumed from killing, death by violence, 3060.
- murder in second degree, before cooling time had elapsed, 3012.
- must be malicious, reasonable doubt, Alabama, 3009.
- necessity of, self defense, must use all reasonable means to avert, 3119.
- not justified by mere threats, overt act necessary, 3146.
- of private citizen by policeman, when not justifiable, 2960a.
- policeman after escape from custody, murder in first degree, e 4633.
- in pursuance of unlawful conspiracy, 2961.
- who attempts to arrest, self defense, e 4737.
- presumption from, as to deadly weapon, provocation, 3069.
- provocation, homicide, must arise at time of killing, 3037.
- reasonable doubt as to who did, 2704.
- seducer of daughter, manslaughter, omitting other provocation, e 4655.
- servant or child, by cruel treatment, 2960.
- through cowardice, self defense not available, 3137.
- through fright or excitement, manslaughter, e 4648.
- to prevent intrusion on premises, e 4763.
- unavoidable, self defense, defendant seeking meeting to provoke difficulty, 3129.

[References are to sections; e refers to Erroneous Instructions.]

# **KILLING—Continued.**

- when justifiable, in defense of property, landlord and tenant, 3182.
- whether justifiable or manslaughter, e 4610.
- while another watches, accessory, 2744.
  - attempting to commit rape, 2999.
- wife caught in adultery, 2958.
- with billiard cues, presumption of murder in second degree, 3021.
- with deadly weapon, malice not a necessary inference from, 3073.
  - not prima facie evidence of murder in first degree, e 4631.
  - whether there is a presumption of malice, e 4668.
- with depraved heart, regardless of human life, correct principle misapplied, e 4619.
- with gun or pistol loaded with power and leaden balls, 2969.
- with pistol in mutual combat not necessarily murder, e 4617.
- without design and in heat of passion, manslaughter in third degree, Missouri, 3030.
- without justification or excuse, malice, 3063.

# **KILLING IN SELF DEFENSE—See SELF DEFENSE.**

# **KING'S BENCH—**

- writs of error on judgments, 281.

# **KNIFE—**

- assault with, self defense, interfering in combat, 3173.
- attack with, self defense, blow need not have been actually struck, 3124.
- stabbing with, murder in first degree, 3002.

# **KNOWING—**

- right from wrong, irresistible impulse, 2583.

# **KNOWINGLY**

- and willfully swearing falsely, 342, 349.
- false testimony, must be as to material facts, e 3301.

# **KNOWLEDGE—**

- act done without, of accessory, 2742.
- and intent, false pretenses, 2940.
- by payee of partnership note, that firm has dissolved, e 4196.
- by vendee of debtor's fraudulent intent, not sufficient to render sale void as fraud against creditors, e 3633.
- contributory negligence, railroad, proximity of engines, 1954.
- gained by agent before employment, principal not charged with, e 3418.
- imputable, agent of telegraph company, negligence, 2118.
- material, sale of intoxicating liquor to minor, 3195.
- necessary, illegal transfer of intoxicating liquor, 3201.
- observation and experience of jury in business affairs of life, 937.
- of acceptance of guaranty, negotiable instruments, 2189.
  - accused that he engaged in a military expedition, 3292.
  - character of officer, killing without, self defense available, 3157.
  - conspiracy, identity, 2918.
  - contents of instrument, fraud, signing without knowledge, e 3657.
  - cow's vicious disposition, adopting means to prevent injury, 2350.
  - creditor, debtor retaining possession of property sold by him, replevin, e 4239.
  - defects or want of consideration, negotiable instruments, e 4214.
  - disposition, vicious dog, 2347.
  - falsity of representations is material in prosecution for fraudulent representations, e 4816.
  - fraud, performance of contract with, damages, e 3639.
  - identity of person killed is not essential to premeditation, e 4676.
  - insolvency of bank, duty of another bank, e 3454.
  - intimacy of deceased with defendant's wife, manslaughter, 3044.
  - larceny, defendant buying with, not guilty of larceny, 3249.
  - liquor dealer not necessary to make him liable for acts of bartender, e 4771.
  - material facts, principal must have to ratify act of agent, e 3445.
  - minority immaterial, sale of intoxicating liquor to minor, 3196.



[References are to sections; e refers to Erroneous Instructions.]

**KNOWLEDGE—Continued.**

- nature of act, larceny, failure to prove, e 4790.
- one partner lacking, disposal of partnership property, e 4228.
- party injured by vicious animal, master and servant, e 4278.
- right and wrong, test of insanity, 2574.
- steer's vicious disposition, due care, 2349.
- opportunity of witness for, credibility, e 3308.
- stating matter to be true without, fraud, must be shown to be false, e 3640.
- stolen goods left at house without owner's, 3255.
- swearing to lack of, perjury, when he had read it in newspapers and heard rumors, e 4794.
- that goods were stolen, what necessary to convict of receiving stolen property, e 4791.

**KNUCKS—**

- metal, murder in first degree, 3002.
- whether deadly weapons a question of fact, 3068.

**LABOR—**

- and materials must be furnished on request, e 3493.
- capacity to, diminished, damages, measure of, e 3568.

**LABORER—**

- lien of, 1328.

**LABORING—**

- under mental delusion, partial insanity, 2586.

**LACK—**

- of evidence, cannot raise abiding conviction of guilt, e 4461.
- evidence, may raise reasonable doubt, e 4460.
- knowledge, swearing to, perjury, when he had read it in newspapers and heard rumors, e 4794.
- motive, arson, as evidence of innocence, e 4799.
- calling attention to importance of motive, homicide, e 4669-4670.
- premeditation, shown by premeditation, e 4414.

**LADY—**

- passenger on street car, contributory negligence, given seat in crowded car by person afterward injured, 2067.

**LAND—See also ADVERSE POSSESSION, EJECTMENT, EMINENT DOMAIN,**

**REAL ESTATE, TRESPASS and WATERCOURSES.**

- already taxed, taxation of ditch upon, e 4234.
- covered by water, adverse possession, 446.
- dedication of, negligence, railroads, 2006.
- to railroads, 2006.
- deed of, name of deceased party forged, 2949.
- flooded, changing of watercourse, 2361.
- grantor who adopts plat in deed warrants same as described, 589.
- market value of acreage for purpose of subdivision, 804.
- obtained by fraud, trespass, entry upon, 2312.
- person claiming under color of title bound by description in deed, 588.
- trespass on, measure of damages, for herding cattle, 825.
- uninclosed, pasturing cattle upon, trespass, e 4274.

**LANDLORD AND TENANT—Chapter LVII, 1227-1247, e Chapter CXL, e 3692-3704.**

- action for rent, lease taken in name of tenant's agent, 1237.
- repairs through failure of tenant to keep in repair, measure of damages, e 3695.
- altering building, 1232.
- certain demands by tenant, acquiescence of agent, 1229.
- condition of basement concealed fraudulently, liability for rent, 1236.
- contract of renting, 1227.
- crops, right of possession of, 1233.
- to be divided after harvest, 1233.
- diminished enjoyment of premises, tenant remaining, bound to pay rent, 1234.

[References are to sections; e refers to Erroneous Instructions.]

# LANDLORD AND TENANT—Continued.

- eviction, forcible expulsion not necessary, 1245.
- from part of the premises, extinguishment of all rent, 1246.
- what constitutes, 1245.
- wrongful, right to procure warrant, 1247.
- forfeiture for using premises for different purposes than leased for, 1239.
- fraud, sub-lessee paying excessive share, 1121.
- heating of apartments, death of a child by failure of, 1242.
- implied contract, 1228.
- landlord's lien on crops raised by tenant, 1233.
- landlord not bound to repair, 1232.
- landlord under no obligation to make repairs in absence of express agreement, 1232.
- leasing premises for a particular purpose, 1239.
- for gambling purposes, e 3698.
- out of repair, whether duty to keep in reasonably safe condition, e 3696.
- levy of distress warrant not necessary to perfect lien, 1331.
- liability for rent of premises rendered untenable, 1235.
- of owner of premises where illegal sales of liquor are made, 1224.
- lien of landlord,*
  - against purchaser of crops from tenant, when, 1332.
  - bona fide purchaser, notice, e 3734.
  - for rent, 1330.
  - levy on crops, 1330.
  - on crops, knowledge of purchaser of crops, 1333.
- misrepresentation of lessee concerning rent paid, 1121.
- no prior agreement can offer or vary term of written lease, 1240.
- receipt for rent, presumption as to back rent, 1238.
- relation of must exist, 1227.
- release of tenant by assignment of lease, acceptance of rent, e 3699.
- right of landlord to enter for condition broken, 1239, e 3693.
- right to evict, eviction in wanton unwarrantable manner, punitive damages, e 3704.
- statement of agent as to location of natural gas shutoff, 799.
- suit against saloon keeper and owner of building jointly, selling intoxicating liquor, 1225.
- surrender of premises, how effected, 1243.
- moving away, giving up the keys, 1244.
- must be assented to by landlord, 1243.
- tenancy at will, implied agreement, e 3701.
- tenant cannot deny landlord's title, 1241.
- claiming set-off for work done on premises under agreement, e 3703.
- holding over, 1228-1230.*
  - agreeing to stay if certain improvements are made, e 3692.
  - increased rental, 1230.
  - new contract, 1230.
  - wrongfully, double rent, 1231.
- tenant not estopped to deny use of premises by voluntary payment of rent, e 3697.
- title to crops, 1233.
- waiving provision in lease, 1232.
- what is covenant to repair, e 3694.
- when tenant is bound to recognize paramount title, e 3700.
- trespass quare clausum fregit can be maintained against owner, e 3702.
- written lease merges all prior agreements, 1240.

# LANGUAGE—

- abusive, in presence of female, 3295.
- insulting, causing violent passion, may reduce grade of homicide, 3089.
- offensive, violent passion from, murder in second degree, 3013.

[References are to sections; e refers to Erroneous Instructions.]

**LANGUAGE**—Continued.

threatening, self defense, as evidence of state of feeling or who was aggressor, 3150.

**LARCENY**—Chapter CI, 3210-3255, e, Chapter CLXXXII, 4777-4797.

appropriation under bill of sale, and possession, 3240.

cattle of different owners, at same time, one offense, 3232.

color of title, belief as to ownership, e 4778.

conviction by comparison with another's guilt, failure to prove intent or knowledge of crime, e 4790.

defined, felonious intent explained, 3210.

definition, should include all essential elements, e 4775.

elements, what is necessary to prove, 3217.

estrays taken up, subsequent intent to convert, 3231.

explanation of possession of goods need only raise reasonable doubt, need not be satisfactory, e 4788.

felonious intent, e 4781.

fraud, artifice, false pretenses, threats, 3212.

finding lost property, intent to convert, concealing fact of finding, 3216.

not larceny, duty to search or advertise for owner, 3215.

forcible taking, resistance necessary, 3221.

fraud defined, 3242.

horse stealing, what necessary to convict, 3214.

identity of accused, homicide, 2446.

inculcating circumstances to show guilt, when, 3243.

intent, honest belief of ownership, reasonable doubt, burden of proof, e 4779.

horse-stealing, 3213.

intoxication as affecting intent, 2616.

may find guilty of in charge of burglary, 2882.

money must be proved genuine, 3224.

murder committed while engaged in, e 4622.

must be asportation of the property, e 4776.

name of person injured must be proved, 3228.

not proved by proof that defendant bought with knowledge of, theft, 3249.

not relieved by replevin, 3251.

not where title and possession obtained by fraud, 3241.

number of parties interested in larceny, only one indicted, e 4789.

obtaining property by threats of bodily harm, 3223.

of certain animals is grand larceny, cannot find guilty of petit larceny, 3235.

of estrays, 3230.

open taking, presumption of innocence, when, e 4782.

opening trunk left in defendant's custody, 3239.

ownership in unknown owner, 3225.

of property, tax schedules admissible to attack credibility of prosecuting witness, e 4780.

special property sufficient, 3226.

person having possession must be produced, 3227.

placing brand on stock, appropriating same, 3233.

possession, defendant's house not used exclusively by him, 3248.

of stolen property not a material ingredient of offense, e 4784.

possession of stolen property not with defendant, property found in barn, 3247.

*recent possession of stolen goods,*

presumption, good character, hypothesis must include evidence, e 4785.

raises presumption of, not of burglary, e 4565, 4786.

satisfactory account of, 3245.

unexplained, 3244.

possession of stolen property, whether sufficient to convict, e 4787.

possession of stock allowed to run at large, burden of explaining, exception, 3246.

without claim, conversion, 3250.



[References are to sections; e refers to Erroneous Instructions.]

**LARCENY—Continued.**

- reasonable doubt, burden of proof, 3252.
- husband and wife, 2721.
- receiving stolen property, criminal intent must exist at instant of receiving, 3253.
- purchase, bona fide or sham, 3254.
- removal of stolen property and sale in another county, belief of jury must be limited to evidence, e 4777.
- rule for determining value, 3219.
- sale of property alleged to be stolen, presumption from, invading province of jury, e 4783.
- stolen goods left at man's house without his knowledge, 3255.
- taking must be with felonious intent, 3211.
- property too suddenly to permit resistance, 3222.
- under mistaken claim of right, 3229.
- time not of the essence of, 3238.
- turning stolen mare loose, no defense, 3234.
- value must be proved, 3218.
- what constitutes principal in, e 4479.
- taking and carrying away, 3220.
- when crime completed, 3237.
- whether petit or grand, 3236.

**LATENT DEFECTS—**

- in brake rods, 1508.
- in lock of switch, causing injury, e 3856.
- rolling stock, duty to search for, 1502.
- roofs of mine, injury to miner, e 3777.
- weld of swivel, liability for, 1417.
- master not liable for, 1409, e 3787.
- railroad employees need not search for, 1574.

**LATIN WORDS—**

- use of in instructions, 184.

**LAW—**

- jury should receive from court, 402, 2620.
- meaning of intoxicating in, intoxicating liquors, 3185.
- object of, as to reasonable doubt, e 4432.
- of nature, statements of witnesses must be reconcilable with, e 4263.
- of self defense, stated, 3103.
- representation as to, whether fraud, 1105.

**LAWFUL SALES—**

- intoxicating liquor, presumption bar tender has authority for, only, 3191.

**LEADEN BALLS—**

- shooting revolving pistol loaded with, murder in second degree, 3005.
- shooting with pistol loaded with, 2969.

**LEADING QUESTIONS—**

- when proper, 137.

**LEASE—**

- assignment of, release of tenant, acceptance of rent, e 3699.
- forfeiture of, entry of landlord for condition broken, e 3693.
- of premises for gambling purposes e 3698.
- written, all prior agreements merged, 1240.

**LEASEHOLD INTEREST—**

- eminent domain, damages, improvements, e 3556.

**LEASING—**

- premises out of repair, whether duty of landlord to keep in reasonably safe condition, e 3696.

**LEATHER BELT—**

- deadly weapon, murder in second degree, 3016.

**LEGAL PROCESS—**

- does not justify assault, 530.

**LEGAL SERVICES—**

- attorney may recover for, 550.

[References are to sections; e refers to Erroneous Instructions.]

**LENGTHY—**

and argumentative instruction, e 3396.

**LESSER CRIMES—**

included in assault with intent to murder, 2855.

**LESSER OFFENSE—**

excluded, rape, e 4519.

**LESSOR—**

trespass on sublet premises, trespass against lessor, 2317.

**LETTERS—**

admission in, e 3371.

as evidence of testamentary capacity, 2375.

**LEVY—see EXECUTION.**

diligence required of sheriffs in making, e 4313.

of attachment, duty of officer as to goods previously sold, 541.

distress warrant not necessary to perfect lien, 1331.

execution, no bar to right to possession, entry by mortgagee, e 3728.

personal property, trespass, not good unless possession is taken, 2302.

on crops by landlord, 1330.

replevin, and taking possession, 2244.

wrongful, interest, 2425.

ratification of, trespass, personal property, refusing to release property taken, 2300.

**LEWDNESS—**

defined, disorderly house, 2799.

**LIABILITY—**

as partners on account of conduct, e 4221.

assuming, measure of damages, personal injury, e 3596.

elements of, negligence, railroads, heifer killed, 1975.

endorsement, negotiable instruments, intention, 2177.

endorsers, negotiable instruments, due diligence, bringing suit, 2178.

for damages, sale of mortgaged property, e 3729.

flooding land, right to dam water, what constitutes a stream, e 4279.

furnishing unsafe artificial light, 2125.

negligence as carriers of passengers, street railroads, 2020-2076.

sale of intoxicating liquor, to drunkard, e 3685.

guarantor, negotiable instrument, in general, 2183.

individual, none for contracts made as officers of corporation, 2419.

joint, does not necessarily follow from joint ownership, e 3488.

negotiable instruments, defense by one defeating plaintiff, 2137.

of street railroads with other individuals or corporations, 2082.

limitation of, by railroads, 1826.

burden of proof, 1841.

negotiable instruments, endorsement constitutes prima facie, 2181.

nuisance, dangerous pit adjoining highway, 2196.

of co-partner, malicious prosecution against partner, e 3715.

director of bank allowing improper loans, e 3455.

corporation, note given for previous indebtedness, e 4194.

gas company for break in gas pipe, negligence, 2124.

justice of the peace for acts of special officer, e 3449.

liquor dealer for acts of bartender, responsible even without

knowledge and against orders, e 4771.

master for acts of servant, 1370-1375.

for servants, e 3755-3757.

to servants, 1376-1494, e 3758-3768.

officer for taking insufficient replevin bond, e 4245.

partners, one partner engaging in outside transaction, 2206.

persons holding themselves out as officers of corporation, 2418.

president or director of bank for negligence or lack of fidelity,

e 3456.

principal and surety, on negotiable instrument, 2141.

for fraud of agent, e 3426.

[References are to sections; e refers to Erroneous Instructions.]

# LIABILITY—Continued.

- railroads, travellers, 1867.
- saloon-keeper for sale to husband, release by wife, e 3686.
- street railroads for injuries to persons other than passengers or employes, 2077-2113.
- partnership, established by ratification of partner's unauthorized acts, 2213.
- incurred by holding out oneself as partner, 2201.
- on business beyond original articles, 2203.
- presumption of, negligence, passenger injured in street car collision, 2032.
- presumptive, negligence, street car derailed, 2031.
- railroads, as to trespassers, 1856.
- release of, negotiable instruments, president of corporation, e 4195.
- sale of intoxicating liquor, act of servant, 3192.
- street railroads, accident or misadventure, 2078.
- to be settled before considering question of damages, 734.
- trespass to real estate, act of independent contractor, 2314.
- trespassers, real estate, jointly and severally, 2303.

# LIBEL—See SLANDER AND LIBEL.

# LICENSE—

- club house without, keeping intoxicants for sale, 3205.
- intoxicating liquor, burden of proof as to, 3187.
- of brokers, at time of sale of real estate, e 3463.
- of marriage, action against judge for issuing, e 4315.
- of saloon-keeper, setting aside and annulling, 1226.
- peddling without, one sale sufficient if intention to continue exists, 3288.
- what constitutes, e 4815.
- practice of dentistry without, receiving pay for work, e 4810.
- required of brokers to entitle them to commission, 604.
- requisite to recovery of commissions by broker, 590.
- sale of drugs without, domestic remedies excepted, 3287.
- to cross railroad track, temporary revocation of, 1861.

# LICENSEES—

- duty of railroad to maintain lookout for on track, e 4022.
- negligence, railroads, 1860-61.
- on railroad track, duty to maintain lookout for, 1860.
- rights of, e 4023.

# LIENS—1324-1335, e 3730-3736.

- against purchaser of crops from tenant, when, 1332.
- agister's, notice of, e 3732.
- for advances, notice of, 1327.
- for storage, e 3730.
- levy of distress warrant to perfect, 1331.
- mechanic's, one lien claim for many things, e 3735.
- of bailee for storage charges, 1326.
- execution by statute, 1324.
- farm laborer, statutory limitation, 1328.
- judgment and chattel mortgage, priority between, 1310, 1311, 1315.
- landlord, 1330-1333.
- bona fide purchaser, notice, e 3734.
- for rent, includes what, 1330.
- mechanic, assignment of contract, claim of lien filed by assignor after assignment, 1335.
- mechanic, brick-making machinery, 1334.
- surety, negotiable instruments, bills of lading held by title to the goods, 2192.
- surety, negotiable instruments, title to goods, 2191.
- vendor, arises when, 1329, e 3733.
- warehouseman, 1325.
- on crops by landlord, 1233.
- crops by landlord, knowledge of by purchaser, 1333.
- logs, statutory, e 3736.
- sale under, notice, e 3731.



[References are to sections; e refers to Erroneous Instructions.]

**LIFE—**

- expectancy of, measure of damages, negligence causing death, mortality tables not conclusive, e 3614.
- measure of damages, negligence causing death, not left entirely to discretion of jury, e 3615.
- measure of damages, personal injury, mortuary tables, e 3580.
- graver transactions of, doubt interposed in, same as reasonable doubt, e 4443.
- of another, self defense, includes saving, 3178.
- possibility of saving, murder, not good defense, 2974.
- regardless of, killing with depraved heart, correct principle misapplied, e 4619.

**LIFE ESTATE—**

- computing state of limitations, life estate intervening, 1258.

**LIFE INSURANCE—See INSURANCE.****LIGHT—**

- artificial, liability for furnishing unsafe, 2125.
- backing train without, 1850.

**LIMIT OF PROCESS—**

- attendance of witnesses, taking testimony by commission, 2775.

**LIMITATIONS—**

- application to trusts, necessary words, 2428.
- as to filing claims for damages against common carriers, e 3961.
- in articles of partnership, third persons not bound by, without notice, e 4223.
- of admissibility of evidence of commission of other crimes, e 4344.
- carrier's liability by contract, 1710-1721.
- liability, by railroads, burden of proof, 1826, 1841.

**LIMITATIONS, STATUTE OF—Chapter LVIII, 1248-1258, e Chapter CXLI, 3705-3708.****See ADVERSE POSSESSION.**

- absence from state sufficient to constitute residence, e 3707.
- adverse possession, 447, 586, 1255-1258.
- boundary, when does not apply, 585.
- check given in payment of note, e 4200.
- computation of, 1258.
- conspiracy, when it begins to run, e 4589.
- continuous service, statute runs from the last item, 1253.
- debt revived by new promise, 1252.
- defined, 1248.
- devisee has no better title than deviser, 1257.
- does not run against infants and lunatics, 1255.
- remainder-man, 1255.
- embezzlement, e 4602.
- estoppel, 1255.
- fraud, statute does not begin to run until after fraud is discovered, 1251.
- giving credit voluntarily upon an outlawed account does not save the running of the statute, 1254.
- ignoring, agency, e 3416.
- in action for money loaned, 670.
- lien of farm laborer, 1328.
- life state intervening, 1258.
- mutual running accounts, statute runs from the last mutual item, 1250.
- new promise, what is not a, 1252.
- possession of logs, title by, e 3708.
- running accounts, when the right of action accrues, 1249.
- statute of repose, 457.
- statute runs if process could be had, though plaintiff did not know defendant's residence, e 3705.
- when does not apply on boundary lines between adjacent owners, 585.
- when it begins to run, 1248.

[References are to sections; e refers to Erroneous Instructions.]

**LIMITATIONS, STATUTE OF—Continued.**

- when statute begins to run, advances by agent for principal, continuous agency, e 3706.
- runs against infants, 1256.
- married women, 1256.
- when suspended by absence from state, 1251.

**LIMITED—**

- authority of agent, notice of, e 3413.
- partnership, money used by partner individually, e 4230.
- to evidence, belief of jury must be, larceny, e 4777.

**LIMITING TIME—**

- consumed in argument, 225.

**LINE—**

- agreement as to, boundaries, adverse possession, fences, e 3462.

**LINES—**

- hanging loose, while driving over railroad tracks, 1926.

**LINEMEN—**

- telephone companies, care required while working near electric wires, 2122.

**LINKS—**

- circumstantial evidence not a chain composed of, e 4354.
- in chain of circumstantial evidence, each must be proved beyond reasonable doubt, 2678.
- of evidence, reasonable doubt, not necessary as to each one, e 4437.

**LIQUOR, INTOXICATING—See INTOXICATING LIQUOR.**

**LITIGATION—**

- interest of party in, similar, credibility e 3305.

**LIVE STOCK—See also CATTLE.**

- animal injured on track, burden of proof, 1981.
- burden of proof as to place of injury, 1983.
- to show negligence of killing, e 4095.
- care required of carrier, 1730, 1731, 1971.
- of carriers of hogs, 1736.
- in shipment of, 1730-1738.
- carrier not liable for injuries due to natural propensities or vice of animals, 1735.
- degree of care required to avoid delay, 1738.
- delay in shipment, poor condition of cattle as excuse, e 3964.
- duties and liabilities of carrier, 1729.
- duty of carriers to furnish stock pens at point of shipment, 1733.
- of railroad to operate train so as to prevent killing live stock, e 4087.
- to avoid injury to after discovering on track, e 4089.
- to sell when injured to avoid loss, e 3529.
- escaping, defective fence, 1969.
- failure of engineer to see, 1979, e 4088.
- of shipper to properly care for, 1737.
- to give warning, causing injury to, e 4090-4091.
- to keep lookout for horses on track, 1976.
- fencing track, 1962-1969.
- getting on track so suddenly that accident could not be prevented, 1978, e 4092-4093.
- heifer killed by railroad, elements of liability, 1975.
- hogs infected from following other hogs, 2131.
- injuries to, at railway crossing, 1974, 1984, 2010, e 4090, 4091.
- cows or heifers at time of collision—measure of damages, 784.
- horses in flangeway at railroad crossing, 1980.
- on track, reasonable care, 1977.
- while being transported—measure of damages, 785.
- measure of damages, 782-785.
- unsuitable cattle guards, e 4094.
- insurance on, representations in application, e 3679.
- killing of, by railroads, 1971-1987.
- larceny, allowed to run at large, burden of explaining possession, 3246.

[References are to sections; e refers to Erroneous Instructions.]

**LIVE STOCK**—Continued.

- measure of damages for injuries received in transportation, 782, 783.
- for injuries to cows by collision of train—series, 784.
- negligence, injured by train, avoiding injury after seeing danger, 1973.
- overloading cars—measure of damages, 782, 783.
- placing brand on, larceny, 3233.
- reasonable care to avoid injuring, 1986.
- shrinkage of weight of cattle, while stopping for fuel and water, e 3963.
- train going at high rate of speed, inability to stop, e 4093.
- not on schedule time, 1982.
- transportation of, duties and liabilities of carriers, 1729, e 3962.
- unlawfully running at large, 1965.
- warranty of, option to return stock or sue for damages, e 4255.
- what will excuse injuries to or lack of readiness to deliver, 1730.

**LIVELIHOOD**—

- peddling goods for, without license, what constitutes, e 4815.

**LIVING IN ADULTERY**—

- occasional illicit acts do not constitute, intention to continue, house of ill fame, e 4508.
- not proved by occasional illicit acts, 2789.

**LOADING**—

- grapes sold for resale, merchantable condition, 2265.

**LOANS**—

- improper, liability of bank director for allowing, e 3455.
- of property, replevin, demand necessary, 2240.

**LOBBY**—

- referring to onlookers as, e 3394.

**LOBSTER**—

- instructions as to measurement of, 3297.

**LOCAL OPTION**—

- illegal sale, intoxicating liquor, 3209.

**LOCOMOTIVE**—

- engineer, assumes risk of employment, 1565.
- riding upon, contributory negligence, 1956.

**LOGS**—

- degree of care required in driving, 2131.
- floatage of, down navigable stream, use of banks, 2359.
- in transit, taxation, 2431.
- lien on, statutory, e 3736.
- sold before measured or price ascertained, 2251.
- title gained by limitation, e 3708.

**LOOKOUT**—

- duty to maintain, for licensees on railroad track, 1860.
- extraordinary, engineer not to neglect other duties, 1873.
- for horses on railroad track, negligence, 1976.
- on down grade, failure of railroad to keep, 1854.

**LOSING EMPLOYMENT**—

- fear of, credibility, e 3310.

**LOSS**—

- accidental, of property rightfully in defendant's possession, trover and conversion, 2336.
- of earning power, measure of damages, e 4146.
- of time, damages for, 935, 1509, e 3579.
- pecuniary, measure of damages, negligence causing death, based on evidence, e 3612.
- proof of, fire insurance, burden on plaintiff, e 3671.

**LOST**—

- deed, 1000.
- goods—by common carrier—measure of damages, 800.
- property, finder concealing fact of finding, intent to convert, 3216.
- finding, not larceny, duty to search or advertise for owner, 3215.



[References are to sections; e refers to Erroneous Instructions.]

**LOTTERY—**

aiding and assisting, 3278.

**LOTS—**

dedication by sale of lots bounded on streets, 1148.

right of purchaser of to have street remain open, 1148.

**LOUISIANA—**

defendant's failure to testify not to be taken against him, 2556.

reasonable doubt defined, 2659.

statute relating to instructions, 153, p 133.

weighing defendant's testimony, 2542, e 4381.

**LUNATICS—**

statute of limitations does not run against, 1255.

**MACHINE—**

purchaser to give trial and notice, provision of returning, 2276.

sale of, acceptance waives implied warranty, 2273.

**MACHINERY—**

furnishing of safe and suitable—See **APPLIANCES**.

conversion of, saw mill, 2345.

railroads should furnish safe, 1843.

sales, installed on trial, in absence of special contract, purchaser

buys at his own risk, 2277.

sold by agent with warranty, ratification, 2272.

when defective and not reasonably fit for purpose intended, 760.

when defects cause loss, 727.

**"MAGNETIC HEALER"—**

action for libel by, e 4263.

**MAIMED BODY—**

grief from contemplating, measure of damages, e 3574.

**MALICE—**

**CIVIL,**

*landlord and tenant,*

whether warrant to evict was procured maliciously, 1247.

*malicious prosecution,*

advice of counsel as bearing on question of, 1279, 1280.

arrest upon suspicion, probable cause, e 3718.

burden of proof on plaintiff in malicious prosecution, 1282.

corporations may be guilty of, 789.

defined, 1267, 1284.

full statement of facts to counsel as bearing on question of, 1279, 1280.

immaterial if probable cause is proved, malicious prosecution, 1268.

jury may but need not necessarily infer, from want of probable cause, 1271.

malicious motive must be shown in malicious prosecution, 1284.

may be implied or inferred on circumstances, 1284.

inferred from want of probable cause, 1284.

not permissible to testify directly to the existence of, 1269.

omitting, in instruction, e 3713.

want of probable cause cannot be inferred from proof of, but may be considered, 1272.

not to be inferred from proof of, 1284.

willful overstatement in affidavit as evidence of, e 3714.

*slander and libel,*

presumed, speaking actionable words, 2283.

unless shown in action of damages compensatory only, 814.

what to be considered, 2287.

whether implied from publication of libel, privileged communications, e 4265.

words not spoken with, 2284.

**CRIMINAL,**

arson, presumed from the deliberate, intentional, unlawful burning, e 4798.

[References are to sections; e refers to Erroneous Instructions.]

**MALICE—CRIMINAL—Continued.**

- assault with deadly weapon implied, 2667.
- assault with intent to kill not necessary element, assault with intent to kill, 2866.
- assault with intent to murder defined, 2865.
- homicide*, 3059-3066.
  - definition of, 2626, 2954, 2957., 3059, e 4663.
  - defining "deliberately, feloniously, premeditatedly, malice, and malice aforethought," Missouri, 2632.
  - difference between implied or constructive, and express, 2631.
  - express and implied, 2629.
  - express, defined, 2630.
  - express embraces implied, may be proved though not charged, 3061.
  - how proven, 3065.
  - implied, causing death of child after its birth by beating mother before its birth, murder, e 4609.
  - includes every unlawful and unjustifiable motive, 3062.
  - in slayer, when immaterial, self defense, 3141.
  - manslaughter, not essential, 3041.
  - murder, deliberation necessary, though not for any particular period of time, e 4666.
    - in second degree, necessary element, but will be implied, Texas, 3010.
  - necessary element of murder, manslaughter without, 3064.
  - need not be expressed, murder, e 4664.
  - not a necessary inference from killing with deadly weapon, 3073.
    - inconsistent with sudden passion, murder, e 4646.
    - necessary in murder in second degree, e 4636.
  - personal, need not be shown where injury done willfully for purpose of gain, 3283.
  - presumed from killing, death by violence, 3060.
    - use of deadly weapon, 2633.
      - may be rebutted, 3072.
  - previous, or threats, plea of self defense not barred, 3153.
  - proved by prior threats or seeking opportunity, 3066.
  - reasonable doubt, 2716.
  - self defense, defendant seeking deceased with, 3128.
    - whether defendant's previously arming himself is evidence of, e 4719.
  - stronger proof required where evidence of good character given, 2482.
  - whether death of deceased evidence of, e 4665.
    - there is a presumption of, killing with deadly weapon, e 4668.
    - without justification or excuse, 3063.
- malicious mischief*,
  - must be proved, 3280.
  - to animal, malice against owner must be shown, 3281.
  - when implied, 3279.

**MALICE AFORETHOUGHT—**

- defined, 2627, 3058.
- deliberate intent to kill, act presumed to be done advisedly, 3048.
- question of fact, 2628.
- specific intent, e 4660.

**MALICIOUS—**

- acts of servants, liability of master for, 1372.
- killing, facts showing, 3051.
  - must be, murder in second degree, reasonable doubt, Alabama, 3009, 3011.
- or wanton assault, exemplary damages may be allowed, 965.
- use of appliances by servants, 1844.

**MALICIOUS MISCHIEF—**

- claim of possession must be in good faith, probable cause of arrest question for jury, e 4314.

[References are to sections; e refers to Erroneous Instructions.]

**MALICIOUS MISCHIEF**—Continued.

- injury done willfully for purpose of gain, personal malice not necessary, 3283.
- to animal, malice against owner must be shown, 3281.
- malice must be proved, 3280.
- when implied, 3279.
- ownership, how proven, 3282.

**MALICIOUS PROSECUTION**—Chapter LIX, 1259-1288, e Chapter CXLII, 3709-3720.

- acquittal before justice of the peace, no indictment by grand jury, 1275.
- admissions of one not evidenced against other defendants to prove conspiracy, 1283.
- advice of counsel, 1279, 1280, 1284.
- against partner, liability of co-partner, e 3715.
- arrest for vagrancy, validity of ordinance, consistent with statute, e 3720.
- arrest upon suspicion, probable cause, malice, e 3718.
- burden of proof on the plaintiff, 1282, 1284.
- charge must be willfully false, 1267.
- conspiracy to incarcerate plaintiff, 1277.
- damages, 1277.
  - actual and punitive, 1284.
  - elements that may be considered by jury, 788.
  - in sound discretion of jury, 790.
- defendants must have caused the arrest of plaintiff or been instrumental therein, or in some way voluntarily aided in the prosecution, 1259.
- discharge as prima facie evidence e 3709.
- dismissal of case as prima facie evidence probable cause, burden of proof, e 3710.
  - civil suit, prima facie evidence of what of probable cause, 1263.
- elements of, 1259, 1268, 1280, 1284.
- exemplary damages may be allowed, 787, 790.
  - or vindictive damages may be allowed in action for arrest of passenger, 789.
- feelings, credit and reputation may be considered by jury, 788.
- for purpose of collecting private debt is conclusive evidence of, 1270.
  - private debts is abuse of process, 1270.
- full statements of facts to counsel, 1279-1280.
- injuries to feelings, credit and reputation, elements of damages, 788.
- jury may but need not necessarily infer malice from want of probable cause, 1271.
  - consider delay in commencing prosecution after alleged commission of offense, 1272.
- malice, advice of counsel as bearing on the question of, 1279, 1280.
  - defined, 1267, 1268, 1284.
  - immaterial if probable cause is proved, 1268.
  - may be implied or inferred on circumstances, 1284.
  - inferred from want of probable cause, 1284.
- maliciously swearing out search warrants, 1278.
- measure of damages, 786-791, e 3531-3532.
  - for wrongful arrest of passenger, 789.
- motives of defendant in instituting criminal proceedings against plaintiff, 1259.
- must be ended to maintain action for, 1274.
  - have been malicious and without probable cause, 1259.
  - without probable cause, 1284.
- not necessary that a crime should have been committed, 1273.
- not permissible to testify directly to the existence of malice, 1269.
- person beginning criminal prosecution must exercise care of an ordinarily prudent man, 1276.
- plaintiff must have been arrested upon crime alleged, 1259.
  - charged with the crime alleged, 1259.
- preponderance of evidence, 1267, 1272, 1282.



[References are to sections; e refers to Erroneous Instructions.]

**MALICIOUS PROSECUTION**—Continued.

- presumption from good character, 1281.
- probable cause*,
  - defined, 1284.
  - discharged by examining magistrate as prima facie evidence of want of, 1280.
  - good reputation of plaintiff, knowledge of by defendant, proper for juror to consider, 1281.
  - justification for beginning criminal proceedings, e 3712.
  - omitting malice in instruction, e 3713.
  - prosecution undertaken for public purpose, e 3711.
  - proving a negative, 1284.
  - want of, must not be inferred from proof of malice, 1284.
  - been malicious, 1284.
- prosecution must have ended, 1284.
- retaining under void warrant of arrest, e 3719.
- settlement of transaction on which criminal suit was based, 1261.
- shame, mortification, mental anguish, pain and injuries to feelings, may be considered in determining damages, 789.
- termination of by acquittal, 1284.
  - by dismissal, 1284.
- want of improper motive, 1284.
  - probable cause, cannot be inferred from proof of malice, but may be considered, 1272.
- wantonness or carelessness of prosecuting witness, 1268.
- what defendant believed when he made complaint and not the guilt or innocence of plaintiff the true inquiry, 1266.
  - is a want of probable cause, 1262.
  - is sufficient to show probable cause, 1261.
  - jury should consider in assessing damages, 786.
  - may be admitted in evidence to show a want of probable cause, 1264.
  - may be considered in determining damage, 789.
  - must be proved, 1259.
  - must be shown by plaintiff, 789.
  - negatives the idea of want of probable cause, 1265.
  - to consider in assessing damages, e 3531.
- when a prosecution is malicious, 1268.
- willful overstatement in affidavit, as evidence of malice, e 3714.

**MALPRACTICE**—Chapter LX, 1289-1303, e Chapter CXLIII, 3721-3726.

- action for damages for shortening a leg in consequence of fracture, 1297.
- advanced state of profession, 1292.
- burden of proof on defendant to prove contributory negligence, 1303.
  - on plaintiff, 1301.
- care and skill required of dentist, series, 1302.
- contributory negligence, 1303.
- damages, measure of, 1302-1303.
- death hastened by acts or omissions, e 3724.
  - resulting from other causes, burden of proof, e 3725.
- degree of care required, 1290.
  - learning and skill contemporaneous with the transaction, 1292.
- different schools of medicines, 1295.
- druggists, negligence of, e 3726.
- guaranty of cure, action for fees, burden of proof, e 3723.
- husband and wife, wife suing physician for malpractice damages, 1303.
- implied contract of ordinary skill by physician, 1303.
- no warranty of cure, 1303.
- ordinary care by agents of physicians, 1294.
  - not the highest skill and care required, 1290.
  - skill of profession in a neighborhood, 1290, 1292.
- patient bound to follow instructions, 1299.
  - can only recover for additional pain, 1298.
  - must conform to advice and co-operate with doctor, 1291, e 3722.

[References are to sections; e refers to Erroneous Instructions.]

**MALPRACTICE—Continued.**

- physician is to be a proper judge of the necessary frequency of visits, 1300.
- not responsible for injurious consequences arising from failure to obey instructions, 1299.
- possessing learning and skill but failing to exercise it, 1293.
- series, 1302-1303.
- should co-operate with doctor, 1291, 1299, e 3722.
- specialist, degree of skill and care required, 1296.
- test of care, skill and diligence required, e 3721.
- warranty of skill, knowledge and care implied, 1289.
- what may be considered in affixing damages, 834.

**MANAGEMENT—**

- and operation of cars and vehicles, railroads, negligence, 1770-1798.

**MANAGER—**

- of picnic grounds, carrying concealed weapons, e 4805.

**MANDAMUS—**

- bills of exceptions, mandamus will lie to compel judge to settle and sign, 303.
- can not take place of writ of error, 284.
- commanding lower court to sign bill of exceptions, 284.
- defined, 284.
- in modern practice used to compel some particular act, 284.
- may issue from supreme or appellate courts, 284.
- will lie to compel judge to sign bills of exception, 303.

**MANIFEST—**

- danger need not be, self defense, e 4701.

**MANSLAUGHTER—3023-3046, e 4642-4659.**

- abortion causing death, depends on intent, 2785.
- aiding and abetting commission of homicide, e 4477.
- and murder defined and distinguished, elements, Michigan, 2989.
- and murder distinguished, 2988.
- assault with intent to commit, 2668.
- to kill, if death had ensued, e 4554.
- causing death of child after its birth by beating mother before its birth, e 4609.
- concealment of body, court drawing inference of fact, e 4652.
- crime reduced to, absence of malice, 3064.
- defendant the aggressor, when not barred from defense of sudden passion, e 4649.
- defined, 3023, 3024, e 4642.
- sudden conflict arising from quarrel, 3025.
- directing verdict, insufficient premises, e 4651.
- distinguished from justifiable homicide, e 4610.
- from self defense, 3033.
- facts amounting to, 3026.
- form of verdict, 3046.
- horse racing on public highway, Alabama, e 4657.
- in first degree, definition, 3028.
- in second degree, definition, 3029.
- in second degree, Missouri, deceased striking defendant's father with fence rail, e 4658.
- in third degree, Missouri, not supported by evidence, self defense, e 4659.
- in fourth degree, 3031.
- in sudden heat of passion or in sudden affray, both not necessary, e 4647.
- insulting words, invading province of jury, e 4620.
- intent to kill necessary, Texas, e 4645.
- not the criterion, e 4662.
- intent to take life not necessary, Alabama, e 4644.
- intoxication may reduce crime to, from murder, 2618.
- killing in attempt to procure abortion, 3043.
- policeman making illegal arrest, e 4607.
- seducer of daughter, omitting other provocation, e 4655.
- through fright or excitement, e 4648.

[References are to sections; e refers to Erroneous Instructions.]

**MANSLAUGHTER—Continued.**

- knowledge of intimacy of deceased with defendant's wife, 3044.
- malice and intent not essential, 3041.
- misplacing burden of proof, e 4650.
- negligence causing boiler explosion, 3045.
- or murder, reasonable doubt as to which, resolved in favor of defendant, 3035.
- policeman who kills in making arrest, e 4654.
- provocation*,
  - and passion must concur, 3039.
  - cooling time, facts constituting, question of law, 3096.
  - heat of blood, cooling time, 3095.
  - insufficient, 3090.
  - insulting words to relatives, 3087.
  - jury to determine adequacy, 3093.
  - mere words not sufficient, 3086.
  - past conduct of deceased as evidence, 3092.
  - preceding as well as attending circumstances, e 4653.
  - referring to great provocation as slight, e 4679.
  - slap with hand, when insufficient, 3091.
  - slight or trivial, not sufficient, 3040.
  - standard for determining sufficiency, 3094.
  - threats not sufficient, 3088.
  - violent passion, insulting words, may reduce grade of homicide, 3089.
- resisting illegal arrest, e 4325.
- right to carry arms, e 4624.
- sheriff killing one who attempts to release prisoner, 3042.
- statutory definition not always applicable, e 4643.
- striking deceased with fist does not render defendant liable for killing by another, e 4656.
- sudden and sufficient provocation, 3038.
- sudden passion and malice not inconsistent with each other, e 4646.
- arising at time of killing, passion and adequate cause defined, 3037.
- third degree, in heat of passion and without design to kill, Missouri, 3030.
- verdict may be for, indictment for murder, 3034.
- should be, where reasonable doubt whether murder or manslaughter, first or second degree, 2707.
- voluntary, distinguished from murder, 3032.
- what constitutes, 3027.

**MANUAL LABOR—**

- defined, 1214.
- incapacity for, 1214.

**MANUFACTURE—**

- contract to, sales, changes made, additional compensation, e 4248.

**MANUFACTURED—**

- article, sale of, implied warranty, 2275.

**MANUFACTURER—**

- defects in articles manufactured, measure of damages, 753.

**MANUFACTURING PURPOSES—**

- value of may be considered in assessing damages, 847.

**MANY WITNESSES—**

- against one credible one, e 3301.

**MARE—**

- larceny, turning loose, no defense, 3234.

**MARGINS—**

- putting up on board of trade, when legal, 606.

**MARKET VALUE—**

- before and after fire measure of damages, e 3536.
- cutting timber, eminent domain, damages, e 3560.
- defined. sales, 2263.



[References are to sections; e refers to Erroneous Instructions.]

**MARKET VALUE**—Continued.

difference that and contract price is measure of damages for refusal to deliver, 748.

measure of in assessing damages in eminent domain, 845.

**MARKING CLAIM**—

mining, contract for sale, condition precedent, 2267.

**MARRIAGE**—

acts and conduct tending to prove, bigamy, 2796.

breach of contract of, 765.

damages, measure of, 765-767.

cohabitation, presumptive evidence of, 702.

*common law*,

defined, 704.

incapacity to contract other marriage, e 3496.

prior, bigamy, what would constitute, e 4514.

proof required, 705.

contracts, discovery that woman is not virtuous after promise made, e 3495.

how proven, 700.

induced by forged telegram, 2952.

license, action against judge for issuance, e 4315.

postponement of, on account of injuries, damages, 954.

presumption of its continuance when proven, 701.

prior, bigamy, persons exempt from charge, 2797.

promise of, seduction, chaste character erroneously presumed, 2832.

previous chaste character, reasonable doubt, 2833.

several acts, presumption of chastity weakened or destroyed, e 4532.

proof of, 700-705, e 3495, 3496.

prostitution of, abduction of minor for, e 4505.

record as evidence of facts recited, 703.

seduction under promise of, refusal of prosecutrix to marry, proof required, 2831.

when presumption by reason of cohabitation may be rebutted, 702.

wills, undue influence, not shown by evidence as to who brought about marriage, 2409.

**MARRIED WOMEN**—1022-1027, e 3627, 3628.

contract of—as to separate property, 1022.

conveying personal estate, consent of husband, e 3628.

may employ husband as agent, 1024.

own, manage or convey separate property, 1023.

ratify act of husband, 1025.

*personal injuries*,

becoming pregnant after injury, not necessarily negligent, 952.

can recover for medical expenses, 949, 951.

cannot recover for time and services as house-keeper, 949.

inability to bear children, 953.

pain and suffering, 953.

what to consider, 951.

right to recover for injuries, 950.

separate estate as to creditors of husband, 1027.

transfer of real estate, positive fraud, e 3627.

when proceeds of farm of wife belong to husband, 1026.

statute of limitations runs against, 1256.

**MASSACHUSETTS**—

reasonable doubt defined, 2660.

statute relating to instructions, 153, p 133.

**MASTER AND SERVANT**—See NEGLIGENCE, MASTER AND SERVANT.

**MATERIAL ALLEGATIONS**—

in pleadings, not left to jury to determine, e 3384.

perjury, each must be proved, 3261.

to be proved, jury not to determine what is material, e 3344.

**MATERIAL ALTERATION**—

adding name to written instrument, e 3433.

[References are to sections; e refers to Erroneous Instructions.]

**MATERIAL ELEMENTS OF GUILT—**

must all be proven to overcome presumption of innocence, 2639.

**MATERIAL FACTS—**

must be known to principal before he can ratify act of agent, suing out attachment, e 3445.

reasonable doubt as to any, 2694, e 4440.

**MATERIAL INGREDIENT—**

of crime of larceny, possession of stolen property not, e 4748.

**MATERIAL KNOWLEDGE—**

and intent, sale of intoxicating liquor to minor, 3195.

**MATERIAL MATTER—**

impeachment must be as to, e 3356.

swearing falsely to, credibility, e 3329.

**MATERIAL QUESTION—**

bastardy, paternity, not character of complaint, 2791.

**MATERIALITY—**

perjury, must be shown, 3262.

test of, 3264.

when sufficient, 3263.

**MATERIALS—**

action for labor and, e 3493.

architect's liability for, e 3437.

**MATURITY—**

negotiable instruments, assignee after, 2166.

endorsement before, innocent holder, 2176

**MAXIMUM PENALTY—**

for forgery, overstating, e 4605.

**MEANS—**

of escape other than killing, self defense, all other need not be resorted to, e 4748.

of learning of dissolution of partnership, and neglect to use same, e 4225.

reasonable, to avoid necessity of killing, self defense, 3119.

**MEASURE OF DAMAGES—See DAMAGES, e 3502-3542.**

**MEASUREMENT—**

of lobster, 3297.

of logs, sale before, price to be ascertained, 2251.

sale, to be performed after transfer, 2253.

**MECHANIC'S LIEN—**

assignment of contract, claim of lien filed by assignor after assignment, 1335.

brick-making machinery, 1334.

one lien claim for many things, e 3735.

**MEETING—**

conspiracy, need not be for unlawful purpose, 2912.

self defense, defendant seeking, to provoke difficulty, killing unavoidable, 3129.

self defense, sought by defendant with malice, 3128.

**MEDICAL—**

assistance, duty to employ, measure of damages, personal injury, e 3582.

attention, measure of damages, e 4146.

examiners, certificate from, and also a diploma not required to entitle to practice, e 4809.

**MEDICINAL PURPOSES—**

intoxicating liquor purchased for, but diverted to other uses, druggists, e 4773.

**MEDICINE—**

all schools must appeal to the intelligence, e 4263.

practice of, diploma from accredited school required, 3288

practicing, without certificate, reasonable doubt, 3285.

[References are to sections; e refers to Erroneous Instructions.]

**MEMBERSHIP—**

in churches, societies, or associations, when ground for, 46.  
restoring to, fraternal life insurance society, waiving validity of,  
e 3681.

**MEMORANDUM NOTES—**

construction of writing, e 4203.

**MEMORY—**

failure of, capacity to make wills, e 4297.  
sound and disposing mind and, capacity to make wills, 2372, e 4293.

**MENTAL CAPACITY—**

previous declaration of testator, e 4308.  
reasonable doubts as to, raised by evidence of drunkenness, 2619.  
what jury may consider in determining, e 4308.

**MENTAL DISEASE—**

irresistible impulse must result from, 2583.

**MENTAL FACULTIES—**

and health, impairment of, damages for, 906-910.

**MENTAL GRIEF—**

and suffering—not an element of in actions for causing death, 983.

**MENTAL INCAPACITY—**

to execute release, negligence, 1368.

**MENTAL POWERS—**

health, etc., damages for injury to, 906-907.

**MENTAL SUFFERING—**

apart from physical injury, rule as to damages in various states,  
921.

may be considered in estimating damages for personal injuries from  
assault, 967-968.

measure of damages, personal injury, e 3572, 3578.

not an element of damages in action for wrongful sale of intoxicat-  
ing liquors, 780.

past and future, element of damages, 918.

sorrow and anguish, element of damage for failure to deliver tele-  
gram, 836.

without physical injury, measure of damages, personal injury, e  
3577.

**MENTIONING—**

defendant's failure to testify, e 4390.

**MERCHANDISE—**

measure of damages for breach of contract to purchase, 746.

failure to deliver within specified time, 749.

**MERCY—**

recommending a person to, homicide, 2980.

**MERE BELIEF—**

of jury, not sufficient to convict, must be satisfaction beyond rea-  
sonable doubt, e 4447.

**MERE WORDS—**

not sufficient provocation for homicide, e 4681, 4682, 4735.

**MERGER—**

written lease merges all prior agreements, 1240.

**METALLIC KNUCKS—**

homicide, whether deadly weapon a question of fact, 3068.

murder in first degree, 3002.

**METAPHORS—**

and Latin words, use of, 184.

**MEXICO—**

weighing defendant's testimony, 2547.

**MILK WAGON—**

crossing railroad track in, negligence, 1916.

**MILL—**

negligent operation of, danger of fire, 2128.



[References are to sections; e refers to Erroneous Instructions.]

**MILL RACE—**

obstructions in, damages, 2357.

**MILITARY EXPEDITION—**

knowledge of accused that it is, 3292.

transporting men and arms, 3291.

**MIND—**

of jury, leaving in state of confusion, reasonable doubt, e 4455.

sound and disposing, wills, 2372, e 4293.

sound, burglary, how intent manifested, 2877.

unsound, must exist when, wills, 2377.

weakness of, whether ever amounting to insanity, 2584.

**MINERS—**

conspiracy of, right of officer to arrest believing, e 4323.

**MINES—**

coal, duty of owner to fence shaft, 2126.

coal, maintaining chute without guard-gate or guard-board, 1401.

dangerous place for work, e 3781.

defective roof in, injury to miner, e 3777.

doing work not in line of regular employment, e 3816.

duty to sprinkle and clean roadway, e 4191.

duty to take precautions against explosions, e 4191.

failure of mine boss to visit room in which miners work, 1400.

to furnish props, 1486.

inspect in the mornings, e 3778.

partition off stairway from main shaft, 1398.

going under dangerous roof in coal mines, 1486.

incompetency of fellow servant, e 3807.

method of lowering rails into, e 3782.

negligence of fellow servants in, e 3806.

reasonably safe place for work, changes due to prosecution of work, e 3770.

failure to put in posts to support roofs, e 3779.

statutory duty of care in, e 4191.

inspection of, 1399.

using defective rope in shaft of, e 3795.

whether runner and helper on mining machine are fellow servants, e 3807.

violation of statutory provisions, 1399.

willfully neglecting to furnish props injury to miner, e 3780.

**MINING CLAIMS—**

contract for sale, condition precedent, marking claim, 2267.

quartz, what constitutes, 2430.

**MINORS—See CHILDREN, INFANTS, AND PARENT AND CHILD.**

abduction of, for purpose of prostitution of marriage, e 4505.

amount of damages left to the enlightened conscience of an impartial jury, 957.

assumption of risk, 1471.

can only disaffirm contract after majority, 1021.

cannot recover for diminution of earning power during minority unless emancipated, 958.

claim for support, not forfeited by voluntary absence from home, e 3625.

contract for necessities, 619.

contributory negligence of, e 3835.

damages, common sense of jury, 957n.

diminished capacity to labor, 955-956.

doing work not in line of regular employment in mines, e 3816.

duty of master to instruct, 1384, e 3766.

earnings of, e 3590.

emancipation of, 1019.

employing child without school certificate, 1386.

employment of, in dangerous position, liability of master for injury to, 1383, e 3765.

injuries to, dangerous machine, e 3765.

liability on board of trade contract, e 3474.

[References are to sections; e refers to Erroneous Instructions.]

**MINORS—Continued.**

- medicines and medical attendance, 955-956.
- pain and suffering, 955-956.
- parent liable for goods furnished where they are separated by mutual consent, 1018.
- support of, 1017.
- payment to for services, 1020.
- pecuniary loss, 955-956.
- permanency of injuries, 955-956.
- possibility of death before reaching 21 years, 955.
- representations as to experience, right of master to rely upon, 1385.
- rule as to contributory negligence, 1482.
- safe machinery and appliances, 1482.
- place to work, 1482.
- sale of intoxicating liquor to, knowledge and intent material, 3195.
- knowledge of minority immaterial, 3196.
- services rendered parent while parent was working for defendant, e 3501.
- suit by parent for payment for services of, 1020.
- such damages as will actually compensate, 956.
- tax sale, adverse possession, e 3408.
- time to bring suit when adverse possession is claimed, 461.
- too young to have selected an avocation, 957.
- what to consider in assessing damages, 954, 955, 956.
- when contracts may be disaffirmed, 1021.

**MINORITY—**

- knowledge of, immaterial, sale of intoxicating liquor to minor, 3196.

**MICHIGAN—**

- elements of murder and manslaughter, 2989.
- reasonable doubt defined, 2661.
- statute relating to instruction, 153, p 133.
- weighing defendant's testimony, 2543.

**MINNESOTA—**

- statute relating to instructions, 153, p 134.

**MISAPPROPRIATION—**

- of funds, 1124, e 3425.

**MISADVENTURE—**

- street railroads, no liability for, 2078.

**MISCONDUCT—**

- of street railroad passenger, causing own injury, 2023.
- wanton, contributory negligence, railroads, law regulating speed, 1960.

**MISCARRIAGE—**

- frightening person near track, producing, 934.

**MISCHIEF, MALICIOUS—See MALICIOUS MISCHIEF.**

**MISDEMEANOR—**

- conspiracy to escape, 2916.
- officer arresting for, can kill only in self defense, 2451.

**MISPLACING—**

- burden of proof, assault with intent to kill, e 4546.
- manslaughter, e 4650.

**MISREPRESENTATION—See also FRAUD.**

- as to use of liquors in application for insurance, 1206.
- by insured or beneficiary, 1195.
- in application for insurance as to application, knowledge of agent, 1189.
- life insurance, knowledge of agent, e 3673.
- measure of damages, e 3522-3535.
- release obtained by, 1369, e 3754.
- sale of partnership interest, fact or opinion, 2212.
- intent, e 4227.
- to client, by attorney, e 3453.

[References are to sections; e refers to Erroneous Instructions.]

**MISSISSIPPI—**

defendant's failure to testify not to be taken against him, 2557.  
murder defined, 2956.  
reasonable doubt defined, 2662.  
statute relating to instruction, 153, p 135.  
weighing defendant's testimony, 2544.

**MISSOURI—**

defendant's failure to testify, not to be taken against him, 2558.  
defining deliberately, feloniously, premeditatedly, malice, and malice aforethought, 2632.  
manslaughter in third degree, not supported by evidence, self defense, e 4659.  
reasonable doubt defined, 2663.  
rule as to credibility, when witness swears falsely, 341.  
series approved in, self defense, 3177.  
statute, manslaughter in second degree, deceased striking defendant's father with fence rail, e 4658.  
manslaughter in third degree, killing in heat of passion without design to kill, 3030.  
relating to instructions, 153, p 135.  
weighing defendant's testimony, 2545, e 4382.  
testimony of defendant and wife, 2554.

**MISTAKE—**

as to boundary, adverse possession, e 3404.  
negotiable instruments, unable to read, relying on another, 2146.  
of fact, execution or payment of negotiable instrument upon, e 4201.  
or fraud, account stated conclusive in absence of, 421.  
prevents an account becoming an account stated, 419.  
questioning account stated, 417.  
will permit an account stated to be opened, 420.

**MISTAKEN—**

claim of right, larceny, 3229.

**MITIGATING CIRCUMSTANCES—**

need not be proved beyond reasonable doubt, e 4470.

**MITIGATION OF CRIME—**

temporary insanity produced by intoxicating liquors, 2614.

**MITIGATION OF DAMAGES—**

assault and battery, e 3438.  
personal injury, previous earning capacity, e 3569.  
slander and libel, plaintiff's conduct suspicious, e 4269.  
when anger to be considered in, 2288.

**MONEY—**

acceptance of order to pay, negotiable instruments, admissions, e 4199.  
advanced for freight, need not be repaid before bringing action of replevin, e 4242.  
*embezzlement of*,  
amount of, e 4596.  
check is not money, 2930.  
immaterial what becomes of it after its embezzlement, e 4598.  
secretion of, must be fraudulent, e 4597.  
whether wrongfully converted or drawn for benefit of bank, 2931.  
extorted by threat of attachment, e 3444.  
larceny, must be proved genuine, 3224.  
leaving where vendor can get it, sale of liquor in prohibition limits, valid sale, 3202.  
robbery, proof that it was "good and lawful" as described, not required, e 4576.

**MONOMANIA—**

capacity to make wills, partial insanity, 2376, e 4294.

**MONTANA—**

statute relating to instructions, 153, p 135.



[References are to sections; e refers to Erroneous Instructions.]

**MONUMENTS—**

control courses and distances, 1138.  
disregarding, deeds, surveys, e 3461.  
govern, exceptions to rule, e 3460.

**MORAL CERTAINTY—**

abiding conviction to, reasonable doubt, 2682.  
defined, e 4464.

**MORALITY—**

proving good character for, e 4337.

**MORPHINE—**

intoxication from, temporary insanity, homicide, e 4416.  
suicide from, life insurance, preponderance of evidence, e 3682.

**MORTAL WOUND—**

murder in first degree, jury must decide question of guilt from evidence, e 4632.

**MORTALITY TABLES—**

measure of damages, negligence causing death, not conclusive evidence, 911, 913, e 3580, 3614.

**MORTGAGES—Chapter LXI, 1304-1335, e Chapter CXLIV, 3727-3736.**

after creditors must be acknowledged and recorded, 1311.  
agreement and mortgage constituting an assignment, 1309.  
application of payment, 1308.  
chattel mortgage as against judgment creditors, 1310.  
consuming mortgaged crops, replevin, e 4243.  
description in, what is sufficient to constitute notice, 1312.  
fraudulent purpose, notice of such facts as would put a man of ordinary prudence on guard, 1313.  
future advances, 1321.  
giving, for more than is due, 1321.  
good between the parties without recording, 1310.  
intent to defraud must exist at the time of making, 1314.  
mortgaged crops, mortgagor consuming, replevin, e 4243.  
goods, damages for wrongful seizure by sheriff, 808.  
mortgagor deeming himself insecure, taking possession, 1318.  
retaining possession, 1315.  
of stock of goods used in retail trade, e 3727.  
taking possession before debt due, 1318.  
of stock of goods, sale in a usual course of trade, 1322.  
penalty for failure to cancel mortgage on record, 1307.  
person having interest in goods covered by chattel mortgage who stands by and allows property to be sold, estopped, 1305.  
possession by mortgagor after default, 1316.  
by the mortgagee, must take possession of the property when, 1317.  
prior mortgage, diligence of principal to discover, 487.  
priority between lien of judgment and chattel mortgage, 1310, 1311, 1315.  
property bought would be measure of credit if sale is fair, purpose for which given, burden of proof, 1323.  
replevin by mortgagee after default, 2236.  
right to possession, entry by mortgagee, levy of execution no bar, e 3728.  
sale by mortgagor with the consent of the mortgagee for benefit of mortgagee, 1319.  
of mortgaged property, liability for damages, e 3729.  
security, agent loaning money on, e 3416.  
securing two debts, one valid, the other illegal, 1304.  
to constitute notice, description in mortgage must be sufficient, 1312.  
to secure contingent liability, 1320.  
when given in the form of deed, 999.

**MOST IMPORTANT AFFAIRS OF LIFE—**

reasonable doubt must arise with exercise of all judgment man would use in, e 4444.

**MOTHER—**

beating, causing death of child after its birth, murder, e 4609.

[References are to sections; e refers to Erroneous Instructions.]

**MOTHER**—Continued.

killing child, murder in second degree, 3019.  
 defendant's, insanity of, must be considered, e 4409.  
 forgery of name to telegram, marriage induced by, 2952.  
 insanity of, must be considered, 2602.

**MOTION TO DIRECT VERDICT**—Chapter XIII, 247-263.

admits truth of evidence, 249.  
 may be waived, 259.  
 most favorable inferences to be allowed evidence, 257.  
 must be made at close of defendant's case, 259.  
 must be separate, 255.  
 when should not be allowed, 258.

**MOTIVE**—3076-3079, e 4669-4671.

absence of, with good character, may generate a reasonable doubt,  
 e 4341.  
 doubt of, no evidence of insanity, e 4399.  
 every unlawful and unjustifiable, included in malice, homicide, 3062.  
 failure to prove, 3076.  
 for flight, other than guilt, argumentative, e 4328.  
 fraud against creditors, transfer of property by insolvent debtor, if  
 in payment of debt due, immaterial, e 3632.  
 fraud, rescission of sale, not necessary to be shown, e 3642.  
 hostile or vindictive, malice, prosecution actuated by, 1268.  
 how determined, 3077.  
 in flight, determines whether evidence or not, 2461.  
 in making valid claim, immaterial, fraud, e 3658.  
 lack of, arson, as evidence of innocence, e 4799.  
 misdirection as to importance of, lack of, e 4669-4670.  
 of defendant in instituting criminal proceedings against plaintiff,  
 1259.  
 prosecuting witness, malicious prosecution, 1267.  
 witnesses, may be considered by jury, 2476.  
 to be considered, usurping powers of jury, e 4499.  
 perjury, absence of, 3266.  
 proof not necessary to convict, 3078.  
 reconciliation in good faith lived up to, previous troubles not con-  
 sidered, 3079.  
 self defense, of defendant, not determined from motives of de-  
 ceased, e 4704.  
 procurement of arms as affecting, e 4721.  
 state failing to prove, e 4671.  
 two ascribed, murder or manslaughter, reasonable doubt resolved  
 in defendant's favor, 3035.  
 want of improper, malicious prosecution, 1284.

**MOTORMAN**—

contributory negligence, going upon street car track without warn-  
 ing, 2108.  
 of street car failing to reduce speed, injury to conductor, 1438.

**MUNICIPAL CORPORATIONS**—See NEGLIGENCE, MUNICIPAL COR-  
 PORATIONS.

**MURDER**—Chapter XCVII, 2953-3003, e Chapter CLXXVIII, 4607-4641.

abortion causing death, depends on intent, 2785.  
 accidental shooting of bystander as evidence of, e 4612.  
 aiding or abetting abortion, 2786.  
 and manslaughter defined and distinguished, elements, Michigan,  
 2989.  
 and manslaughter distinguished, 3032.  
 assault with intent to, defined, 2854.  
 form of verdict, 2871.  
 how proven, 2857.  
 malice and deliberation, malice defined, 2865.  
 not necessary to prove premeditated design, e 4551.  
 what lesser crimes included, 2855.  
 attempt to escape, 2998.  
 causing death of child after its birth by beating mother before its  
 birth, e 4609.

[References are to sections; e refers to Erroneous Instructions.]

# **MURDER—Continued.**

- circumstantial evidence, absence of body, 2509.
- failure to use deadly weapon, 2510.
- committed in robbery, e 4622.
  - accomplice in robbery guilty though not consenting, 2746.
- concealing body, court drawing inference of fact, e 4652.
- conspiracy for, former acquittal, testimony of conspirator, 2914.
  - to commit, 2913.
- crime may be reduced from, to manslaughter, intoxication, 2618.
- deadly weapon, large stone or piece of iron, 3001.
- death caused by reckless driving of horses, 2964.
- deceased assaulting defendant, cooling time, 2992.
  - making first hostile demonstration, direct evidence not necessary, 2994.
- defendant charged with killing one man, evidence of killing of another not to be considered, 2967.
- defense of death from other causes, 2975.
- defined in various states, 2953-2957.
- discharging gun in air, 2970.
- distinction between first and second degree, 3006.
- distinguished from manslaughter, 2988.
- duel, assuming facts, argumentative, e 4623.
- dying declarations—See DYING DECLARATIONS.
- elements of, should not be included in instruction on assault with intent to kill, e 4556.
- error to prevent verdict in lesser degree, e 4625.
- essential elements, Illinois, 2955.
- fatally wounded by striking with billiard cue, 3000.
- first and second degree distinguished, 2987.
- form of verdict, 3046.
- formed design not essential element, Alabama statute, e 4615.
- if death ensues, assault and battery, deliberation, 2864.
- immaterial whether defendant could see deceased or not, e 4618.
- indictment for, verdict may be for manslaughter, 3034.
- insulting words, invading province of jury, e 4620.
- intent to kill not the criterion of, e 4662.
- intoxication not inconsistent with premeditation, 2615.
- jury to consider only unlawful homicides, 2978.
- killing another man than the one shot at, 2966.
  - policeman in pursuance of unlawful conspiracy, 2961.
  - making illegal arrest, e 4607.
  - with pistol in mutual combat, not necessarily, e 4617.
- malice, deliberation necessary, though not for any particular period of time, e 4666.
  - necessary element, 3064.
  - need not be expressed, e 4664.
- mitigation, temporary insanity produced by intoxicating liquors, 2614.
- mutual combat, deadly weapon, premeditated design, 3082.
  - threats to kill, carrying deadly weapons, 2968.
- necessary intent, administering poison, 3057.
- no defense that life might have been saved, 2974.
- opportunity for deliberation not equivalent to fact of deliberation, homicide, e 4674.
- or manslaughter, reasonable doubt as to which, resolved in favor of defendant, 3035.
- order in which jury may consider issues, New York code, 2991.
- peacemaker acquitted, 2971.
- presumption as to degree of, burden of proof, 2475.
- preventing escape of prisoner, 2962.
- provocation*,
  - cooling time, facts constituting, question of law, 3096.
  - heat of blood, cooling time, 3095.
  - insufficient, manslaughter, 3090.
  - insulting words to relatives, 3087.
  - jury to determine adequacy, 3093.
  - past conduct of deceased as evidence, 3092.



[References are to sections; e refers to Erroneous Instructions.]

# MURDER—Continued.

- slap with hand, when insufficient, 3091.
- standard for determining sufficiency, 3094.
- threats not sufficient, 3088.
- violent passion, insulting words, may reduce grade of homicide, 3089.
- words not sufficient, 3086.
- reasonable doubt whether, or manslaughter, verdict should be manslaughter, first or second degree, 2707.
- referring to great provocation as slight, e 4679.
- right to carry arms, e 4624.
- self defense—See SELF DEFENSE.
- shooting with gun or pistol loaded with powder and leaden balls, 2969.
- sudden passion and malice not inconsistent, e 4646.
- time necessary to constitute premeditation, e 4673.
- using statutory words of definition and concluding that there was no crime, e 4675.
- various elements of homicide, series, 2984.
- weighing defendant's testimony, Nebraska, 2546.
- while attempting to commit rape, 2999.
- in first degree*, 2985-3003, e 4627-4635.
  - by poison, instruction varying from indictment, e 4634.
  - deadly weapon, jury's belief must arise from the evidence, e 4632.
  - deceased having had illicit intercourse with defendant's wife, 2996.
  - definition, in perpetration of robbery, 2997.
  - elements of, form of verdict, e 4630.
  - erroneous definition of, may not reverse conviction in second degree, e 4627.
  - form of verdict, 3003.
  - Idaho statute, 2990.
  - intent inferred from killing, e 4629.
    - to kill must be deliberate and premeditated, e 4628.
  - killing policeman after escape from custody, e 4633.
    - with deadly weapon not prima facie evidence of, e 4631.
  - metal knucks or means unknown, stabbing with knife, 3002.
  - no presumption of premeditated design, 3085.
  - only grade of homicide excused by voluntary intoxication, 2617.
  - or second degree, series, 2983.
  - poison, essential facts, 2995.
  - premeditation, distinguishing characteristic, 3083.
  - seeking quarrel with intention of shooting deceased, 2993.
  - taking deceased to secluded spot, question for jury as to intent, e 4635.
  - what constitutes, 2985.
  - what constitutes, duration of deliberation, 2986.
- in second degree*, 3004-3022, e 4636-4641.
  - criminal intimacy of deceased with defendant's sister, no defense, 3018.
  - definition of, e 4636.
    - revolver, 3005.
  - elements of, 3004.
    - to consider, California, 3007.
  - form of verdict, 3022.
  - heat of passion, determined with reference to ordinary men, 3014.
  - improper definition, Texas, e 4641.
  - in violent passion from offensive language used, 3013.
  - killing before cooling time had elapsed, 3012.
    - child by beating mother, 3019.
    - must be malicious, reasonable doubt, Alabama, 3009.
  - malice necessary but will be implied, Texas, 3010.
  - mutual combat, deadly weapon suddenly snatched up, 3017.
  - need not be planned and deliberated upon, but must be malicious, Wyoming, 3011.
  - North Carolina, 3008.

[References are to sections; e refers to Erroneous Instructions.]

**MURDER—Continued.**

- presumed, burden of proof, 3020.
- from killing with billiard cues, 3021.
- sudden transport of passion, without adequate cause, deadly weapon, leather belt, 3016.
- under such passion as to deprive defendant of power to form intent to kill, 3015.
- variance from statutory definition, Florida, e 4640.

**MUTUAL COMBAT—**

- assault and battery, both parties guilty, 2841.
- both parties may act in self defense, e 4729.
- defendant agreeing to, bars plea of self defense, 3132.
- homicide, premeditated design, 3082.
- killing with pistol in, not necessarily murder, e 4617.
- murder in second degree, deadly weapon suddenly snatched up, 3017.
- whether engaging in, bars plea of self defense, e 4728.

**MUTUAL CONSENT—**

- contract may be rescinded by, 650.

**MUTUAL RIGHTS—**

- and liabilities of railroads and travelers, 1867.

**MUTUAL THREATS—**

- self defense, indicating who was aggressor, 3149.
- to kill, carrying deadly weapons, 2968.

**NAME—**

- adding to written instrument, material alteration, e 3433.
- confusion of, libel, e 4267.
- of deceased party, forged to deed of certain land, 2949.
- of parties to conspiracy, not disclosed, e 4583.
- of person injured must be proved, larceny, 3228.
- of principal, should be given in trial of accomplice, e 4482.
- property insured in wrong name, husband and wife, 1180.

**NARCOTICS—**

- no presumption of suicide from, life insurance, e 3682.

**NARROWING—**

- issue before jury, self defense, e 4754.

**NATURAL CAUSES—**

- producing abortion, 2784.

**NATURAL CONSEQUENCES—**

- homicide, presumption that one intends, 3047.
- of unlawful purpose, conspiracy, killing, e 4584.

**NATURAL FLOW—**

- of water, preventing, diverting watercourse, omitting element of ordinary care, e 4280.

**NATURE—**

- laws of, statements of witnesses must be reconciled with, e 4263.
- of act, defendant not conscious of, must be acquitted, 2576-2577.

**NAVIGABLE STREAM—**

- building docks, 2360.
- floatage of logs down, use of banks, 2359.
- willfully placing obstruction in, 3290.

**NEBRASKA—**

- burglary, possession of stolen property, jury may determine weight as evidence, e 4564.
- defendant's failure to testify not to be taken against him, 2559.
- murder in first degree, 2990.
- reasonable doubt defined, 2664.
- rule as to reading and marking instructions, 161.
- statute relating to instructions, 153, p 136.
- weighing defendant's testimony, murder, 2546, e 4383.

**NECESSARIES—**

- husband and wife, when husband liable for purchases by wife, 1013-1016.

[References are to sections; e refers to Erroneous Instructions.]

**NECESSARIES—Continued.**

minor's contract for, 619.  
wife the agent of the husband in buying, 1013.

**NECESSARILY—**

leading to a conclusion of guilt, evidence, not sufficient to convict, e 4451.

**NECESSARY—**

fact, proof of every, inconsistent with every other reasonable hypothesis, 2712.  
killing in defense of sister need not be proven, self defense, e 4760.  
may use more force than actually, self defense, e 4709.  
proof, conspiracy, circumstantial evidence, 2905.  
self defense, no more force to be used than apparently necessary, 3121.  
time for premeditation, homicide, 3081.

**NECESSITY—**

of killing, self defense, must use all reasonable means to avert, 3119.  
pecuniary, fraud, sacrifice of property, e 3653.  
self defense arises from, reasonable cause to apprehend immediate personal injury, 3104.  
self defense, defendant need not believe death of assailant necessary, 3114.

**NEGATIVE—**

matter of defense, state need not, burden of proof, e 4329.  
testimony, credibility, not so strong as affirmative, 336, e 3303.

**NEGLECT—**

of wound, death from, homicide, 2973.  
to use means of learning of dissolution of partnership, e 4225.

**NEGLIGENCE—**

IN GENERAL—Chapter LXII, 1336-1369, e Chapter CXLV, 3737-3754.

as charged in the declaration, e 3740.  
as regards children, 1364.  
assumed in destruction by fire, e 3535.  
blindness, injured person being blind should be considered by jury, 1336.  
burden of proof, upon plaintiff, 1347.  
charged must be the proximate cause, 1338, 1342, e 3742.  
circumstantial evidence must be inconsistent with any other conclusion, 1346.  
comparative, e 3753.  
*contributory*,  
becoming pregnant after injury, not necessarily, 952.  
burden of proof, 1361, 1362, e 3747, 3752.  
danger must be impending to be a defense, 1359.  
defined, 1351.  
effect of, 962, 1338, 1352, e 3748.  
terror in sudden emergency, 1358.  
injury after defendant saw danger in time to prevent it, 1360.  
on sidewalks, 1336.  
intoxication, 1356.  
master and servant, 962.  
no bar to relief for fraud, e 3651.  
of children, 1354, 1355, e 3750, 3751.  
personal injuries, e 3746.  
producing miscarriage, 934.  
conditional admissions at time of accident, 383.  
coroner's verdict not evidence of, 1349.  
corporation has same status as individual, 1366.  
defective hearing, 1357.  
defined, 1336, e 3737.  
definition of proximate cause, e 3742.  
effect of release, 1368.  
elements necessary for a recovery, 1338, e 3740.  
gross, defined, 962, e 3738.



[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—IN GENERAL—Continued.

- injury must be the result of, 1340-1341.
    - on sidewalk, liability of contractor, 1367.
    - the result of negligence and accident, 1341.
  - imputed, 1363-1364.
  - jury not to compromise between questions of liability and amount of damages, e 3740.
  - leaving to jury materiality of allegations in declarations, e 3744.
  - may be so gross and reckless as to imply intent for purpose of allowing punitive damages, 944.
  - mere accident not actionable, 1339.
  - must be the proximate cause of plaintiff's injuries, 1338.
    - prove defendant guilty of, 1338.
  - no right to guess or conjecture as to any ailment complained of, 1347.
  - of contractor, 1367.
  - of defendant, testimony of plaintiff, e 3350.
  - ordinary care defined, 1337, e 3737, 3739.
    - of plaintiff, defined, 1353, e 3749.
  - parties to action, several defendants, 1365.
  - plaintiff must not have been negligent, 1338.
  - preponderance of evidence, 1338.
  - proof of may be made by defendants' own witnesses, 1348.
  - question of fact for the jury, 1343.
  - recovery on proof of allegations contained in one or more counts of declaration, 1345.
  - referring jury to pleadings as to negligence alleged, 1344.
  - release obtained by fraud or misrepresentation, 1369, e 3754.
  - sidewalks, ordinary care to prevent injury when passing over, 1336.
  - singling out facts on which defendant relies to escape liability, e 3746.
  - testimony as to actions of deceased at time of injury, e 3747.
  - view by jury of scene of accident as evidence of, 1350.
  - willful or wanton defined, 1360.
    - seeing danger in time to avert it, 1360.
- COMMON CARRIER OF GOODS, Chapter LXVII, 1690-1746, e Chapter CL., 3956-3964.
- acceptance of goods by carrier knowing they cannot be delivered in time, e 3956.
  - are not bound to delivery to consignee personally, 1739.
  - bill of lading*, 1696-1699.
    - burden of proof on defendants to show flaw in bill of lading, 1698.
    - not conclusive of condition of goods, 1699.
    - or receipt prima facie evidence of good order of goods, 1696, 1697, 1698.
    - what implies, 1696.
  - burden of proof on carrier to show that loss was occasioned by causes for which it was exempt, 1721.
    - on carrier to show loss within exemption, 1718.
  - cannot restrict liability as to, 1720.
  - can only restrict their common law liability by special contract, 1712.
  - care required in loading live stock, 1734.
    - of carriers of hogs, 1736.
    - of warehousemen, 1744.
  - conditions in receipt do not apply to carrier's own negligence, 1720.
  - condition requiring claim for damages to be presented within a specified time, 1717.
  - connecting carriers, 1700-1705.
  - damage to goods, bill of lading, 1696.
  - degree of care in shipment of live stock, 1730-1738.
    - required to avoid delay in shipment of live stock, 1738.
  - delay in shipment, facts to be considered by jury, e 3961.
    - of live stock, poor condition of cattle as excuse, e 3964.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—COMMON CARRIER—Continued.**

- delivery by, 1739-1745.
  - delivery to, 1692-1695.
    - carrier without directions beyond own line, 1700.
    - may be from owner or from another carrier, 1692.
  - duties and liabilities in transportation of live stock, 1729, 1731, e 3962.
  - duty and liability of express companies, 1743.
    - as to transportation of goods, 1722-1738.
    - of transporting goods promptly, e 3959.
    - to furnish stock pens at point of shipment, 1733.
  - failure of shipper to properly care for live stock, 1737.
    - to deliver goods on demand, liability of last carrier, e 3958.
  - first carrier cannot relieve himself of liability by storing goods without delivery to next carrier, 1705.
  - goods not delivered to consignee must be stored, 1742.
  - injury to cattle, presumption of negligence of last connecting carrier, e 3957.
  - legal duty of carriers imposed by law, 1710.
  - liability and exceptions thereto, 1706-1709.
    - of, 1706.
  - liable for all losses except by act of God and public enemy, 1707.
  - limitations as to filing claims for damages, e 3960.
  - limitation of carrier's liability by contract, 1710-1721.
  - live stock, care required of carrier, 1729, 2731, e 3962.
  - must deliver goods within a reasonable time, 1722.
    - exercise reasonable care to prevent loss within exemption, 1719.
    - use reasonable care to avoid injury by "act of God," 1709.
  - not an insurer as to time of transportation, 1723.
    - bound to deliver freight to consignee personally, 1739.
    - liable for delay in delivery of goods caused by inevitable accident or act of God, 1724.
    - for injuries due to natural propensities or vice of animals, 1735.
    - special damages unless notified of importance of shipment, 1725.
  - ordinarily liable only for losses and injuries occurring on own line, 1701.
  - partnership between, 1704.
  - railway companies and express companies are common carriers, 1691.
  - rule as to delivery of freight in various states, 1740-1741.
    - in Illinois as to conditions in receipt, 1714-1715.
  - shrinkage of weight of cattle, while stopping for feed and water, e 3963.
  - suit by, for freight and charges, 1748.
  - what constitutes through contract of carriage, 1695.
    - is a common carrier, 1690-1691.
    - meant by "act of God," 1703.
    - ordinary diligence and care, 1745.
  - when liability of the carrier commences, 1692.
    - shipper will be presumed to agree to exemption clause, 1713.
    - not bound by notice printed on receipt, 1715, 1716.
  - written receipt not required, 1694.
- COMMON CARRIERS OF PASSENGERS, Chapter LXVIII, 1747-1842, e Chapter CLI, 3965-4009.**
- agreement with conductor to check speed of train in order that passenger may alight, 1786.
  - alighting*,
    - from moving train, 1479, 1806-1807.
    - after sufficient time to alight has been given, 1807.
    - from train, conductor able to prevent same, 1810.
    - encumbered by grips and valises, 1803.
  - all human care and foresight required, e 3964.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—COMMON CARRIER—Continued.**

- as alleged in declaration, e 3970, 3990.
- assault of passenger by servant, 1768.
- authority of brakeman to invite person to become passenger on freight train, e 3973.
- baggage*, 1832-1836.
  - carrier not bound to inquire as to the contents of, 1835.
  - if baggage contains articles of special value, carrier should be notified, 1834, 1835.
  - liability of carrier terminates, when, 1836.
    - warehouseman after reasonable time after arriving at destination, 1836.
  - what it does not include, 1833.
    - includes, 1832.
- boarding moving train, 1805.
  - train at place where stop is required by statute, 1775.
- bound to receive and safely carry, e 3965.
- bridges and culverts, degree of care required, 1760.
- burden of proof, 1839-1841, e 3990, 4007, 4008.
  - as to conditions in tickets, 1841.
- collision, e 4007.
- care due from hotel keeper toward servants riding on elevator, 1842.
  - persons on platform of road to meet passengers, 1753.
- care required of both railroad and passengers, 1747k.
- carrier not an insurer against accident to passengers, 1747, 1748, e 3966.
- cars and appliances, 1762-1767, e 3978-3979.
- carrying passenger past destination, 1778, e 3983.
- changing cars, announcement of, e 3982.
- condition of roadbed and track, 1759.
- conductor directing passenger not to get off moving train, 1809.
  - to get off moving train, 1808.
- conductor pulling passenger from moving train, 1785.
- collision*,
  - at crossing with train of another railroad, e 3989.
  - causing injury to person in caboose, e 3974.
  - injury to passenger, 1795, e 3988.
  - prima facie negligence, 1796.
- common sense of jury, e 3969.
- connecting lines liable for injury to passengers, 1751.
- contributory negligence, 1800-1818, e 3991-3997.
- damages, ejection of passenger, 1827.
  - for failure to run trains according to schedule, 1770.
- defective axle, e 3979.
- defined as relating to passengers, 1747.
- degree of care, all that human care, vigilance and foresight can reasonably do, 1747.
  - consistent with mode of conveyance, e 3996.
  - due trespassers, 1752-1754, e 3971.
  - required by carriers of passengers, 1747, 1748, e 3965, 3966, 3983.
    - as to station facilities, 1757.
    - in controlling and operating trains, 1747.
    - while passengers are alighting, 1780.
  - which human mind is capable of inventing, e 3996n.
- derailment of car, prima facie negligence, 1797.
  - train through embankment giving away, 1760.
- duty** as to operation of stock trains carrying passengers, 1793.
  - of carrier furnishing motive power as to inspection of vehicles used, 1765.
  - of conductor to protect female passenger from vulgarity and obscenity, 1799.
    - announce stations; passenger negligently failing to hear announcement, 1777.
  - to furnish safe appliances for engine, e 3978.



[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—COMMON CARRIER—Continued.**

- give passengers notice of arrival at stations, 1776.
- prevent the escape of cinders from engine, e 3978.
- stop train reasonable time for passenger to alight, 1779.
- stop train reasonable time for passengers to get on, e 3981.
- effect of conductor's promise to come for passengers at destination, 1778.
- ejection of passengers, Sec. 1827-1831, e 3999-4002.
  - for refusal to pay fare, 1827, 1830, e 4000.
  - from moving train, 1831, e 4001.
- ejection of trespasser, e 3971.
- elevators*,
  - assumption of by falling of, e 4009.
  - burden of proof, e 4009.
  - degree of care required, e 4009.
  - fall of elevator, injuring passenger, e 4009.
  - injury to passengers, 1842.
  - encouraging passengers to alight at unsafe places, 1788.
- failure to heat waiting room, e 3977.
  - properly heat car, 1762, 1763.
  - provide step box or stool for passengers to alight, e 3986-3987.
  - supply spark arrester on engines, 1767.
  - warn passenger of danger in alighting, 1787.
- fall of passenger while alighting must be due to negligence of carrier, 1782.
- falling of transom, e 3990.
- forcibly ejecting passengers from train, 1752.
- freight train not required to stop at platform to receive or discharge passengers, 1772, e 3980.
- furnishing filthy or unfit car, 1764.
  - passenger safe means for alighting, 1789.
- getting off of moving train, 1783, e 3993-3994.
  - moving train by direction of employe, 1789, e 3995.
  - what jury may consider, e 3995.
  - train on side away from station, e 3997.
- has right to be safely carried and delivered at destination, 1747, 1789.
- helping passengers to alight, 1790, e 3986.
- highest degree of care consistent with practical operation, 1747, e 3965.
- injured by flying cinders, burden of proof, e 4008.
- injury to passenger, burden of proof, 1839.
  - by having dress stepped on while alighting, 1791.
  - defect in construction, operation or maintenance of roiling stock or road-bed, burden of proof, 1840.
  - through obstruction near or on track, 1761.
  - while alighting, e 3984.
- injury to stockman while attending horses and cattle, jolting car, 1794.
- instructions need not mention the relation of passenger specifically, 1755.
  - omitting to state whether trespasser or passenger, e 3970.
- jumping from cars, negligence, when, 1811.
  - moving trains when suddenly placed in a perilous position by carrier, 1812, e 3996.
  - train on seeing another train approaching, 1814.
- jury may consider age of plaintiff, e 3994.
- liability for assault of passenger by conductor, 1769.
  - for baggage, 1832.
  - defective cars and appliances, 1762.
  - coupling, 1766.
  - of connecting lines for accidents to passengers, 1751.
  - limitation of liability, existence of contracts a question of fact for the jury, 1826.
  - live stock shipper remaining in car with stock, knowledge of perilous position, 1815.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—COMMON CARRIER—Continued.**

- liability for loss of pocket book, negligence of person occupying berth with plaintiff, e 4005.
- management and operation of cars and vehicles, 1770-1798, e 3980-3990.
- may eject passenger, using abusive or obscene language, 1828, 1829.
- person refusing to produce ticket or pay fare, 1827.
- may set apart separate cars for ladies, 1820.
- measure of care as to bridges and culverts, 1760.
- must exercise highest degree of care and diligence which is reasonably practicable, 1747, e 3965.
- negligence defined, 1747.
- no obligation to stop train after starting to permit passengers to board it, 1774.
- not an insurer against accidents, 1766.
- liable for inevitable accident to passenger, 1749.
- required to guard against cyclones, cloud-bursts and the like, 1760.
- stopping train reasonable time for refreshments, 1792.
- obeying directions of conductor in alighting from train, 1784.
- on freight trains, degree of care, e 3968.
- ordinary care and caution defined, 1801, 1806.
- prudence required of passenger, 1801.
- overcrowding cars, e 3988.
- owes due care to persons rightfully on platform, 1753.
- passenger relation, 1754-1756, e 3973-3975.
- should be given reasonable opportunity to safely leave train, 1756.
- passing from car to car while train is in motion, 1817.
- payment of fare necessary to constitute relation of passenger, 1754.
- permitting improper persons in filthy and unfit car, 1764.
- placing pocket book in berth liability for the loss of, e 4003.
- ring in pocket book, liability of sleeping car company for loss of, e 4004.
- porter going to sleep, liability of sleeping car company, for loss of pocket book, e 4006.
- preponderance of evidence explained, e 3976.
- protection of passengers, 1799.
- proximate cause, e 3991.
- punitive damages may be allowed for failure to run trains according to schedule, 1770.
- pushing car containing passenger against another car, 895.
- reasonable time for passengers to alight, duty to stop, 1779.
- refusal to leave train when ordered by conductor, 1830.
- representation of ticket agent, binding on carriers, 1822.
- requiring higher fare when paid on train, ejection of passenger, 1823.
- responsibility of carrier for negligence or wrongful conduct of servants, 1768.
- riding in caboose with consent of conductor, e 3974.
- on engine at invitation of conductor, 1802.
- freight or mixed trains, 1750, e 3969.
- loaded freight cars belonging to another carrier, 1765.
- rights of common carriers, 1746.
- to expel passenger for failure to obey rules of company, 1819.
- prescribe reasonable rules for employes and passengers, 1827.
- rules for passengers, 1819-1821.
- refuse to receive intoxicated persons as passengers, 1821.
- reject for failure to produce ticket or pay fare, e 3999.
- risk assumed by passenger riding on freight or mixed trains, 1750.
- roadbed and track, 1759-1761.
- round-trip tickets, effect of purchaser signing, 1825.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—COMMON CARRIER—Continued.**

- rules and regulations, 1819-1821.
  - riding in caboose contrary to rules, e 3974.
- schedule, duty to run according to, 1770.
- servants, 1768-1769.
- shipper of live stock riding on engine, contributory negligence, 1813.
- should allow passenger reasonable time in which to leave train, 1756.
- sleeping car company, care due property of passenger by, 1837-1838, e 4003-4006.
- standing on platform of car, 1816.
- starting train before passenger has alighted, e 3985.
  - while passenger is getting on, 1773.
  - in act of alighting, 1781.
- stational facilities, 1757-1761, e 3976-3977.
- stumbling or falling while alighting, 1804.
- takes all risk necessary incident to the mode of conveyance, 1749, e 3967.
- stopping at suitable place for passenger to alight, 1788.
- switching of trains, care due passenger, 1798.
- tickets, 1822-1825, e 3998.
  - as contract, e 3998.
- train not stopping long enough for passengers to alight, jumping from moving train, 1806.
- trespassers and persons not passengers, 1752-1753, e 3971, 3972.
  - boarding moving train, duty towards, e 3972.
  - defined, 1754.
- unreasonable delay in leaving train, 1756, e 3975.
- usage, effect of, 1775.
- use of spark arrester on engines, 1767.
- using unsafe or dilapidated platform, 1758, e 3976.
- validity of reduced rate round-trip tickets, identification and stamping, 1824.
- voluntarily riding in dangerous place, e 3992.
- wanton ejection of passengers, e 4002.
- what risks passengers assume, 1747, 1749.
  - would constitute negligence, 1748.
- when delay is presumptively negligence, 1771.
  - liable for defects in roadbed and track, 1759.
  - derailment of train, 1759.
  - not liable for injuries to passengers, 1748.
  - passenger may recover for injuries, 1755.
  - relation of carrier and passenger end, 1756, e 3975.
  - riding on outside of passenger train without payment of fare, not a passenger, 1754.
- wrongful conduct of servants, 1768.

**MASTER AND SERVANT—Chapter LXIII, 1370-1494, e Chapter CXLVI, 3755-3838.**

- absence of safe-guards around vats in packing-house, falling into vat, e 3775.
- accident to child through inattention of driver, e 3757.
- act of servants must pertain to the particular duties of that employment, 1370.
- admission of plaintiff that explosion was his fault, effect of, 1388.
- allowing shavings to accumulate in passage way near moulder, 1402.

**appliances**

- and machinery used by master not owned by him, 1408.
- duty of master to explain to minor dangerous character of, 1384.
  - to keep in proper repairs, 1406.
- in other establishments not a test for fitness, 1425.
- need not be the latest, newest, most improved, safest or the best, 1425.



[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- not bound to provide machinery which is absolutely safe, 1377.
- what are, 1415.
- arrangement of set screw increasing danger, causing injury, e 3791.
- assumption of risk*, 1376, 1444-1471, e 3813-3828.
  - burden of proof as to, e 3814.
  - by employes of street car company, 1459.
  - carrying too heavy a piece of timber, 1464.
  - caving in of bank, e 3819.
  - circumstances to be considered in determining, 1446, e 3815.
  - employing insufficient help, 1464.
  - grinding planer tool upon emery wheel, 1461.
  - knowledge of dangerous roof in coal mines, 1486.
  - no duty of servant to use ordinary care to discover increased danger, e 3820.
  - of injuries by fellow servants, e 3808.
  - tearing down bridge, e 3824.
  - unloading timbers, 1463.
  - using defective gas pipe as lever, 1462.
  - warning of dangerous nature of work or place, 1446.
- authority of watchman to guard premises does not include authority to shoot trespassers, 1374.
- board on side of window insecurely fastened, 1395.
- burden of proof as to contributory negligence, e 3831.
- carrying glass through passage-way knowing same to be obstructed, 1457.
- coal mines, maintaining chute without guard-gate or guard board, 1401.
- co-employes, who are, 962.
- comparative negligence, e 3837.
- continuing work*
  - after insufficient repair of appliances, e 3825.
  - promise of master to repair, e 3827.
  - at dangerous machine, e 3834.
  - in dangerous places after notice of defect to master, 1467, e 3826.
  - without repairing defects after being warned of danger, 1480.
- contributory negligence*, 962, 1472-1492, e 3829-3837.
  - admission of servant that explosion was his fault, 1388.
  - defined, 1473.
  - in grinding tools, 1490.
  - lowering air pumps, 1487.
  - unloading cattle, 1489.
- minors rule as to, 1482.
- must be the proximate cause, 1474, e 3830.
- pleaded by defendant, South Carolina, 1476.
- of minors, e 3835.
  - servant, prevents recovery, 1472, e 2829.
  - series, 1886, 1494.
- servant bound to exercise ordinary care for his own safety, 1472-1473.
- should be negatived in instruction, e 3803.
- surrounding facts and circumstances in evidence to be considered, 1475.
- defect in lever of jack screw, 1418.
- defective*
  - belt in mill, 1419-1420.
  - bolt, continuing in employment after bolt had come off many times, 1469.
  - construction of runways to vessel, e 3776.
  - derrick, 1425.
  - ladder, 1423.
  - machinery, injury must have resulted from defect in, 1413.
  - must be the proximate cause, 1413.
  - pulley, e 3793.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- defective roof, latent defects in, e 3777.
- scaffold, elements to be proved, 2132.
- tire bender, 1424.
- doing work in way other than ordered by master, 1479.
- duty in furnishing mail cranes and engines, 1416.
- of inspection, character of business to be considered, 1412.
- duty of master*
  - for servant, e 3758.
  - to adopt reasonable rules and regulations to avoid injuries, 1437.
  - dismiss incompetent employes, 1437.
  - hire competent employes, 1437.
  - inspect appliances at proper intervals, 1411-1412.
  - instruct minor, e 3766.
  - keep premises reasonably safe, e 3810.
  - make rules for the guidance of employes, 1381.
  - protect his servant, operating a furnace without a screen, e 3823.
  - provide safe and suitable appliances, and keep them in proper repair, 1406, 1437, e 3782, 3784.
  - reasonably safe place for work, 1390-1405.
  - suitable and reasonably safe tools and machinery, 1425.
  - use ordinary care to provide reasonably safe machinery and appliances, e 3769.
  - reasonable care to avoid injuries to servants, e 3758.
  - warn servant of danger, e 3824.
- duty of servant*
  - as to examination of grip-car, 1460.
  - to apprise himself of dangers of machinery, 1452.
  - exercise care to avoid injury to himself, 1453.
  - look out for patent and obvious defects, 1453.
- electric wires, knowledge of servant of wires being uncovered, 1458.
- elevators,*
  - duty to keep in repair, 1396-1397.
  - failure of master to guard opening, 1397.
  - falling into elevator shaft, 1467.
- employing child without school certificate, 1386.
- insufficient help proximate cause of injury, 1464.
- employment of minor in dangerous position, 1383, e 3765.
- failure to employ sufficient number of servants, e 3801.
- furnish reasonably safe machinery as charged in the declaration, e 3785.
- heed warning of foreman to get away from falling timber, 1485.
- observe peril of servant, 962.
- falling into excavation, assumption of risk, 1456.
- fellow servants,* 1376, 1428-1443, e 3799-3812.
  - care required of master in selection of, 1434-1435.
  - defined, 1428-1433, e 3799.
  - elements necessary to constitute relationship of, 1429, e 3800.
  - liability of master for incompetency of, e 3803.
  - negligence of bars recovery, e 3808.
  - question of fact for the jury, 1431.
  - repairing machinery, 1469.
  - responsibility of master for incompetency of, 1435.
  - rule in Colorado, 1433.
  - should be actually co-operating just before and at the time, 1429.
  - superior authority does not always destroy relationship of, e 3811.
  - who are, a question of fact for the jury, e 3802.
- flanges on car wheels being worn too thin, 1422.
- foreman assumes risk of carelessness of employe subject to his control, 1389.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- gross negligence defined, 962.
- habitual violation of rules by employes, effect of, personal injuries, e 3762.
- handling dynamite without proper precautions, e 3798.
- hotel keepers, care due in operation of elevators, toward servant, 1842.
- in general, 1376-1389.
- injuries by being jolted from car on logging road, 1403.
  - by negligent use of compressed air, 1427.
  - from falling of bricks through insufficient platform of scaffolding, 1393.
  - received from X-ray apparatus, liability of master, e 3756.
  - through careless use of hammer, 1491.
  - through defective sewer, 1394.
- to conductor of street car, defective rail, 1404.
  - employee, what to consider, 961.
  - series, 962.
- grip-man on street car through defective brake, 1426.
- miner, defective roof in mine, e 3777.
- servant, violation of contract to furnish medical attendance, 959.
- servant, wound as direct cause of death, e 3767.
- inspection of tools and appliances by servants, e 3789.
- insufficient fastening of scaffold, 1391.
- insurance, agreements between employers and employed as to insurance against accident, 1493.
- intoxication of servant as contributory negligence, 1481.
- jury should not be governed by sympathy, 1379.
- knowledge of danger by servants, 1564, e 3817-3818.
- defective material in lever by servant if he had exercised ordinary care, e 3822.
- foreman of plaintiff's perilous position, liability of master, e 3763.
- incompetency of fellow servant subsequently acquired by master, e 3804.
- insecure scaffolding by servant if he had exercised ordinary care, e 3821.
- superior of danger of servant, 962.
- latent defects, 1417.
- master not liable, 1409.
- liability of band director for acts of member of band, 1375.
- for acts of servants, 1370-1375, e 3755-3757.
  - acts of servants in connection with business intrusted to them, 1371.
  - assault and battery by servants, 1372.
  - malicious, vexatious or wanton acts of servants, 1372.
  - negligent, fraudulent or deceitful acts of servant if done in the course of his employment, 1370.
  - negligence of servants, 1370.
- though he may have forbidden acts causing injury, 1370.
- to servants, 1376-1494, e 3758-3838.
  - for failure to hire ordinarily skillful workmen, 1376.
  - to use reasonable care, skill and judgment to furnish suitable machinery and implements, 1376.
- when relation has ceased for the day, e 3759.
- master cannot delegate duty and avoid liability, e 3810n.
- does not insure absolute safety of appliances, e 3788.
- in furnishing material stands on footing as third person, 1407.
- is not an insurer, 1376.
- must be guilty of negligence to be held liable, 1379.
  - furnish reasonably safe place and surroundings, e 3769.
  - place for work, 1390-1405, e 3769-3798.
- not bound to furnish the safest and best appliances, 1414.
- insurer of servants' safety, 1379.
- absolute safety of appliances, 1410-1411.
- liable for negligence of fellow servants, 1428, 1437.



[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—MASTER AND SERVANT—Continued.

- material not an appliance, 1407.
- may be fellow servants as to part of employment and not as to other part, 1430.
- mental incapacity to execute release, 1368.
- mere accident not actionable, e 3741.
- mines*,
  - dangerous place for work, e 3781.
  - doing work not in line of regular employment, e 3816.
  - failure of mine boss to visit room in which miners work, 1400.
  - to furnish crops, 1486.
  - inspect in the morning, e 3778.
  - partition off stairway from main shaft, 1398.
  - fellow servants in, e 3806.
  - incompetency of fellow servant, e 3807.
  - method of lowering rails into, e 3782.
  - reasonably safe place for work, failure to put posts to support roof, e 3779.
  - statutory inspection of, 1399.
  - violation of statutory provisions, 1399.
  - whether runner and helper on mining machine are fellow servants, e 3807.
  - wilfully neglecting to furnish props, e 3780.
- miners*,
  - assumption of risk, 1471.
  - dangerous machine, e 3765.
  - doing work not in line of regular employment, failure to instruct, e 3816.
  - duty of master to instruct and explain, dangers and hazards of work, 1384.
  - safe machinery and appliances, 1482.
  - place to work, 1482.
  - unable to comprehend the danger to work about machine, 1383.
- molder as vice principal to laborer, 1443.
- motorman of street car failing to reduce speed at dangerous places, injury to conductor, 1438.
- must furnish reasonably safe place and surroundings, 1390.
- negligence not presumed, burden of proof on plaintiff, 1387.
- of defendant and of fellow servant, 1432, 1437.
- fellow servant must be proximate cause, 1474.
- master must be the proximate cause of injury, e 3761.
- no greater duty of master to protect servant, than servant to exercise on his own behalf, e 3829.
- no liability for latent defects, e 3787.
- not liable for mere accident, 1380.
- notice of defect, master promising to remedy, reliance upon promise by servant, 1467.
- nut on shaft continually coming off, causing injury, e 3792.
- only liable for acts of servant within scope of his employment, e 3755.
- operating dangerous machine after promise by master to supply device for lessening danger, 1468.
- ordinary care defined, 1377-1379, 1486.
- perils, not obvious to employment, e 3758.
- person charged with ventilation of mine, not fellow servant of miner, 1436.
- place not dangerous, employer negligently creating peril injuring servant, 1447.
- placing hot water barrels in dangerous position, servant stepping into when frightened by a dog, e 3774.
- plaintiff making out his case as laid down in his declaration, e 3768.
- poles being too near track of street car, 1459.
- prior knowledge of condition of ditch by employe of municipal corporation, 1455.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- proof as to defective condition presumed to continue until rebutted, e 3786.
- question of negligence one of fact for the jury, e 3743.
- raising beam in obviously dangerous ways, 1484.
- reasonable care only required for safety of employes, 1377, e 3760.
- reasonably safe place for work, 1390-1405, e 3769-3798.
  - changes due to prosecution of work, e 3770.
  - injured by falling derrick, e 3773.
  - injuries through defects in staging, e 3771.
  - injury to servant by falling on defective stairs, e 3772.
- receiving injury while handling water pipe and sand bucket, omitting essential facts, e 3797.
- refusal of master to repair, e 3828.
- release of right of action by servant, 1494, e 3838.
- repairing machine from time to time, 1469.
- right of master to rely on representation of minor as to experience, 1385.
  - servants to presume master has performed duty with ordinary care, 1378.
    - servant to rely on assumption that there is no danger, in obeying order of master, e 3764.
  - to assume that reasonable care has been used in selection of fellow servants, e 3812.
- risk not ordinarily incident to employment, burden of proof, 1445.
- safe and suitable appliances, 1406-1427.
- saw-mill, providing foundation for lumber stack, personal injuries, e 3783.
- servant assumes all risks ordinarily and naturally incident to particular service in which he is engaged, 1444.
  - assumes all the risks ordinarily incident to particular service, 1425, e 3813.
    - known dangers, 1468, 1564.
  - being directed to do work not in line of his regular employment, e 3816.
  - does not assume danger after promise to repair, right to remain a reasonable time, 1468.
    - extraordinary perils or risks, 1448.
  - risk of dangers not incident to the business, 1447.
- engaging in extra hazardous work, different from ordinary employment at command of fellow servant, 1441.
- failing to use precautions against known danger, 1465.
- ignorant of the dangers of his position, 1382.
- injured by lowering of window, knowledge that window was a greatweight, effect of, 1454.
- knowing hazards, safer way of conducting business, no ground for recovery, 1466.
- may assume master has furnished safe scaffold, 1392.
  - recover for actual loss of wages, 762.
- notifying superintendent of defective machinery, superintendent assuring servant machine is all right, 1470.
- servant's knowledge of facts which would make his own acts dangerous, 1451.
- slipping on floor and injuring hand in machinery, e 3818.
- spike maul flying off handle, 1421, e 3794.
- superior authority does not always destroy relationship of fellow servants, 1442.
- telephone wires, burden of proof as to negligence in adjusting, 1405.
- tendering employe other employment same salary, good defense, 763.
- unsuitable belt on planer machine, 1420.
- using appliances and machinery for years before causing injury, e 3790.
- using defective rope, 1492, e 3795, 3836.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- shaft of wagon, 1488.
- vice principals, liability of master for negligence of, e 3810.
- responsibility of master for negligence of, 1439-1440.
- voluntarily assuming duty not arising under his employment, 1449.
- doing work in more dangerous of possible different ways, 1478, e 3832.
- taking dangerous position in front of truck, e 3833.
- taking place he is not required to take, 1450.
- want of ordinary care of both master and servant, 1486.
- what to consider in determining whether servant exercised ordinary care, e 3765.
- when servant cannot be charged with negligence, 1423.
- whether negligence in using certain kind of hitches on dirt dumpers, e 3796.
- servant is bound to inquire as to competency of fellow servant, e 3805.
- who are vice principals, 1439, 1440, e 3809.
- working near dangerous lumber pile, 1483.
- wrongful acts of servants, 1373.

**MASTER AND SERVANT, RAILWAY COMPANIES.—Chapter LXIV, 1495-1608, e Chapter CXLVII, 3839-3914.**

- allowing clinker to remain at side of track, causing injury, 1526.
- derrick to swing over track, 1525.
- steel plates on engine to rust, e 3850.
- appliances, 1497-1499, e 3843-3850.
- assumption of risk*, 1545, 1561-1583, e 3881-3900.
- as to cars received by company, e 3889.
- defective drawhead, e 3891.
- stirrup on railroad, 1577.
- switchstand, e 3890.
- track, 1580.
- handcar, e 3892.
- by employes who know of dangerous condition, 1575.
- engineer, top-heaviness of engine, e 3886.
- firemen, 1568, 1569.
- switchman, 1570.
- in rolling engine wheels, e 3893.
- of dangerous culverts or cattle guards, 1582.
- working on sidetrack, 1581.
- with engineer on first trip, 1567.
- authority of one who occasionally runs engine, e 3874.
- to remove ashes and fire, no authority to move engines, 1552.
- bleeding reservoir of car unnecessarily, 1588.
- boarding moving engine, e 3908.
- rapidly moving engine, 1599.
- bound to furnish ordinarily safe and appropriate appliances, 1497.
- brakemen disobeying the rules by remaining on locomotive, e 3870.
- voluntarily disconnecting cars while in motion, 1591.
- burden of proof of contributory negligence, 1509.
- on plaintiff, 1509.
- circumstantial evidence as to application of brake, e 3861.
- cars must be in condition to be uncoupled with reasonable safety, 1503.
- collision, causing injury, e 3860.
- failure of engineer to give signal, 1536.
- of passenger train with loose car, 1537.
- proximate cause of injury, 1537.
- complying with rules prevented by negligence of master, e 3873.
- conductor of passenger train, risks assumed by, 1571.
- continuing in employment with knowledge of dangerous conditions, 1575, e 3898.



[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- contributory negligence*, 1584-1608, e 3901-3914.
  - leaning against loose plank in chute on stock pen, e 3914.
  - of brakeman, e 3913.
    - employees in coupling cars, 1590.
    - engineer, 1584-1586.
    - fellow servant, e 3880.
    - servant, 961, 1509, 1524, 1532, 1545.
      - failing to keep lookout for signal, 1596.
    - stepping from caboose while it is being uncoupled, e 3910.
    - striking mauls together, 1603.
  - coupling cars, throwing wrong switch, causing injury, 1538.
  - custom of employe sleeping in caboose, 1606.
    - of switching cars, knowledge of, by injured person, e 3895.
    - declaration as alleged in, e 3845.
  - defects in coupling apparatus, 1505.
    - driving box, prior knowledge of by employes, e 3888.
    - engine, notice by engineer to foreman of roundhouse, 1513.
    - hand-hold of car, competency of inspector, 1510.
    - track, promise to repair, e 3900.
  - defective brake staff, injury to servants, 1507.
    - bridge, wreck of train on, 1527.
    - condition of track at crossing, assumption of risk by engineer, e 3885.
    - draw-bars or draw-heads, causing injury, e 3847.
    - track, risks assumed by engineer, e 3884.
  - defined, 1509.
  - degree of care required by servants of carriers, 1768.
  - disobeying a rule as to cars being left uncoupled, e 3872.
    - rules as to coupling cars, 1550.
    - does not insure safety of tools and appliances, must use ordinary care to provide, 1510.
  - due care defined, 1594.
  - duties of master towards employes, 1495.
    - to employ competent persons to manage its business, 1500.
      - employ competent servants, e 3876.
      - exercise ordinary care in keeping a lookout for employes on or in close proximity of the track, 1529.
      - furnish cars properly equipped and supplied with appliances reasonably necessary, 1509.
      - servant a reasonably safe place in which to work, 1522.
    - have yard suitably lighted, e 3855.
    - inspect cars received from other roads, 1501, e 3846.
      - handholds of cars, e 3849.
    - keep appliances reasonably safe, 1522.
      - track and roadbed in reasonably safe condition and free from obstructions, 1525.
    - make proper rules for safety of servants, 1548.
    - provide cars with handholds, e 3848.
      - reasonably safe appliances, e 3881, 3855.
      - rolling stock in a reasonably safe condition for use, 1500, 1502, e 3845.
      - suitable and skillful workmanship in construction of its road and appurtenances, 1499.
    - supervise, examine and test engines, 1513n.
    - use ordinary care in furnishing reasonably safe appliances, e 3843.
      - ordinary care to see that track and roadbed are reasonably safe, e 3851.
      - reasonable care in employing competent persons, e 3839.
  - duty of section foreman towards servant while unloading car, 1547.
    - servant to exercise ordinary care for his own safety, 1509.
    - to set brakes while couplings are being adjusted, 1539.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- employees, knowledge of, dangerous condition, assumed risk, 1575.
- need not search for latent defects, 1574.
- not having equal opportunity to know of danger, 1521.
- remaining in dangerous position in reliance on foreman, 1608.
- riding on worktrain, 1606.
- encountering danger to save lives of passengers, e 3901.
- engine colliding with other cars, series, 1605.
- leaving track, brakeman locking switch to wrong track, 1544.
- running off track, assumption of risk, e 3896.
- engineer assumes risk if he has knowledge of defective headlights, 1576.
- violating the rules, knowledge of, by fireman, whether risk is assumed, e 3887.
- wetting deck and apron of engine, 1585.
- equal knowledge of master and servant of defective track, 1583.
- failure of employe to discover approaching train, 1598.
- employe to use handhold and stirrup in boarding car, 1595.
- engineer to exercise ordinary care in operating engine, 1584.
- to keep proper lookout, 1586.
- obey signal to slow up train, 1532.
- to stop train, run at dangerous rate of speed, 1533.
- report defects at end of run as required by company, 1553.
- servant to discover absence of ladder, handle, or steps, 1578.
- failure to check train running at dangerous speed, 1587.
- give signal, causing collision, e 3860.
- warning of approach of engine, 1534.
- guard against danger of known custom of kicking cars while switching, 1592.
- have switch thrown back after entering spur track, 1593.
- heed whistle or bell, 1597.
- keep track in repair, proximate cause of injury, 1520.
- obey ordinances as to speed and ringing bells, causing injury to servants, 1531.
- fellow servants*, 1554-1560, e 3875-3880.
- defined, 1554.
- no liability for negligence of, e 3875.
- of brakemen, who are, 1556.
- of mechanic on railroad, 1558.
- orders of vice principal, 1545.
- furnishing car strong enough for the transportation of steel rails, 1502.
- trucks for removal of trestles from round-house, 1515.
- general custom, authority of engineer, e 3874.
- practice of yard crew in giving signals, e 3868.
- giving undivided attention to work, assuming warning would be given of any danger, e 3902.
- in employing servant, 1555.
- in general, 1495-1496, e 3839-3842.
- in handling hand car, 1602, e 3907.
- incompetent servant, right of fellow servant to presume that master knows of incompetency, e 3876.
- injury in manner and form as charged in declaration, e 3857.
- must be the proximate cause to negligence, e 3853.
- received through defective draw bars or draw heads, 1506.
- through act of God and concurrent negligence of the company, 1530.
- to employees while operating hand car, 1560.
- engineer through defective step on engine, 1512.
- insufficient ballasting of road, injury to employe, 1521.
- jumping from moving train at defendant's command, 1601.
- kicking cars not negligence per se, 1589, 1592.
- knowledge of defects, burden of proof, e 3884.

[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—MASTER AND SERVANT—Continued.

- knowledge by fireman that engine was without brake-shoes, 1568, 1569.
  - servants, e 3883, 3884.
- laborers working on or about gravel cars, duty of company to exercise care to avoid injury, 1546.
- latent defects in brake rods, 1508.
  - lock of switch, e 3856.
  - rolling stock, duty to search for, 1502.
- launching ties from moving car, whether proximate cause, e 3867.
- locomotive engineer assumes risk of employment, 1565, 1566.
- maintaining portable coal chutes too near track, e 3852.
  - posts in dangerous proximity to track, e 3853.
  - manner of uncoupling cars, 3905.
- master cannot delegate duty to furnish reasonably safe places to work, 1496.
- measure of damages, 1509.
- must keep track in reasonably safe condition, 1580.
  - prove negligence proof of accident and injury alone not sufficient, e 3842.
- necessity of lookout at points where employes commonly pass in discharge of their duties, 1529.
- negligence defined, 1509.
- no exact standard for height of bridges over, 1528.
  - fixed standard for height of bridges over, e 3854.
- not bound to anticipate extraordinary rainfalls, or to build bridge that would resist such, 1527.
  - to furnish any particular kind, or style of bridge, 1527.
- not liable for injury through disregard of its plain instructions, 1549, e 3869.
  - to employes for patent or obvious defects, 1572.
- not necessarily negligence to use couplings of unequaled height, 1504.
- obligations to keep roadbeds and tracks free from obstructions, 1516.
- of engineer in operating engine, 1584.
- oil-house near track, assuming risk of injury from, e 3894.
- operating car at dangerous rate of speed, e 3858.
  - handcar contributory negligence, 1602, e 3907.
- operation and management of trains and cars, 1529-1547, e 3857-3868.
- ordinary care defined, 1509.
  - reasonable care and due care defined, 1594.
- plaintiff must prove that negligence of defendant was proximate cause of injury, e 3906.
- preponderance of evidence, e 3840.
- projecting door of car causing injury, e 3866.
- promise of master to repair right to remain a reasonable time after promise, e 3898.
  - to repair by engineer, promise of defendant, e 3899.
- proximate cause, 1553.
- protruding cross-tie and hole in track, 1523.
- providing steps at end of freight cars for use of employes, 1511.
- pushing trucks with shoulders instead of hands, e 3911.
- reasonable care defined, 1594.
- recklessly running train at high rate of speed through a crowd of workmen, e 3859.
- referring jury to pleadings without reference to issues, e 3841.
- removing ties, servant being injured while, 1545.
- requiring servant to prove his employment while connected with use and operation of road, erroneous, e 3840.
- right of engineer to assume that track is reasonably safe, 1518, e 3886.
  - to establish and enforce reasonable rules and regulations for its employes, 1548.
- risk ordinarily incident to employment, defined, 1562.
- rolling stock, 1500-1515, e 3845-3850.



[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MASTER AND SERVANT—Continued.**

- rules and regulations, 1548-1553, e 3869-3874.
- rule against coupling cars in motion may be waived, e 3871.
  - as to contributory negligence, 1573.
  - coupling cars in motion may be waived, 1551.
- section boss as vice-principal, 1559.
- sending hand cars at great speed immediately after one another, 1541.
- servant assumes ordinary risks of employment, 1509, 1561.
  - assumes risks necessarily incident to his employment, e 3881.
  - of usual jarring and shaking of car, 1579.
  - being struck by car propelled on track at dangerous rate of speed without warning, 1542.
  - does not assume negligence of defendant, 1509.
  - employed outside of his regular employment, assumption of risk, e 3893n.
  - exposing his body between cars, contributory negligence, e 3909.
  - having knowledge of defects, 1564.
  - knowing of one defect does not assume risk of another of which he has no knowledge, e 3892n.
  - may assume that appliances are reasonably safe, 1498.
  - must report defects to master, 1563.
  - riding on footboard of engine, 1605.
  - struck by car deviated from its course after passing switch, e 3895.
- servant's leg being over side of the car, e 3912.
- side rod on engine breaking, injury to fireman, 1514.
- slanting side-track, injury to servant, 1522.
- South Carolina, rule as to obviously defective appliances, 1573.
- starting car before plaintiff had reasonable time to board it, e 3865.
  - without warning to servants, e 3866.
- sudden jerk or lurch of train, causing injury, e 3863-3864.
- telegraph operator delivering order to engineer, injured by another train on returning, 1535.
- third person unsettling brakes on cars, injury by reason of, e 3862.
- timber sticking out of shed and over transfer table, injury through, 1524.
- track and road bed, 1516-1528, e 3851-3856.
  - master must use ordinary care to see that they are safe, 1517.
  - sidings must not be in too close proximity to other structures, 1519.
- train leaving the track, injury to servants, 1520.
  - run at dangerous speed, failure to slacken speed, when able to do so, e 3904.
  - striking person repairing track, 1543.
- trying to escape peril, injured while so doing, e 3903.
- using cars without handholds, series, 1509.
  - handcar without a brake, 1540.
  - same kind of appliances as a specified number of other railroads, e 3844.
- voluntarily placing himself in place of danger between cars, 1604.
- what is a risk ordinarily incident to the employment, e 3882.
- when master liable in negligence in employing servant, 1555.
  - not liable for acts of fellow servant, 1554.
- where employe knows of dangerous condition, 1575.
- whether conductor and flagman are fellow servants, e 3877.
  - conductor represents the company, e 3877.
  - duty of employe to search for defect, e 3897.
  - road-master is fellow servant of one working on track, e 3879.
  - section-foreman is fellow servant of laborer, e 3878.
- yard master boarding moving engine, 1600.

[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—Continued.

MUNICIPAL CORPORATIONS, Chapter LXVI, 1609-1677, e Chapter CXLVIII, 3915-3948.

- absent minded driving—series, 1670.
- admissibility of evidence of other similar accidents at same place, 1636.
- automobile running into excavation in street, e 3925.
- bicycle rider—degree of care required, 1672.
- bridge—county not required to provide for extraordinarily, unreasonably heavy loads, 1663.
- care of pedestrian must be proportionate to the known danger, 1614.
  - streets and sidewalk must be in proportion to known danger, 1613.
- changing grade—injury to adjacent property, 1652, e 3933.
  - parties have right to change at discretion, 1653.
  - when liable and when not liable to the adjacent property owners, 1653.
  - whereby water flows on private property, 1654.
- changing water course through changing grade—when liable, 1654.
- circumstances to be taken into consideration in determining liability for defective walk, 1645.
- city council receiving report of city engineer whether amounting to ratification, e 3936.
- constructive notice, 1640-2.
- contributory negligence—burden of proof, 1675-6, e 3947.
  - circumstances to be considered—series, 1668.
  - crossing over road known to be dangerous, e 3946.
  - defeats recovery, e 3939.
  - defined, 1667.
  - falling into ditch, dug by plaintiff, e 3944.
  - intoxication as, e 3940.
  - not necessarily—passing over defective walk by bicycle rider, 1672.
  - person falling over wire in street, 1673.
  - placing oneself in position of danger, 1674.
  - what amounts to, e 3939.
  - while driving, e 3941.
- county only required to provide bridge to properly accomodate public at large, 1663.
- defect in street—necessity of notice to city, 1632.
- defective bridge, knowledge of traveller, 1666.
  - condition of bridge must be proximate cause, injury to horse, 1665.
  - plan of public improvements—liable for personal injuries, 1651.
  - sidewalks—notice, 1628-30.
    - when notice presumed, 1630.
- degree of care of city and traveller defined, 1671.
  - required on much travelled street, 1641.
- delegation by, to street railroad company, duty to keep streets safe, e 4160.
- digging ditch, damage to adjacent property, e 3935.
- do not insure safety, 1619.
- due care and caution required of persons passing over streets, 1667.
- duty of cities and villages to keep roads and bridges in repair, 1635, e 3926.
  - commissioners to construct bridges in workmanlike manner, 1664.
- duty to construct streets and to make them reasonably safe, 1617.
  - have notice or warning given of obstruction in street, 1627.
  - keep bridges in a reasonably safe condition, e 3917.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MUNICIPAL CORPORATIONS—Continued.**

- duty to keep sidewalks and crossings of suburbs reasonably safe, 1624.
  - streets in safe condition cannot be shifted to persons employed by city, 1620.
  - provide cards and notice where street is being improved, 1635.
- effect of knowledge of authorities that sidewalk is defective, 1643.
  - sidewalk becoming insecure from use or break, 1647.
- essential elements necessary to warrant recovery for defective sidewalk, 1639.
- fact that hole in street was filled with water may be considered on question of contributory negligence, 1634.
- failure to construct sidewalk in accordance with provisions of ordinance, 1646.
- fallen tree striking horse in street, causing injury, e 3934.
- falling in hole in sidewalk—contributory negligence—series, 1669, e 3928, 3931.
- flow of surface water on private property due to street railway operated on highway, 1659.
- for allowing sewer to remain out of repair, 1662.
- ice, accumulation of, on sidewalk in winter, 1649, e 3922.
- injury to adjacent property by change in grade, 1652.
  - child by defective sidewalk, 1650.
  - passenger, combined negligence of city and driver, e 3948n.
  - person driving on street in night, 1631.
  - through body of water on street and adjacent private property, 1656.
  - stick projecting over sidewalk, 1648.
- instructions not applicable to evidence, e 3928.
- joint liability of, with other defendants, e 3921.
- knowledge of person using defective sidewalk, 1671, e 3922, 3942, 3943.
- leak in water main—liable for damages to contiguous property, 1657.
- liability of, contradictory statements in instructions, e 3916.
  - when defect has existed for a long time before accident, e 3930.
  - intervening acts of third parties concur in injury, e 3920.
- liable for agents and servants, 1621, e 3919.
- damages to contiguous property by leak in water main, 1657.
- defective bridges, e 3937.
  - sidewalk, e 3926-3932.
- flow of surface water where no system of drainage extends, 1658.
- hole in street depends on locality of road, 1633.
- injuries at crossing constructed by private persons, 1622-3.
- knowingly permitting person to obstruct street, 1626.
- loss from flow of surface water occasioned by act of God, 1660.
- neglect to light bridges, e 3938.
- negligence of independent contractor, 1625.
- overflowing contiguous property in laying out streets, 1655.
- safety of streets while improvements are being made, 1637.
- loose board in sidewalk, 1671.
- must exercise reasonable care over walk constructed by private persons, 1622, 1623.
  - reasonable care to keep streets and sidewalks in reasonably safe condition, 1611, e 3917.
- must guard against elements reasonably to be anticipated, 1615.
  - have actual or constructive notice of defects in street or sidewalk, 1629, 1641, e 3922, 3923.
  - keep sidewalks and streets in repair and reasonably safe, 1616.
- necessity of notice to city of defect in sidewalk, 1641.
- need not provide access to private property, 1618.
  - put entire width of street in condition for use, 1618.



[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—MUNICIPAL CORPORATIONS—Continued.

- negligence—and accident combined—city liable for, 1610.
  - defined, 1667.
  - driver, 1677, e 3948.
- no defense that part of sidewalk was safe if the other defective, 1644.
  - liability without, 1613.
- not an insurer against injuries, 1611ne.
  - bound to put entire width of street in condition for use, e 3918.
    - to use utmost care for sidewalks, 1611.
- not liable for mere accident, 1609, 1619.
  - for slippery condition of sidewalk, 1611.
  - if person, in the exercise of ordinary caution could have passed over in safety, 1611.
  - unless they know of defective sidewalk, 1613.
  - where injury resulted from want of reasonable care or accident, 1613.
- not obliged to open streets, 1616.
  - required to exercise highest degree of care, 1619.
- notice presumed when, 3924.
- number passing over defective street may be considered in determining degree of negligence, 1641.
- obstruction in street without notice or warning, 1627.
- obstructions—when liable for in street, 1667.
  - when not liable, 1667.
- only bound to keep in safe condition for travel, that portion of street open for public travel, e 3918.
- ordinances of, duty of railroads to observe, 1879.
- ordinary care defined, 1667, e 3917.
- overflowing contiguous property in laying out streets, 1655.
- passing over defective walk not necessarily contributory negligence, 1672, e 3945.
- persons driving on street may presume it to be in reasonably safe condition, 1631.
  - falling over wire in street, 1673.
  - not bound to leave walk merely because he knows that it is defective, 1640.
  - on sidewalk or street may presume it reasonably safe for ordinary travel, 1640, e 3927.
  - passing along streets and sidewalks must use reasonable care, 1611, 1619, 1641, 1647.
- placing oneself in position of danger, 1674.
- presumption that streets and sidewalks are in a reasonably safe condition, 1631.
- required to keep streets and sidewalks in reasonably safe condition, 1619.
- sidewalks or street may be presumed to be reasonably safe for ordinary travel, 1640.
- slippery condition of sidewalk from accumulation of ice, 1649, e 3932.
- snow and ice negligently allowed to accumulate, does not create liability, when, 1614.
- speed of railroad train through city limited by ordinance, 1987.
- streets and walks should be kept reasonably safe, 1611, 1640.
  - include sidewalks, 1638.
  - open to use of the entire public, e 3915.
  - when liable for persons falling thereon, 1611.
- water plugs in streets duty of city, 1661.
- what is and what is not contributory negligence, 1669.
- when city deemed to have constructive notice of defect in sidewalk, 1642, e 3929.
  - liable for defective streets and sidewalks, 1641, 1671.
  - negligence of others, 1628.
  - personal injuries, 1622.
  - unsafe condition of streets, 1612.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MUNICIPAL CORPORATIONS—Continued.**

- when not liable for changing grade, 1652.
  - defective sidewalk, 1671.
  - negligence of others, 1628.
  - to persons injured, 1611.
- where defect of such a nature as could not be discovered by ordinary care city not liable, 1641.
- whole width of sidewalk should be kept in repair in populous district, 1644.

**PUBLIC HIGHWAYS—Chapter LXVI, 1678-1689, e Chapter CXLIX, 3949-3955.**

- allowing horse to stand unhitched, series, 1689.
- automobile running at greater speed than statutory rate, 1682.
- barb wire causing injury to horse, 1688.
- children riding on rear step of bus, duty of driver, e 3952.
- collision on highway, 1681, e 3951.
- constructing building so that snow and ice endanger traveler, 1683.
- contributory negligence in falling into man-hole, 1685.
  - of plaintiff, 1688.
- degree of care required of person passing over sidewalk, series, 1685.
- driving rapidly through a street of a city is not per se culpable negligence, e 3951h.
- falling through man-hole, ordinary care, contributory negligence, 1685.
- injury from falling barber pole through backing of wagon against it, e 3953.
  - runaway horse, series, 1689.
- obstruction of, by ashes or cinders, 1679.
  - construction of fence, 1673, e 3949.
  - horse and wagon, e 3950.
  - pile of cross-ties, 1680.
- rights of footmen and horsemen on public way equal, 1681.
- right of running automobile on highway, e 3954.
- sidewalk, injury, falling into man-hole, 1685.
  - opening used for raising and lowering baggage, 1686.
- unsafe condition of, e 3955.
- violation of ordinance as to fast driving, 1681.

**RAILROADS—Chapter LXIX, 1843-2011, e Chapter CLII, 4010-4116.**

see **STREET RAILROADS.**

- actions for killing live stock, 1971-1987, e 4087-4095.
- animals coming on track, so suddenly that accident could not be prevented, e 4092-4093.
- animal injured on track, burden of proof, 1981.
- apparatus to prevent escape of fire, 1998.
- approaching crossing at high rate of speed, e 4059.
- as charged in the declaration, e 4046.
- assault upon, person getting freight, 1942.
- assuming plaintiff a trespasser, e 4017.
  - risk of crossing railroad track, 1869.
- assumption that driver of vehicle will remain at safe distance, 1925.
- attempting to cross although view obstructed, e 4058.
- avoiding injury after seeing stock, 1973.
- backing cars after gate opened, 1894.
  - engine tender foremost, 1849.
- train through populous part of town, 1850, e 4010.
- bell, failure to ring when excused, 1880, e 4039.
- bridge over farm crossing, 2011.
- burden of proof, as to origin of fire from engine, e 4098.
  - as to ringing bell, 1985, e 4035.
- care due by railroad servants to avoid collision, 1855.
  - in operation of trains, e 4087-4095.
  - towards child on railroad track, 1852.
- care required in switching, 1899.
  - of railway travelers, 1902.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—RAILROADS—Continued.**

- care to avoid injuring stock, reasonable, 1986.
- toward watchman at crossing, 1897.
- casual breach in fence, 1964.
- cattle entering at point where fence not required, e 4084.
- getting on track from failure to lock gate in fence, e 4085.
- guards, 1967, e 4086.
- children, fencing track, 1970.
- circumstances determine whether contributory, unconscious person, 1959.
- comparative negligence, e 4080.
- comparing affirmative and negative testimony in regard to giving warning, e 4043.
- conduct in presence of sudden danger, 1929.
- consignee a trespasser, 1941.
- constant habit to stop, look and listen, 1913.
- construction of, injury to abutting property, e 4115.
- contributory negligence, 1945-1961, e 4066-4080.
- at crossing, 1950 e 4069.
- burden of proof, 1961, e 4078.
- cannot be imputed from fact that railroad gates were down, 1918.
- driving across track carelessly, 1955.
- law regulating speed, wanton misconduct, 1960.
- looking and listening for approach of trains before crossing, e 3944.
- no defense if defendant should have avoided injury after discovering peril, e 4073.
- of children, 1948.
- driver in crossing track will prevent recovery, e 4062.
- ordinary care, 1945.
- standing on track, 1952.
- crossings, giving warning at, as required by law, e 4035.
- greater caution where much used, 1864.
- made public by customary use, 1890, e 4027.
- must be put in safe condition, e 4024.
- preference in crossing, 1868.
- safe condition, 1862.
- whether negligence not to have flagman at, e 4046.
- crossing track at place other than customary crossing, care used by railroad, e 4013.
- in milk wagon, 1916.
- knowing that cars were shifted there, 1951.
- on bicycle, 1915.
- trespasser, 1859.
- death at crossing, proof must correspond with allegation, 1933.
- by cars insufficient to justify verdict, standing alone, 1935.
- dedication of lands, 2006, e 4113.
- defective bridge at farm crossing, e 4114.
- condition of crossing causing collision, e 4029.
- fence, stock escaping, 1969.
- degree of care due towards children on track, e 4014.
- discovery of approaching train in time to avoid, 1923.
- driving across track in a reckless manner, e 4072.
- with baby in arms, e 4053.
- lines hanging loose, 1926.
- driving upon track although view obstructed, 1919.
- duty in crossing another's track, 1937.
- of traveler to look and listen for approach of train at crossing, e 4052, 4055.
- to avoid injury after discovering live stock on track, e 4089.
- fence track, burden of proof, e 4083.
- furnish safe machinery, 1843.
- give warning by bell or whistle at crossings, e 4025.
- of approach of train, e 4030.
- keep lookout at crossings, e 4025, 4031.



[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—RAILROADS—Continued.

- duty to keep track and right of way free from dry grass and weeds, e 4103.
  - look and listen excused, 1914.
  - look out for persons on track, e 4015.
  - maintain gates or flagman at railroad crossing, 1891.
    - look out for licensees on track, 1860, e 4022.
  - observe ordinances, 1879.
  - operate train to prevent killing live stock, e 4087.
  - passengers, engineer, 1972.
  - provide reasonably safe crossings, e 4025.
  - ring bell, e 4038.
    - and blow whistle, e 4052.
    - duty of person crossing track, 1882.
  - shippers and consignees, 1939-1942.
  - use reasonable care to avoid injuring person on track, e 4012.
- duty toward helpless person on track, 1853.
  - shipper loading cars, 1939.
- effect of plaintiff's deafness, e 4076.
  - using proper spark arrester, e 4100.
- ejection of trespasser from moving train, e 4020.
- elements, injuries by fire, 1994.
  - of liability, heifer killed, 1975.
    - negligence in injuries by fire, e 4096.
- engine following train at short distance, e 4011.
- engineer and fireman bound to use reasonable care at highway crossings, 1871.
- engineer's failure to see stock when he should, 1979.
- establishment of plantation roads, 2008.
- examination of defective gate by jury, e 4085.
- expelling person from car, 1944.
- extraordinary lookout, 1873.
- eye witness as to care and caution of injured party, 1949.
- failure of employe to avoid injury when possible, 1896, e 4051.
  - of engineer to see animals on track, e 4088.
    - person to stop, look and listen, 1911.
- to discover approaching train, e 4071.
  - fence track, negligence per se, e 4081.
  - give signals, traveler not excused from using ordinary care, 1905.
  - give warning, e 4010.
  - hear noise of approaching train, e 4060.
  - heed signal of train, 1922.
    - watchman's signal to stop, 1924.
  - lower gates, e 4049.
  - restore highway to its former condition, e 4065.
  - ring bell, e 4063.
  - select the best place to stop, look and listen, 1912.
  - sound whistle or ring bell, 1885, e 4049.
  - stop, look and listen, e 4056.
  - use most approved apparatus to prevent escape of fire, 1999.
- fencing track,*
  - benefit of children, 1970.
  - live stock, 1962-1969, e 4081-4086.
  - reasonable care, 1963.
  - statute, 1962.
- flagman motioning to cross, effect of, e 4048.
  - necessary at crossing, 1892.
  - signal will not excuse want of ordinary care, 1906.
  - signaling not to cross, effect of, e 4049.
- frightening horses by blowing steam from engine at crossing, e 4034.
  - by blowing whistle unnecessarily, e 4033.
  - ordinary noise, 1875.
  - unloading cinders, 1876.

[References are to sections; e refers to Erroneous Instructions.]

NEGLIGENCE—RAILROADS—Continued.

- wanton defined, 1874.
- going at high rate of speed, unable to stop, causing injury to live stock, e 4093.
- forward in spite of obstruction and noise, 1920.
- guilty as charged in declaration, 1866, e 4028.
- high speed, want of ordinary care, 1903.
- highway crossing, elements considered, 1872.
- horse injured in flangeway, 1890.
- on track, reasonable care, 1977.
- imputed negligence, parent and child, e 4079.
- inferred from injury at crossing, ordinances, 1934.
- injuring person on track, 1851.
- injuries at highway crossings, 1862-1938, e 4024-4065.
- employe operating hand car for private use, 1901.
- through horse balking, 1898.
- injuries by fire*, 1988-2004, e 4096-4113.
- burden of proof, 1991, e 4109.
- care to prevent escape of sparks, 2004.
- contributory negligence of land owners, e 4111.
- degree of care required of land owners, e 4110.
- dry weeds and grass, 2000.
- duty in unusual and extraordinary weather, e 4106.
- of land owner, 2002.
- necessity of engines emitting sparks, heavy grade, 1995.
- not conclusive evidence, 1989.
- origin conjectural, 1990.
- of fire not to be left to conjecture, e 4097.
- precautions to be taken in dry or windy weather, e 4104.
- prima facie face, 1988.
- rule in South Carolina, 1993.
- Texas as to instructions, 1992.
- speed of engine, e 4096.
- injury through team being unmanageable*, 1927.
- to adjacent land and properties, e 4115-4116.
- adjoining property by noise and unsightly structures, e 4116.
- consignee, while unloading car, 1940.
- cotton by fire, engine running at excessive speed, e 4102.
- live stock at crossing, 1974, e 4090-4091.
- failure to give warning, e 4090-4091.
- unsuitable cattle guard, e 4094.
- trespasser getting off moving train, e 4021.
- turf after grass burned, 2001.
- intoxication as contributory negligence, e 4075.
- jury may infer that engineer saw person on track, e 4016.
- "kicking" car, willful, 1895.
- killing cattle from failure to fence track, e 4082.
- live stock, 1971-1987.
- burden of proof, e 4095.
- knowledge of proximity of engines, contributory, 1954.
- less care at farm crossings, 2009.
- liability as to trespassers, 1856, e 4018.
- for failure to give warning, e 4042.
- licensees, 1860-1861, e 4022-4023.
- looking out back of buggy only when crossing track, 1917.
- lookout for horses on track, 1976.
- on down grade, 1854.
- lulling plaintiff into a feeling of security by failure to give signals, e 4042, 4044.
- machinery and appliances, 1843-1845.
- maintenance of track, 1846.
- making flying switch at crossing, e 4050.
- malicious use of appliances by servants, 1844.
- must exercise reasonable care in driving across track, e 4067.
- necessity of greater caution at crossing in populous district, e 4026.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—RAILROADS—Continued.**

- need not blow whistle and ring bell at same time, e 4040.
- continuously, e 4041.
- neglect to ring bell, etc., stock injured at crossing, 1984.
- negligence generally a question for the jury, e 4056n.
- per se in traveler, 1928.
- no eye witness to killing by train, presumption of due care by deceased, e 4064.
- gate-keeper, traveler not excused from using ordinary care, 1904.
- noise of approaching train as substitute for blowing whistle or ringing bell, e 4060.
- obligation to fence right of way, 1966, e 4082.
- observance of ordinances, effect of, e 4035.
- obstructing highway by cars, 2005.
- view of crossing, running train at great speed, 1878, e 4032, 4045.
- open gate invitation to cross, 1893.
- operation and management of trains, 1848-1885, e 4010-4016.
- parent and child, imputed, 1931.
- persons crossing track in safety not proof of safety of crossing, 1865.
- crossing tracks should stop, look and listen, 1910.
- may assume that ordinance as to ringing bell will be obeyed, 1883.
- must use faculties in proportion to the known danger, 1909.
- place of injury to stock, burden of proof, 1983.
- placing obstruction on track, reasonable doubt, e 4819.
- plaintiff building on right of way, injury by fire, 2003.
- must exercise ordinary care for his own safety, 1947, e 4063, 4066.
- not bound to highest degree of care, 1946.
- discovering approaching train, 1953.
- plaintiff's knowledge of dangerous character of crossing, e 4054.
- possibility of avoiding injury, 1958.
- power to foresee consequences of fire, e 4108.
- presumption of due care by deceased, 1936.
- negligence from failure to obey ordinance, e 4036.
- from sparks escaping from engine, e 4098.
- that party crossing railroad track stopped, looked and listened, 1921.
- production of screen for inspection of jury, injuries by fire, e 4101.
- providing engine with approved apparatus for preventing escape of sparks, e 4098-4099.
- rate of speed of railroad trains, 1848.
- reasonable care at highway crossings, 1863.
- to prevent spread of fire, 1997.
- reasonable rules, 1943.
- reckless conduct of plaintiff not necessarily a defense, e 4077.
- removing switch supposed to be permanent, measure of damages, 2007.
- repairs at street car crossings, 1938.
- rescuing child on track, e 4068.
- revocation of license to cross railroad track, 1861.
- riding on coal car without consent, 1957.
- on loaded freight cars belonging to another carrier, 1765.
- upon locomotive, 1956.
- ringing bell, when excused, 1880, e 4039.
- right of adjoining land owner to stack straw near right of way, injuries by fire, e 4112.
- of employe to assume that driver will remain at safe distance from crossing, e 4061.
- of way unfenced six months, 866.
- to raise and lower tracks, 1900.
- rights and liabilities of railroad and travelers at crossings are equal and mutual, e 4030.



[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—RAILROADS—Continued.**

- rights of licensee, e 4023.
    - railroads and travelers, 1867.
  - rules and regulations, 1943-1944.
  - running engine past cotton yard, 1996.
    - train over crossing at greater speed than allowed by ordinance, e 4036.
  - signal at crossing made public by use, 1890.
  - signals at private crossings, 1889.
  - sparks of coal from engine causing fire, e 4096.
    - of unusual size and number being carried an unusual distance, e 4105.
  - speed of train in absence of ordinance, 1881, e 4037.
  - through cities and villages, limited by ordinance, 1987.
  - standing on track, duty to look and listen, e 4070.
  - starting car without appliance to stop, 1845.
  - stock injured at farm crossings, 2010.
    - killed, care due in operation of trains, 1971.
    - running at large, 1965.
  - sudden coming of stock on track, 1978.
  - suit for failure to give signals, recovery must be for same, 1888.
  - surrounding circumstances, 1930.
  - switches and farm crossings, 2007-2011, e 4114.
  - ticket window closed, excuse for passenger not buying ticket, 839.
  - track a proclamation of danger, 1908.
    - and roadbed, 1843-1847.
    - once fenced, plaintiff's negligence, 1968.
  - train not on schedule time, stock, 1982.
  - trespasser, 1856-1859, e 4017-4021.
    - getting on moving train, 1858.
  - turning back toward track on sudden approach of train, e 4074.
  - turntable attraction for children, 1847.
  - vehicle crossing tracks, contributory, 1932.
  - violating speed ordinance, 1880.
  - voluntarily crossing over to dangerous place, 1907.
  - wanton injury to trespasser by brakeman, e 4019.
  - warning on approaching crossings, 1870.
  - watchman at crossings, care to be exercised, 1897.
    - standing at crossing whether sufficient warning, e 4047.
  - weeds obstructing view of track, 1877.
  - when duty to stop, look and listen is excused, e 4057.
    - failure to ring bell excused, 1884, e 4039.
    - there is no speed ordinance, 1881.
  - whistle blown at insufficient distance from crossing, 1887.
    - need not be blown continuously, 1886.
  - willful and wanton misconduct, toward trespassers, 1857.
- STREET RAILROADS—Chapter LXX, 2012-2113, e Chapter CLIII, 4117-4182.**
- admissions of plaintiff, e 4120.
  - admitting written rules of company in evidence, e 4134.
  - alighting from car, evidence of previous method of alighting, e 4154.
    - passenger struck by car coming from opposite direction, 2047.
  - as alleged in the declaration, e 4121, 4152.
    - carrier of passenger, by street railroads, 2020-2076.
  - assaults on passengers by company's servants, 2054.
  - assumption of risks by employees, poles being too near tracks, 1459.
  - bicyclist falling under fender of car, e 4173.
  - burden of proof, degree of care, 2022, e 4177, 4179.
    - slowing down for passenger to board, 2035.
  - car colliding with buggy, e 4164.
  - care due infant trespasser, 2080.
    - due persons in vehicles along track, 2079.
    - of road beds and tracks, 2083.
  - carriers of passengers, degree of care required, 2020.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—STREET RAILROADS—Continued.**

- carrying passenger past destination, 2052.
- cars and appliances, 2084.
- change of jurisdiction over highway from county to city, 2014.
- child run over, 2098.
- collision between street car and fire engine, e 4130.
  - between street cars and vehicles, e 4130, 4148, 4169, 4182.
  - caused by wet or slippery rail, e 4128.
  - injuring passenger, presumption of negligence, e 4132.
  - with other street cars, 2096.
    - other vehicle, fire department, 2028.
  - person, 2097, e 4172.
    - vehicle passing along the track, e 4182.
    - failure of driver to use reasonable care, e 4182.
- conductor failing to see intending passenger, 2038.
  - must see that no passenger is in act of alighting, 2043.
- contributory negligence.*
  - burden of proof, e 4120, 4179.
- deliver message, e 4183.
  - as to children, 2102.
  - intoxication, 2103.
- care due by driver of vehicle crossing track, ordinary care defined, 2107.
- collision of bicyclist with car, 2105.
- deafness of passenger, 2065.
- driver of vehicle, 2110.
- getting off moving street car, 2072.
- getting on moving car, 2071.
- injury avoidable nevertheless, 2109.
  - by trailer, 2074.
- jumping from moving car at command of conductor, 2073.
- of passengers, 2062, e 4143.
- passenger injured, trying to escape from imminent danger, 2075.
- payment of fare in genuine coin, 2076.
- persons other than passengers and employes, 2100.
- rule in Tennessee, e 4178.
  - that burden of proof is on defendant, 2101.
  - to stop, look and listen, 2104.
- crossing in front of approaching car, e 4181.
- crossings, fire engines crossing track, 2095.
  - vehicles crossing track, 2094.
- degree of care due passengers, e 4121.
  - due pedestrian, 2077.
  - not insurers, 2021.
- delegation by city to street railroad company the duty to keep street safe, e 4150.
- derailment of car, presumption of negligence, e 4131.
- dress of plaintiff caught on bolt contributory negligence, e 4145.
- driving across tracks at crossing, collision, e 4177.
  - street car into wagon near the track, e 4163.
- duty not to start car until passengers are safely off, e 4136.
  - of passenger to obey instructions, e 4126.
    - pedestrian to look out for approaching street cars, e 4177.
  - on seeing approaching cars, 2048.
  - to afford reasonable opportunity of taking small children from car, e 4134.
    - avoid injury to dogs on track, e 4176.
    - exercise highest practicable care, diligence and skill for safety of passengers, e 4123.
    - have tracks and switches in reasonably safe condition, e 4127.
    - look out for persons and vehicles upon the car, e 4169.
    - provide reasonably safe cars, e 4121.
      - safe access to seats on car, e 4122.
      - safe track, road bed and car, e 4122.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—STREET RAILROADS—Continued.**

- duty to remove snow and ice from track, e 4161.
- stop car or check speed to avoid injury, e 4174.
- stop, look and listen, e 4180.
- electric wires, utmost degree of care in construction and maintenance of, e 4162.
- entering car without transfer through fault of first conductor, 2061.
- fact of injury admitted and assumed on both sides, 2018.
- failure of conductor to warn of danger unknown to passenger, 2045.
  - of conductor to warn passenger of danger, known to conductor but not to passenger, e 4137.
- to check reckless speed of approaching car, 2049.
  - check speed when danger imminent to person on track, 2099.
  - have both motorman and conductor on the car at the time of injury, e 4140.
- inform of injury, 2016.
  - keep watch for persons and vehicles, e 4166.
  - provide power for proper headlight, e 4164.
  - ring the gong, e 4166.
  - sound bell running into covered wagon, e 4163.
  - take hold of hand rails while alighting, e 4153.
  - use brakes, running into wagon, e 4163.
- frightening animals, car not operated in ordinary manner, 2091.
  - car operated in ordinary manner, 2090.
- getting off moving car, comparative negligence, e 4151.
  - on moving car not necessarily contributory negligence, e 4149.
- giving wrong transfer, 2060.
- going upon track without warning to motorman, 2108.
- high rate of speed, e 4166-4167.
  - causing injury, e 4129.
  - circumstances, 2025.
  - collision with vehicle crossing track, e 4171.
  - jumping from car, thrown from platform, 2026.
- highest degree of care and caution reasonably consistent with practical operation of car, e 4148.
  - and foresight for safety of passengers, consistent with practical operation, e 4121.
- horses of company running away, causing injury, e 4175.
- imputable, parent and child, 2113.
  - rule in Illinois, 2111.
  - Wisconsin, 2112.
- in general, 2012-2019, e 4117-4120.
- information of injury, 2015.
- injuries due to mere accident, 2012.
  - through panic of passengers produced by explosion on car, 2033.
  - to passenger, defective condition of vehicle, 2029.
    - passenger trying to escape from apparently imminent danger, e 4156.
- inspection of vehicle, 2030.
- intoxication as contributory negligence, e 4155.
- joint liability with other individuals or corporations, 2082.
- knowledge that plaintiff is boarding car, starting violently, 2037.
- lawfully operated on highway, causing flow of surface water to adjacent property, city liable, 1659.
- letting running board extend over sidewalks, 2087.
- liability, as carrier of passenger, 2020-2076.
  - for injuries to persons other than passengers or employes, e 4157-4182.
  - injuries to persons other than passengers or employes, 2077-2113.
  - negligence as carriers of passengers, 2020-2076, e 4121-4156.



[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—STREET RAILROADS—Continued.**

- malicious acts of conductor, e 4158.
- measure of damages for personal injury, e 4146.
- men in charge responsible for movement of car, 2042.
- mere happening of accident as presumption of negligence, e 4125.
- negligence defined, e 4117.
  - must be the proximate cause of injury, e 4118.
  - of street car company and third person contributing to injury, joint liability, 4159.
  - which did not contribute to injury, e 4144.
- negligent management or operation of car, causing injury to passenger, e 4127.
- no prejudice to exist against, e 4119.
- noise of car frightening horses, e 4168.
- not an insurer of safety of passengers, e 4122-4123.
  - liable for mere accident or misadventure, 2078.
  - negligence per se to cross in front of an approaching car, e 4177.
- obeying instructions to move to another part of car, 2070.
- omission to perform duty, e 4117.
- ordinary care defined, e 4152.
- over-crowding car, 2053.
- own cars colliding, 2027.
- passenger alighting near parallel track, 2046.
  - burden of proof, e 4124.
  - defining degree of care as to facts not in issue, e 4123.
  - falling off car, run over by following car, e 4138.
  - injured by own misconduct, 2023.
  - jumping from car, to escape blow by conductor, e 4156.
  - raising umbrella while alighting, 2050.
  - stepping from car, sudden jerk of car, burden of proof, e 4135.
  - to exercise ordinary care in alighting from car, e 4150, 4152.
  - use all human care, vigilance and foresight could reasonably do in view of mode of conveyance adopted, e 4121.
- pedestrian passing over tracks at street crossing, e 4170.
- personal injury, equipment, management or operation of vehicle, 2024.
  - part of ordinance withdrawn from jury's consideration, 2019.
  - posted warnings in cars, 2057.
  - prejudice against corporation, reading instructions by lawyers, 2017.
  - presumptive liability, passenger injured through collision, 2032.
  - when car derailed, 2031.
- proximate cause of injury, 2013.
- rate of speed, 2088.
  - duty to infant trespassers, 2089.
- reasonable care of driver of vehicle near track, 2106.
- regulations as to transfers, 2059.
- relative rate of speed in city and suburb, e 4166.
  - rights of persons using the streets, e 4157.
- riding on running board, contributory, 2069.
- right of company for free passage of its cars, e 4169.
  - vehicles to be on street car track, e 4169.
  - way of car over other vehicles, collision, 2092, e 4169.
- ringing bell to go ahead while passenger is alighting, 2044.
- rule to stop only at further crossing, e 4139.
- running cars on wrong track, e 4165.
- separating colored passengers, 2058.
- slowing down for passenger to board, car suddenly started, 2034, 2041.
- sounding bells and gongs, 2085.
- standing on platform, e 4146.
  - by direction of employes, contributory negligence, 2068, e 4147.
  - car overcrowded, contributory negligence, 2066, 2067.
- standing on running board of car, e 4148.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—STREET RAILROADS—Continued.**

- starting car while passenger is alighting, 2040, e 4134.
- while plaintiff is boarding, taking hold of hand rail, 2036, e 4133.
- states holding burden on plaintiff to prove freedom from contributory negligence, 2063.
- requiring defendant to show contributory negligence of plaintiff, 2064.
- stranger ringing bell and starting car, 2039.
- street crossings, pedestrians, 2093.
- switch thrown by unauthorized act of stranger, liability of company, e 4142.
- use of more force than necessary in ejecting passenger, 2056.
- proper brakes, 2086.
- vehicles crossing track, e 4171.
- violation of ordinance, 2081.
- warnings, posted in cars, e 4141.
- what jury may consider in determining whether passenger exercised care in alighting from car, e 4150.
- when relation of passenger and carrier ceases, backward movement after alighting, 2051.
- whether speed was the proximate cause of injury, e 4167.
- wrongful ejection of passenger, 2055.

**TELEGRAPH COMPANIES—Chapter LXXI, 2114-2123, e Chapter CLIV, 4183-4186.**

- care due while working with cable above public street, 2121.
- required of lineman while working near electric wires, 2122.
- duty of company to make prompt delivery of telegram, 2115, e 4183.
- failure to consummate business deal through non-delivery of telegram, 2119.
- in delivery of telegram, defined, 2114.
- incorrect or insufficient address non-delivery, 2117, e 4184.
- knowledge of agents of telephone company as to purpose of call, 2118.
- of agents as to purpose of telegrams, e 4185.
- importance of message, e 4186.
- no duty on agent to disclose agency to company, 2120.
- not insurer of absolute safety and accuracy of telegrams, 2116.
- presumption of danger from electric wires, 2123.
- to exercise ordinary and reasonable diligence to find plaintiff and deliver message, e 4183.

**MISCELLANEOUS—Chapter LXXII, 2124-2133, e Chapter CLV, 4187-4192.**

- architect's liability for negligence, materials, e 3437.
- boiler, damage caused by overflow, 2127.
- causing death, damages—See DAMAGES.
- coal-mine operator—words of statute as to keeping supply of timber on hand to secure workmen, 990.
- collision of ships, e 4192.
- contributory, malpractice by patient in action for, 1303.
- malpractice, duty of patient to co-operate with doctor, e 3722.
- purchaser guilty of, expression of opinion may amount to warranty, e 4253.
- damage from ditch built on one's own land, 2130.
- danger from fire, escape of sparks, mill, 2128.
- defective scaffold, elements to be proven, burden of proof, preponderance 2132.
- degree of care by electric light company, e 4189.
- druggists, malpractice, e 3726.
- duty of auctioneer to exercise due care as to safety of place in which sale is held, e 4188.
- of owner of coal mine to fence shaft, 2126.
- employe, fire insurance, sprinklers, e 3669.
- furnishing unsafe artificial light, 2125.
- gas company, break in gas pipe, 2124.
- hogs infected from following other hogs, 2133.
- in signing contract without reading, e 3476.

[References are to sections; e refers to Erroneous Instructions.]

**NEGLIGENCE—MISCELLANEOUS—Continued.**

- injury caused by cable or guy wire, e 4190.
- leaving blank spaces in written instrument, e 3434.
- logs, degree of care required in driving, 2131.
- may be inferred from facts and circumstances, malpractice, 1303.
- mines, duty to sprinkle and clean roadway, e 4191.
- duty to take precautions against explosions, e 4191.
- statutory duty of care in, e 4191.
- of counsel in perfecting appeal, 294.
- warehousemen not presumed from mere loss of goods, 561.
- onus of proving absence, extraordinary freshet, act of God, 2362.
- or want of skill causing loss by architect, 516.
- personal injuries to child through bar of iron on recklessly driven wagon, 1687.
- president or director of bank liable only for his own, e 3456.
- proper care and diligence defined, e 4189.
- recovery of proof of allegations contained in one or more counts of declarations, e 3745.
- should not charge jury with respect to matters of fact, e 4192.
- starting fire, injury to trees, 2129.
- tram cars running down slope and injuring licensee, e 4187.
- trespass, mere happening of accident does not justify award of damages, e 4275.

**NEGOTIABILITY—**

- of life insurance policy, 1205.

**NEGOTIABLE INSTRUMENTS—Chapter LXXIII, 2134-2193, e Chapter CLVI, 4193-4220.**

- acceptance of draft without bill of lading, 2142.
- of order to pay money, admission, e 4199.
- accepting draft upon false representations, 1126.
- accommodation paper, 2161.
- action on bond, recoupment, 2139.
- agreement as to security, secret understanding, e 4205.
- alteration of, 504, e 4220.
- assignee after maturity, 2166.
- with notice from an assignee without notice, 2170.
- of suspicious facts, 2167.
- authority of president of corporation, release of liability, e 4195.
- balance on account, credits, 2140.
- bona fide holder, note vitiated, 2169.
- purchaser, filling of blank, appearance of note irregular, e 4219.
- burden of proof of settlement, e 4211.
- check given in payment of note, verdict based on single fact, statute of limitations, e 4200.
- consideration, forbearing suit on note, 2159.
- for guaranty, 2187.
- settlement of criminal charge, 2160.
- what notice sufficient to put on guard, bound to make inquiry, e 4216.
- construing contract as legal rather than illegal, other evidence to be considered, e 4206.
- conversion of note, excuse for non-delivery upon demand made, e 4210.
- corporation note for previous indebtedness, liability of directors, e 4194.
- co-sureties, partners, 2190.
- defendant inducing plaintiff to buy note, estoppel, 2150.
- drawing checks without funds, 1126.
- duress, abuse of criminal process, 2152.
- burden of proof, preponderance, e 4213.
- ratification of voidable note, 2153.
- threats of imprisonment, 2151.
- endorsement before maturity, innocent holder, 2176.
- constitutes prima facie liability, 2181.
- in blank, 2175.
- intention, liability, 2177.



[References are to sections; e refers to Erroneous Instructions.]

# NEGOTIABLE INSTRUMENTS—Continued.

- evidence necessary to overcome presumption of good faith in assignment, 2173.
  - of gift of note, 2138.
  - required for recovery, 2135.
- execution and delivery, burden of proof, 2143.
  - or payment upon mistake of fact, e 4201.
- extension of time, 2180.
- financial standing, argumentative, e 4202.
- forgery, overstating maximum penalty, e 4605.
- fraud may be waived, 2149.
  - mistake, unable to read, relying on another, 2146.
- genuineness of note, forgery, who must prove, e 4207.
  - signature, bona fide holder, 2144.
  - delay in payment, e 4208.
- guarantor, liability generally, 2183.
  - liable till note is paid, not released by delay, 2185.
- guaranty, acceptance, knowledge thereof, 2189.
- illegal consideration, 2157, e 4215.
- immaterial change, 509.
- inference of fact for jury, failure to put revenue stamp on note, e 4198.
- innocent purchaser, security for pre-existing debt, 2171.
- joint liability, 2137.
- knowledge of defects or want of consideration, e 4214.
- liability of endorsers, due diligence, bringing suit, 2178.
  - principal and surety, 2141.
- lien of surety, bills of lading held by title to goods, 2192.
  - title to goods, 2191.
- material alteration of, 507.
- memorandum notes, construction of writing, e 4203.
- must use reasonable care to avoid imposition, 2148.
- new party, new consideration, 2182.
- notes due bank may be paid out of deposit, 569.
  - given by fraudulent purchaser for goods, fraud, 1116.
  - in payment for property, 2165.
  - stolen or wrongfully obtained, 2174.
  - taken in payment or part payment of existing debt, 2172.
- options, gambling, e 3473.
- partner signing firm name, 2205.
- partnership note, dissolution of firm, knowledge of by payee, e 4196.
- payment, burden of proof, 2162.
  - deception as to ownership of note, 2163.
- possession of personal property evidence of ownership, 2193.
- presumptions in favor of holder, 2134.
- prima facie case, proof of execution, e 4193.
- proof of insolvency, return of officer not conclusive, 2188.
- protest, demand of payment, 2164.
- purchaser in good faith not bound to see to application of funds, e 4217.
- purchasing notes at discount, e 4209.
- receipt of payment, genuineness of signature, 2145.
- release of guarantor, extending time, surety, 2186.
- return of officer not conclusive, diligence unavailing, 2179.
- settlement of old debt, consideration, 2156.
- signature obtained through artifice or fraudulent representations, 2147.
- signed in blank may be filled in afterwards, 508.
- usury, 2136, e 4204.
- varying written contract by parol, must ratify all agent's transactions or none, e 4197.
- void consideration, liquor sold on Sunday, note executed on Sunday, 2158.
- waiver of fraud, ratification, e 4212.
- want of consideration, 2154.
- what constitutes innocent holder, 2168.

[References are to sections; e refers to Erroneous Instructions.]

**NEGOTIABLE INSTRUMENTS—Continued.**

- is insufficient to amount to notice, e 4218.
- when endorser a guarantor, Illinois, 2184.
- made by agent with plaintiff's consent, 505.
- where one of two innocent persons must suffer, 509.
- "worthless" and "doubtful" notes, 2155.

**NEIGHBORHOOD—**

- residence, factory a nuisance, 2194.

**NERVOUS PROSTRATION—**

- induced by dwelling upon claim not to be considered in assessing damages, 910.

**NEXT OF KIN—**

- and widow—measure of damages in actions for causing death, 972.
- in actions causing death—what must be proven, 980.

**NEVADA—**

- statute relating to instructions, 153, p 137.

**NEW MEXICO—**

- statute relating to instructions, 153, p 137.

**NEW PARTY—**

- negotiable instruments, new consideration, 2182.

**NEW PROMISE—**

- debt revived by, 1252.
- to perform legal obligation is without legal consideration, 622.
- what is not in order to revive debt from statute of limitations, 1252.

**NEWSPAPERS—**

- reading of matter in, perjury, swearing to lack of knowledge, e 4794.
- should not influence jurors, e 3387.

**NEW TRIAL—**

- correcting error, twice putting in jeopardy, e 4504.
- facts learned concerning juror after trial which could not have been used on challenge for cause of juror not ground, 33.
- once tried for murder and convicted of manslaughter, not again tried for murder, e 4477.
- points not included in motion for, waived, 262.

**NEW YORK—**

- code, order in which issues considered, murder in first degree, 2991.
- personal examination as evidence not allowed, 151.
- reasonable doubt defined, 2665.
- statute relating to instructions, 153, p 137.

**NIGHT—**

- protraction of trial over, 219.

**NIGHT TIME—**

- burglary must be in, e 4560.
- defined, 2788.
- or day time, burglary, 2884.

**NOISE—**

- element of damage for causing nuisance, 794.
- of passing trains affecting value of land, e 3548.
- ordinary railroads frightening horses, 1875.

**NOMINAL DAMAGES—**

- defined, 869.
- polluting watercourse, e 4231.

**NON-COMPOS MENTIS—**

- improvidence or want of success in business not evidence of insanity, 615.

**NON-PERFORMANCE—**

- ground for, sale of real estate, e 4232.

**NORTH CAROLINA—**

- error to submit defendant, a negro, for inspection of jury, 150.
- murder and malice defined, 2957.
- in second degree, 3008.

[References are to sections; e refers to Erroneous Instructions.]

**NORTH CAROLINA—Continued.**

statute relating to instructions, 153, p 137.  
weighing defendant's testimony, e 4384.

**NORTH DAKOTA—**

statute relating to instructions, 153, p 138.

**NOT GUILTY—**

plea of, what in issue, 2776.

**NOTARY PUBLIC—**

deeds, presumption as to truth of contents of certificates, e 3621.

**NOTES—See NEGOTIABLE INSTRUMENTS.**

bona fide holder, what vitiates in his hands, 2169.  
deception as to ownership of, offer to pay, 2163.  
defendant inducing plaintiff to buy, estoppel, 2150.  
forbearing suit on, negotiable instruments, consideration, 2159.  
forgery of, overstating maximum penalty, e 4605.  
given by partner, presumption, burden of proof, 2208.  
in payment for property, 2165.  
on Sunday, liquor sold on Sunday, void consideration, 2158.  
guarantor liable till paid, not released by delay, 2185.  
of partnership, dissolution of firm, knowledge of by payee, e 4196.  
partnership given for personal indebtedness, e 4222.  
paid by check, verdict based on single fact, statute of limitations, e 4200.  
partner signing, in firm name, 2205.  
purchasing at discount, e 4209.  
stolen or wrongfully obtained, 2174.  
taken in payment of existing debt, innocent purchaser for value, 2172.  
treasurer pledging bonds in security for, embezzlement, intent, 2932.  
"worthless" and "doubtful," 2155.

**NOTICE—**

actual or constructive, municipal corporations must have to be held  
liable, 1628-1630, e 3922, 3923.  
carrier should be notified, if baggage contains articles of special  
value, 1834-1835.  
constructive, 1060.  
as to defective side-walk, 315, e 3929.  
dissolution of partnership, dealing with firm without, e 4224.  
liability of particular partner, credit extended on his account,  
2211.  
means of learning and neglect to use same, e 4225.  
when necessary, what sufficient, 2215.  
knowledge of facts and circumstances from which fraudulent in-  
tent may be inferred, 1072.  
fraudulent purpose of seller, 1074.  
negotiable instruments, assignee having, suspicious facts, 2167.  
assignee with, from assignee without, 2170.  
what is insufficient to amount to, e 4218.  
sufficient to put on guard, bound to make inquiry, e 4216.  
of adverse possession, 433.  
agister's lien, e 3732.  
appeal, 293.  
failure to give, 293.  
cancellation of insurance policy, 1202.  
defect in engine, liability of railroad company, 1513.  
in title to real estate, heirs, facts calling for inquiry, 2228.  
servant continuing to work in dangerous place, 1467, e 3826.  
promise to repair, right of servant to remain a reasonable  
time, 1468.  
to repair, reliance upon promise, 1467.  
defective machinery, superintendent assuring servant machine is  
all right, 1470.  
fraudulent intent, 1060.  
purpose, such facts as would lead a man of ordinary prudence  
to a knowledge of, 1313.



[References are to sections; e refers to Erroneous Instructions.]

**NOTICE—Continued.**

- inability to pay, life insurance, fraternal society, default of sick member, e 3680.
- landlord's lien, bona fide purchaser, e 3734.
- lien for advances, 1327.
- limitations in articles of partnership, necessary to bind third persons, e 4223.
- limited authority of agent, e 3413.
- resale, refusal to take residue of goods ordered, 2258.
- rules of board of trade, recovery of commissions, e 3471.
- sale under lien for storage, e 3731.
- putting a prudent man upon enquiry, 1060.
- to agent, is notice to principal—when, 475.
- is usually notice to principal, 476.
- of two principals—not notice to each, 477.
- to constitute, description in mortgage must be sufficient, 1312.
- corporations, estoppel, 2422.
- municipal corporations of defects in streets to presume when, e 3924.
- stop manufacturing, effect on damages for breach of contract of sale, e 3509.
- what is sufficient, of fraudulent intent, 1072.

**NUISANCES—Chapter LXXIV, 2194-2198.**

- church property, railroad shops in neighborhood, 2197.
- damage—measure of, 792-794.
- smoke, noise, smell, etc., 794.
- which causes the value of plaintiff's property to be reduced, 792.
- erection of boiler near house of another, 792.
- liability of owner for maintaining dangerous pit, adjoining highway, 2196.
- maintenance of factory, residence neighborhood, 2194.
- measure of damages for causing, 792.
- for maintaining, 793.
- polluting stream, coal refuse, 2198.
- smoke and soot from stationary steam engine, 2195.
- noise, smells, etc.—damages, 794.
- steam and cinders an element of damages, 792.
- unhealthy condition of basement of leased premises, liability for rent, 1236.
- what jury may consider in assessing damages, 792.
- which causes the value of neighboring property to be reduced, 792.
- increase the value of neighboring property—no damage, 794.

**NUMBER—**

- of parties interested in larceny, only one indicted, e 4789.
- witnesses, number of, does not necessarily make preponderance, 355.

**OATH—**

- attorney should not administer to client, 115.
- form of, 115.
- of witness not conclusive, 370.
- of affirmation of witnesses, 115.
- perjury, authority of officer administering must be shown, 3265.

**OBJECT—**

- of evidence as to commission of other crimes, evidence should be limited to, e 4344.
- law, as to reasonable doubt, e 4432.

**OBJECTIONS—**

- abstract of record must show, 318.
- failure to make, account of partnership presented, settlement, e 4229.
- retention of account stated without, e 3398.

**OBJECTORS—**

- burden of proof on, e 3348.

**OBLIGATION TO FENCE—**

- railroads, not limited to adjoining owner, 1966.

[References are to sections; e refers to Erroneous Instructions.]

**OBLITERATING—**

sense of right and wrong, insanity, 2575.

**OBSERVATION—**

knowledge and experience of jury in business affairs of life, 937.

**OBSTRUCTIONS—**

duty of railroads to keep track clear from, 1525.

in drains, duty to keep free from, 2229.

highway, negligence, railroads, leaving cars standing needlessly, 2005.

sufficient proof of, 3289.

mill race, 2357.

obligations of railroads to keep free from, 1516.

placing, on railroad, reasonable doubt, e 4819.

preventing defendant from seeing deceased, may be guilty of murder nevertheless, e 4618.

view of railroad track at crossing by cars, 1878.

weeds or brush, 1877.

watercourses, diverting water, damages, 2356.

embankments, party acquiring interest after erection, right of action, 2358.

willfully placed in navigable stream, 3290.

**OBTAINING GOODS—**

by fraud, giving check in payment, e 3641.

threats, larceny, of great bodily harm, 3223.

**OCCASIONAL ILLICIT ACTS—**

do not prove living in state of adultery, 2789, e 4508.

**OCCUPATION—**

misrepresentation as to, in application for insurance, knowledge of agent, 1189.

unlawful, no justification of killing, self defense, 3140.

**OCEAN—**

a public highway, 1152.

**OFFENSE—**

doubt as to degree of, guilty of less offense, 2706.

gist of, embezzlement, conversion, 2928.

others not in issue, keeping disorderly house, 2800.

same to kill bad person as to kill good one, 2490.

well founded doubt of defendant's guilt, if any, will not prevent conviction, e 4452.

**OFFENSIVE LANGUAGE—**

violent passion from, murder in second degree, 3013.

**OFFER—**

of testimony, statement by counsel, 130.

withdrawal of, sale of real estate, 2221.

**OFFICER—**

authority of, perjury, must be shown, 3265.

bank, knowing bank was in failing circumstances, 576.

corporation, in same position as other creditors, 2417.

liability of persons holding themselves out as, 2418.

no individual liability for contracts made as, 2419.

salary of vice president, period of contract, 2421.

killing without knowledge of his character, self defense available, 3157.

liability of, for taking insufficient replevin bond, e 4245.

making arrest, misdemeanor, can kill only in self defense, 2451.

not bound to retreat to avoid conflict, e 4743.

prisoner shooting, self defense, 3156.

unjustifiable assault, e 3442.

property, 2302.

must take possession to constitute valid levy, trespass, personal police, testimony of, greater care in weighing, 2768.

testimony of, not to be discarded or discredited, 2769.

public, bribery of, to do what they are already obligated to do, intent essential, series, 3273.

[References are to sections; e refers to Erroneous Instructions.]

**OFFICER—Continued.**

- return of, not conclusive proof of insolvency, negotiable instruments, 2188.
- resisting, in execution of writ, personal animosity immaterial, 2455.
- right to arrest, believing conspiracy between union miners, e 4323.
- shooting to escape, what constitutes an act of selling liquor, 2452.
- without warrant, private individuals, 2449.
- whether crime committed in presence of officers, e 4324.
- right to kill prisoner to prevent escape, e 4608.
- to seize property, attachment, e 3446.
- special, liability of justice of the peace for act of, e 3449.

**OHIO—**

- statute relating to instructions, 153, p 139.

**OIL TANK—**

- not a part of wagon, 3296.

**OKLAHOMA—**

- reasonable doubt defined, 2666.
- weighing defendant's testimony, 2547.

**OLD AGE—**

- wills, does not necessarily incapacitate, 2382.

**OMISSION—**

- of elements in definition of manslaughter, e 4648.
- intent, robbery, e 4574.

**OMITTING—**

- duty to retreat, self defense, instruction to acquit, e 4747.
- element of embezzlement, "without the assent of his employer," e 4600.
- of knowledge of falsity of representations, prosecution for fraudulent representations, e 4816.
- essential element of self defense, defendant must believe himself in imminent peril, e 4695.
- freedom from fault in bringing on difficulty, e 4692.
- malice in instruction, malicious prosecution, probable cause, e 3713.
- necessary element of false pretenses, intent to cheat or defraud, e 4603.
- to define corroboration, testimony of accomplice to be received with caution, e 4489.

**ONE FACT—**

- proved inconsistent with guilt, reasonable doubt, e 4438.

**ONE SALE—**

- intoxicating liquor, delivered at different times, 3194.

**ONLOOKERS—**

- referring to, influence on jury, e 3394.

**ON SIGHT—**

- killing, former assailant, not justified by self defense, e 4718.

**OPEN—**

- saloons, on prohibited days, unlawful sales in side or rear rooms, 3206.
- taking, larceny, presumption of innocence, when, e 4782.

**OPENING STATEMENTS—Chapter VI, 70-82.**

- anticipating defense of opponent, 81.
- criminal cases, order of in discretion of court, 72.
- exceptions taken to improper remarks, 79.
- full and complete important, 73.
- importance of, 73.
- improper remarks cured by withdrawal or instruction, 80.
- how cured, 80.
- matter foreign to the issues should be prohibited by the court, 75.
- one having burden of proof has right to open, 70.
- party having right to make, 70.
- not confined to facts recited in opening statement, 70-75.
- reading of law, 78.
- of papers supposed to be introduced, 77.



[References are to sections; e refers to Erroneous Instructions.]

**OPENING STATEMENTS—Continued.**

- reading the pleadings to the jury, 76.
- refusal to make waiver, 82.
- what competent, 74.
  - improper, 75.
  - it should contain, 70.
- when not proper to read pleadings to the jury, 76.
  - should be made by defendant, 71.

**OPENING TRUNK—**

- larceny, left in defendant's possession, 3239.

**OPERATION AND MANAGEMENT—**

- of trains and cars, of railway companies, 1529-1553, 1848-1855.
- See RAILROADS.

**OPINION—**

- bribe must be given for purpose of influencing, to constitute bribery, e 4801.
- expressing, as to what has been proved, e 4484.
- expression of, duty to convict, 2760.
  - may amount to warranty, purchaser guilty of contributory negligence, e 4253.
- misrepresentation, sale of partnership interest, 2212.
- of prosecuting attorney, not to be considered by jury, 2755.

**OPPORTUNITY—**

- for deliberation, not equivalent to fact of, homicide, e 4674.
- of knowing facts, fraud, instruction to find verdict must contain all the elements of case, e 3655.
  - witness to know, credibility, e 3308.
- seduction, acquaintance and opportunity not sufficient, 2835.
- seeking, proof of malice, homicide, 3066.

**OPTIONS—**

- in grain, defense to note, burden on defendant, e 3473.
- local, illegal sale, intoxicating liquor, 3209.
- of purchase, of horse, degree of care required, 556.
- on board of trade, commissions, usages, e 3472.
  - illegal, 609.
  - legality of, series, 610.
  - settlement made on differences of price, 609.
- to return stock or sue for damages, warranty of live stock, e 4255.

**ORAL—**

- admissions regarded as weak evidence, 385.
- contract, of real estate, statute of frauds, 2227.
- what constitutes adverse possession, 452.
- evidence of written contract, e 3483.
- understanding, fire insurance, does not waive condition in policy, e 3667.

**ORDER—**

- in which issues considered, New York code, murder in first degree, 2991.
- keeping, in religious meeting, justification, assault and battery, 2843.
- of intoxicating liquor, by agent, not a sale, 3207.
- to pay money, acceptance of, negotiable instruments, admissions, e 4199.
- written, intoxicating liquor, burden of proof, 3197.

**ORDERS—**

- bartender acting contrary to, liquor dealer liable nevertheless, e 4771.

**ORDINANCE—**

- absence of in regard to speed of train, e 4037.
- as to ringing bell, person may assume it will be obeyed by railroads, 1883.
  - speed of railroad trains, violation, negligence per se, 1880.
- duty of railroads to observe, 1879.
- failure to obey, as to speed or ringing bells, causing injury, 1531.
- negligence, railroad crossing, inference from injury, 1934.
  - street railroads, 2081.

[References are to sections; e refers to Erroneous Instructions.]

**ORDINANCE—Continued.**

- observance of as to warning at railway crossing, effect of, e 4035.
- part of, withdrawn from consideration of jury, negligence, street railroads, personal injury, 2019.
- presumption of negligence from failure to obey, e 4036.
- profane swearing, attempted arrest, shooting, 2847.
- running train at greater speed than allowed by, e 4036.
- speed of railroad trains limited by, negligence, 1987.
- when none exists, 1881.
- validity of, arrest for vagrancy, consistent with statute, e 3720.
- violation of, traveler not excused from using ordinary care, 1904.

**ORIGINAL BED—**

- watercourses, user must restore water to, 2354.

**ORDINARY CARE—**

- and caution, defined, 1801.
- by agent of physicians, 1294.
- dentist, 1302.
- physicians and surgeons, 1290.
- defined, 1292.
- railroads to see that track and road bed are safe, 1517.
- defined, 562, 1377-1379, 1486, 1509, 1801, 1806, e 3737, 3739, 3749, 3917, 4152.
- vehicle crossing street car track, 2107.
- degree of care of warehousemen when goods stored without reward, 562.
- due from hotel keeper toward servant in operation of elevators, 1842.
- duty of railroad company in keeping lookout for employees on or close to the track, 1529.
- servants to exercise to avoid injury, 1509.
- must be exercised by person passing over slippery sidewalk, 1614.
- of employe defined, 1594.
- goods contained in warehouse, 562.
- plaintiff defined, 1353.
- omitting element of, diverting watercourse, preventing natural flow of water, e 4280.
- passengers alighting at dangerous places, 1788.
- must exercise, in alighting, 1787.
- required in selling property by agent, 603.
- servant must exercise, for his own safety, 1472-1473.
- to be exercised by master, 1377.
- want of, by both master and servant, 1486.
- what to consider in determining whether servant exercised, e 3765.

**ORDINARY DILIGENCE—**

- defined, 1114, 1745.
- measure of damages for failure to use, in caring for personal property, 796.

**ORDINARY MEANING—**

- slander and libel, words presumed to be used in, 2282.

**ORDINARY MEN—**

- heat of passion determined with reference to, murder in second degree, 3014.

**ORDINARY SKILL—**

- defined, 726.

**OREGON—**

- statute relating to instructions, 153, p 139.

**OSTER—**

- must be open, visible, exclusive, 460.

**OUTCRY—**

- failure of prosecutrix to make, rape, 28
- rape, prevented by fear, 2813.

**OUTSIDE TRANSACTION—**

- partner engaging in, liability of other partners, 2206.

**OVERCROWDING CARS—**

- collision, e 3988.

[References are to sections; e refers to Erroneous Instructions.]

**OVERFLOW—**

of boiler, negligence in maintaining, 2127.

**OVERFLOWING LAND—**

injury to roadway, measure of damages, e 4283.

**OVERSTATEMENT IN AFFIDAVIT—**

willful, malicious prosecution, as evidence of malice, e 3714.

**OVERT ACTS—**

dangerous character of deceased, self defense, e 4731.

necessary to justify killing in self defense, what constitutes, 3147.

self defense, threats not sufficient, 3146.

self defense, danger must be shown by, and must be imminent, e 4700.

danger must be shown by, defendant need not act as a brave man, e 4706.

must await, mere threats not sufficient, e 4735.

**OWN DWELLING—**

attacked in, no duty of retreat, 3165.

**OWNER—**

adjoining, railroad's obligation to fence track not limited to, negligence, 1966.

fault of, cannot cut off broker's commission, e 3470.

intoxicating liquor, not necessary that defendant be, e 4767.

liability for negligence of contractor, 1367.

malice against, must be shown to establish malicious mischief where animal injured, 3281.

nuisance, liability of, dangerous pit adjoining highway, 2196.

of land adjoining railroad, negligence, injury by fire, degree of care required, 2002.

land bordering on navigable stream has right to build docks, 2360.

lost property, duty of finder to advertise and search for, 3215.

soil, owner of subterranean and surface water, 2355.

riparian, real estate, rights defined, accretions, 2233.

when trespass quare clausum fregit maintainable against, e 3702.

**OWNERSHIP—**

arson, evidence essential, 3269.

assumption of, embezzlement, e 4599.

belief as to, larceny, color of title, e 4778.

defendant's possession not prima facie evidence of, replevin, e 4238.

embezzlement, intent, 2922.

honest belief of, larceny, intent, reasonable doubt, burden of proof, e 4779.

joint, does not necessitate joint liability, e 3488.

larceny, in unknown owner, 3225.

special property sufficient, 3226.

tax schedules admissible to attack credibility of prosecuting witness, e 4780.

malicious mischief, how proven, 3282.

not necessary to maintain replevin, 2235.

trespass, possession alone sufficient, e 4270.

of building, necessary element of burglary, e 4561.

possession as evidence of, 1065, 2193.

proof of, burglary, what sufficient, 2874.

replevin, question of law, e 4241.

trover, plaintiff must prove general or special, 2326.

**PAIN AND ANGUISH—**

of body and mind, elements of damages, 920.

**PAIN AND SUFFERING—**

damages for, 935.

conjectural, future suffering, e 3573.

future suffering, reasonably certain, e 3575, 3576.

malpractice, measure of damages, can only recover for additional pain, 1298.

measure of damages, 940, e 3572, 3579, 4146.



[References are to sections; e refers to Erroneous Instructions.]

**PAIN AND SUFFERING**—Continued.

- mental and physical, damages for, 902-905, 934, 946, 950, 951, 961, e 3578.
- of married woman, personal injuries, 948, 949, 953.
- mental, without physical injury, e 3577.
- minor, personal injuries, 955-956.

**PALPABLY FALSE TESTIMONY**—

- may be disregarded, 343.

**PANIC**—

- street car, passenger injured, explosion on car, 2033.

**PAPER**—

- accommodation, negotiable instruments, 2161.
- title not necessary to constitute adverse possession, 454.

**PAPERS**—

- failure to produce, not necessarily admission, e 3366.
- filing, what constitutes, 2429.

**PARAMOUNT TITLE**—

- when tenant bound to recognize, e 3700.

**PARENT AND CHILD**—1017-1021.

- defense of parent, self defense, 3179.
- emancipation of child, 1019.
- goods purchased by child with consent of parent, 1017.
- imputed negligence, 1364, 2113, e 4079.
- liability for goods furnished child, 1018.
- support of minor child, 1017.
- minor can only disaffirm contract after majority, 1021.
- negligence, railroads, 1931.
- parents sued for alienation of affection, e 3429.
- whipping child, 529.
- payment to minor for services, 1020.
- separation of parents by mutual consent, liability for goods furnished child, 1018.
- suit by parent for minor child's services, 1020.
- wills, undue influence, 2407, e 4304.

**PARENTAGE**—

- bastardy proceedings, period of gestation should not be fixed by court, e 4513.

**PAROL**—

- agreement—may avoid written contract—burden of proof, 652.
- contract of sale—adverse possession limited to actual possession, 451.
- evidence—cannot vary description contained in deed, 580.
- varying written contract by, negotiable instruments, must ratify all agent's transactions or none, e 4197.

**PART OF EVIDENCE**—

- reasonable doubt arising from does not acquit, e 4459.

**PARTIAL INSANITY**—

- capacity to make wills, monomania, e 4294.
- laboring under mental delusion, 2586.
- wills, monomania, 2376.

**PARTIAL PAYMENT**—

- in disputed claim will operate as release if retained, 675.

**PARTICIPATION**—

- required to charge co-defendant with wrong done by other, 2730.

**PARTICULAR PARTNER**—

- liability of, credit extended on his account, notice of dissolution of firm, 2211.

**PARTICULAR PURPOSE**—

- leasing premises for, 1239.

**PARTICULARIZING**—

- witnesses for prosecution, e 4496.

**PARTIES**—

- testimony of, Chapter XIX, 363-372, e Chapter CVII, 3349-3352.
- appearance of witnesses subject of comment, 231.

[References are to sections; e refers to Erroneous Instructions.]

**PARTIES—Continued.**

- burden of proof when evidence is evenly balanced, 361.
- can not complain of conduct of opposite party when equally guilty, 246.
- opponent's instruction if similar one is requested, 314.
- cannot impeach own witnesses, 379.
- waive brief by agreement, 320.
- competent witnesses in own behalf, 363.
- conduct and appearance subject of comment, 231.
- corporations and individuals of equal standing, 366.
- either party may prosecute appeal or writ of error, 295.
- failure to testify, 144, 371.
- how testimony should be weighed by jury, 363, 364, 365.
- joining in exceptions, 306.
- jury may consider interest in determining credibility, 145, 363, 364.
- should not be led by sympathy, 366.
- may assume any reasonable hypothesis, 168.
- names of should appear in abstract of record, 316.
- new, negotiable instruments, new consideration, 2182.
- number of, interested in larceny, only one indicted, e 4789.
- opening statement, when entitled to make, 70-71.
- presence in court when verdict is returned, 273.
- previous relations of, homicide, 2965.
- to conspiracy, whose names and identity are not disclosed, e 4583.
- mutual combat, may both act in self defense, e 4729.
- suit, failure to testify, e 3352.
- testimony of, e 3349.
- weight to be given testimony of employes, 367.
- when evidence is equally balanced, 356.
- not bound by statement of own witnesses, 390.

**PARTITION FENCE—**

- wrongful removal and conversion—measure of damages, 772.

**PARTNER—**

- action for accounting, when may sue at law, 2216.
- borrowing money, signing note in firm name, 2205.
- credibility, books falsified, e 3351.
- engaging in outside transaction, liability of other partners, 2206.
- giving note, presumption, burden of proof, 2208.
- holding oneself out as, liable as, 2201.
- in fact, who are, 2199.
- malicious prosecution, liability of co-partner, e 3715.
- negotiable instruments, co-sureties, 2190.
- power to bind firm, 2204.
- using partnership credit or effects, 2207.

**PARTNERSHIP—Chapter LXXV, 2199-2216, e Chapter CLVII, 4221-4230.**

- action for accounting, when may sue at law, 2216.
- acts beyond scope of business, 2209.
- of one partner without consent of co-partner, e 4226.
- as to third persons, holding oneself out as partner, 2201.
- bound by ratification of partner's acts, 2213.
- business enlarged beyond original articles, liability to third persons, 2203.
- cannot be made partner against will, 2202.
- conversion, saw mill machinery, 2345.
- conveyance by partner of individual property not ground for attaching firm, 544.
- dealing with firm after dissolution but without notice, e 4224.
- disposing of firm property by one partner without knowledge or consent of other, e 4228.
- firm note for personal indebtedness, e 4222.
- fraudulent conveyance, 1063.
- how formed, 2200.
- liability as partners on account of conduct, e 4221.
- of particular partner, credit extended on his account, dissolution, notice of, 2211.
- limited, money used for personal objects, e 4230.

[References are to sections; e refers to Erroneous Instructions.]

**PARTNERSHIP—Continued.**

- malicious prosecution against partner, liability of co-partner, e 3715.
- not formed against person's will, 2202.
- note, dissolution of firm, knowledge of by payee, e 4196.
- given by one partner, presumption, burden of proof, 2208.
- notice of dissolution, means of learning and neglect to use same, e 4225.
- when necessary what sufficient, 2215.
- partner, borrowing money signing note in firm name, 2205.
- engaging in outside transaction, liability of other partners, 2206.
- power of partner to bind firm, 2204.
- presenting of account of, failure to object, settlement, e 4229.
- sale of interest, misrepresentation, fact or opinion, 2212, e 4227.
- third persons not bound by articles of, without notice, e 4223.
- what acts do not bind, partner using partnership credit or effects, 2207.
- when fraud of one partner binds others, 2214.
- whether individual or partnership funds, amount of indebtedness of firm, 2210.
- who are partners in fact, 2199.

**PARTY WALL—**

- assumpsit for value of, 2223.
- falling of, duty of owner to protect and maintain, 2224.

**PASSENGERS—See NEGLIGENCE, COMMON CARRIERS OF PASSENGERS, STREET RAILROADS.**

*alighting,*

- from car, 2040.
- evidence of previous method of alighting, e 4154.
- starting car before alighting, e 4134.
- from moving car, 2072, e 4151.
- train, 1479, 1806, 1807.
- from train, conductor able to prevent, 1810.
- encumbered by grips and valises, 1803.
- near parallel track, 2046.
- assaulted by company's servants, 2054.
- boarding car, car started before getting on, 2036, 2037, e 4133.
- moving car not necessarily contributory negligence, e 4149.
- moving train, 1805.
- bound to follow reasonable rules and regulations by railroads, 1819-1821.
- burden of proof as to whether injured person was a, e 4124.
- slowing down as invitation to board, 2035.
- buying a round-trip ticket, 1825.
- care due, while train is being switched, 1798.
- carried past destination, 2052.
- collision between street car and other vehicle, e 4130.
- caused by wet or slippery rails, e 4128.
- conductor directing passenger not to get off moving train, 1809.
- directing passenger to get off moving train, 1808.
- failing to see person intending to become passenger, 2038.
- must see that no one is in act of alighting, 2043.
- contributory negligence of, 1800-1821, 2062, e 4143.
- damages for being expelled for refusal to pay excess fare on train, 839.
- for wrongfully expelling from train, 914.
- defective condition of vehicle causing injury, 2029.
- defining degree of care as to facts not in issue, street railroads, e 4123.
- degree of care required of carriers, 1747, e 4121.
- required while alighting, 1780.
- safety not insured, 2021.
- derailment of street car, presumption of negligence, e 4131.
- dress of, caught on bolt, failure to discover same whether contributory negligence, e 4145.
- duty of motorman not to start car until are safely off, e 4136.
- passenger to obey instructions, e 4126.



[References are to sections; e refers to Erroneous Instructions.]

**PASSENGERS—Continued.**

- duty of railroads to exercise highest degree of care and foresight for safety of passengers, consistent with practical operation, e 4121.
  - to provide reasonably safe cars, e 4121.
- street railroad to afford reasonable opportunity of taking small children from car, e 4134.
  - to exercise highest practicable care, diligence and skill for safety of, e 4123.
  - furnish safe access to seats, e 4122.
- duty to, engineer, 1972.
  - stop reasonable time for passenger to alight, 1779.
- effect of carrying past destination, 1778.
  - promise by conductor to come for, at destination, 1778.
- ejection of, 1827-1831.
  - from moving train, 1831.
- entering without transfer through fault of first conductor, 2061.
- expelled from train—what may be considered by jury in assessing damages—series, 839.
- failure of conductor to warn of danger unknown to passenger, 2045, e 4137.
  - to have both motorman and conductor on the car at the time of injury, e 4140.
  - take hold of hand rails while alighting from street car, e 4153.
  - warn of danger in alighting, 1787.
- falling off car, run over by a following car, e 4138.
- female, duty of conductor to protect from vulgarity and obscenity, 1799.
- high rate of speed of street car causing injury, e 4129.
- highest degree of care and caution reasonably consistent with practical operation of car, e 4148.
- injured by fall of elevator, 1842.
  - from own misconduct, 2023.
  - in collision, presumptive liability, 2032.
  - through overcrowding car, 2053.
  - panic produced by explosion on car, 2033.
- injury to brought on by refusal to leave train when ordered by conductor, 1830.
  - through collision, 1795-1796.
    - between street car and wagon, e 4148.
    - presumption of negligence, e 4132.
  - through defective track and switches, e 4127.
  - negligent management, or operation, e 4127.
- intoxicated, carrier may refuse, 1821.
- intoxication as contributory negligence, e 4155.
- jumping from cars, negligence, when, 1811.
  - to escape blow by conductor, e 4156.
- jumping from moving train when suddenly placed in a perilous position by carrier, 1812.
  - from train on seeing another train approaching, 1814.
- measure of damages for being expelled from train, 839.
- mere happening of accident as presumption of negligence, e 4125.
- negligently failing to hear announcement of stations, 1777.
  - starting train while passenger is getting on, 1773.
- obeying instructions to move to another part of car, 2070.
- ordinary care and prudence required of, 1801.
  - passenger must use in alighting, 1789.
- passing from car to car while train is in motion, 1817.
- presumption that place of exit is safe, 1789.
- protection of by carrier, 1799.
- railroads, degree of care required of servants, 1768.
  - may eject person refusing to produce ticket or pay fare, 1827, 1830.
  - set apart separate cars for ladies, 1820.
  - should give notice of arrival at stations, 1776.
- raising umbrella while alighting, 2050.
- requiring higher fare of, when paid on train, ejection of passenger, 1823.

[References are to sections; e refers to Erroneous Instructions.]

**PASSENGERS—Continued.**

- riding on engine at invitation of conductor, 1803.
  - freight trains, 1772.
  - running board, 2069.
- right to expel by railroad for failure to obey rules, 1819.
  - to rely upon directions of agent in alighting, 1789.
- separation of white and colored, 2058.
- slowing down and starting suddenly while passenger alighting, 2041.
  - for passenger to board, car suddenly started, 2034.
- standing on platform by direction of employes in charge of street car, e 4147.
  - platform when car overcrowded, 2066-2067.
    - whether contributory negligence, e 4146.
  - running board of street car, e 4148.
- stepping from car, sudden jerk of car, burden of proof, e 4135.
- stoppage of trains for passengers to alight, 1788.
- street railroad not an insurer of safety of, e 4122-4123.
- struck by car coming from opposite direction while alighting, 2047.
- stumbling or falling while alighting from train, 1804.
- switch thrown by unauthorized act of stranger, liability of company, e 4142.
- to exercise ordinary care in alighting from car, e 4150, 4152.
  - use all human care, vigilance and foresight could reasonably do in view of mode of conveyance adopted, e 4121.
- use of more force than necessary in ejecting from car, 2056.
- using abusive or obscene language, right of railroad to eject, 1828-1829.
- warning posted in cars, e 4141.
- what jury may consider in determining whether passenger exercised care in alighting from street car, e 4150.
- when relation ceases, backward movement after alighting, 2051.
- wrongfully ejected, 2055.

**PASSING—**

- forged note, for personal gain, must be proved, 2945.
- of titles, sales, not before fulfillment of specific conditions, e 4247.
  - when, e 4246.

**PASSION—**

- advising jury not to be swayed by, polluting stream with coal refuse, 2198.
- and provocation must concur, manslaughter, 3039.
- aroused by provocation, insulting conduct, e 4683.
- assault in heat of, punishment, 2840.
- depriving defendant of power to form intent to kill, murder in second degree, 3015.
- excitement and revenge distinguished from insanity, 2579.
- killing in heat of, manslaughter in third degree, without design to kill, Missouri, 3030.
  - murder in second degree, 3012, 3014.
    - or in sudden affray, either sufficient to reduce killing to manslaughter, e 4647.
- provocation, insulting words to wife of defendant, other relatives, 3087.
- sudden and uncontrollable, homicide, 3038.
  - arising at time of killing, definition, 3037.
  - manslaughter, not inconsistent with malice, e 4646.
  - transport of, murder in second degree, without adequate cause, deadly weapon, leather belt, 3016.
- violent, from offensive language used, murder in second degree, 3013.
  - provocation, homicide, grade may be reduced, 3089.

**PAST CONDUCT—**

- of deceased, evidence of provocation for homicide, 3092.

**PASTURING CATTLE—**

- on uninclosed lands, trespass, e 4274.

**PATERNITY—**

- material question in bastardy, 2791.

[References are to sections; e refers to Erroneous Instructions.]

**PATIENT—**

malpractice, must co-operate with doctor, contributory negligence, 1291, e 3722.

**PAUPER—**

acquiring legal residence, 1033.

**PAY—**

receiving for dental work, practice of dentistry without a license, e 4810.

**PAYEE—**

knowledge of, partnership note, that firm has dissolved, e 4196.

**PAYING—**

expenses of witness, credibility, e 3311.

**PAYMENT—**

accepting and retaining less amount in disputed claim, 428.

application of money to one demand instead of another, 672.

mortgage debt and unsecured debt, 1308.

bank may deposit to pay note, 569.

burden of proof in suit on contract, 668.

defence of—burden of proof, 668.

delay in, negotiable instruments, assuming fact of, giving undue prominence to, e 4208.

demand of, negotiable instruments, protest, 2164.

for property, negotiable notes given, 2165.

future, measure of damages, personal injury, e 3571.

goods taken in payment of debt, 1118.

in full, sale upon condition, 2250.

installments, sale intended, whether considered as rent or not, 2254.

made in settlement of disputed claim will operate as release if retained, 675.

negotiable instruments, burden of proof, 2162.

deception as to ownership of note, 2163.

not conclusively proved by receipt, e 3486.

of existing debt, negotiable note taken, 2172.

upon mistake of fact, e 4201.

of note by check, verdict based on single fact, statute of limitations, e 4200.

rent, voluntary, does not estop tenant from denying use of premises, e 3697.

part in satisfaction of whole, 428.

retention of money under agreement amounts to, 669.

sale, time of, when interest begins to run, 2262.

tender as good as, trover and conversion, not good if tender conditional, 2342.

when partial will constitute settlement, 426.

**PEACE—**

breach of, abusive language in presence of female, 3295.

vile epithets on street, 3294.

reputation for, criminal defense, 2484, e 4336.

**PEACEABLE POSSESSION—**

ownership presumed, 1039.

unlawfully break, pull down or injure another's fence, 3298.

**PEACEMAKER—**

homicide, should be acquitted, 2971.

**PECUNIARY DAMAGES—**

grief from contemplating injured body not an element of, e 3574.

**PECUNIARY LOSS—**

damages limited to, death caused by negligence, e 3609.

measure of damages, negligence causing death, award must be based on evidence, e 3612.

suffered by family of person killed by negligence, care of family, e 3611.

**PECUNIARY NECESSITY—**

fraud, sacrifice of property, e 3653.



[References are to sections; e refers to Erroneous Instructions.]

**PEDDLING WITHOUT LICENSE—**

one sale sufficient if intention to continue exists, 3288.  
what constitutes, e 4815.

**PEDESTRIAN—**

contributory negligence, street railroads, going upon track without warning to motorman, 2108.  
street railroads, degree of care due, 2077, 2093.

**PEDIGREE—**

may be proven by entries in family Bible, 128.

**PENALTY—**

for failure to cancel mortgage on record, 1307.  
forgery, overstating maximum, e 4605.

**PENITENTIARY SENTENCE—**

evidence of, as affecting reputation as a good citizen, e 4348.

**PENNSYLVANIA—**

statute relating to instructions, 153, p 139.  
weighing defendant's testimony, e 4385.

**PEREMPTORY CHALLENGES—57-59.**

allowed at common law, 57.  
general observations, 57.  
given to insure a person a fair trial, 57.  
information elicited on Voir Dire may be important in exercising, 57.  
may be made as caprice or judgment dictate, 57.  
method of exercising, 58.  
number allowed, 59.  
right to reserve until challenge for cause exhausted, 58.  
struck jury equivalent of, 61.  
waiving and accepting jury waives error, 59.  
when additional may be allowed, 59.  
    may be allowed after jury accepted, 58.  
        be exercised, 58.  
    right of must be exercised, 58.

**PEREMPTORY INSTRUCTION—**

comes too late after other instructions are out, 260.  
direction of court to find verdict has same effect, 249.

**PERFORMANCE OF CONTRACT—**

full compliance required, e 3479.  
prevented by one party, damages, e 3515.

**PERIL—**

imminence of, must be left to jury, e 4703, 4708.  
    must believe himself in, e 4695.  
retreat necessary unless it would increase defendant's peril, e 4741.

**PERIOD—**

necessary to be covered by alibi, need not be proved to jury's satisfaction, e 4317.  
of gestation, should not be fixed by court, bastardy proceedings, e 4513.

**PERISHABLE GOODS—**

duty of carrier when damaged by inevitable accident or act of God, 1727-1728.  
owner's rights when goods are damaged by carrier's neglect, 1727.  
shipment of, 1726, 1727, 1728.

**PERJURY—Chapter CII, 3256-3267, e Chapter CLXXXIII, 4793-4795.**

absence of motive, 3266.  
authority of officer must be shown, 3265.  
compelling defendant to testify against himself, e 4795.  
elements to be considered, 3267.  
every material allegation must be proved, 3261.  
materiality must be shown, 3262.  
    sufficient, when, 3263.  
more than one witness required, 3258.  
must be proved that accused was sworn, 3256.

[References are to sections; e refers to Erroneous Instructions.]

**PERJURY—Continued.**

- rejecting evidence of perjured witness, credibility, 2767.
- swearing falsely, no reasonable grounds for believing statements to be true, 3257.
- swearing to lack of knowledge when he had read it in newspapers and heard rumors, e 4794.
- test of materiality, 3264.
- testimony alleged must be proved, 3260.
- when one witness sufficient, 3259.
- wilful swearing must be to a matter material to the issue, e 4793.

**PERMANENCY OF INJURIES —**

- damages for, 949, 951.
- to minor, 955, 956.
- married women, damages, 953.

**PERMANENT INSANITY—**

- distinguished from temporary, delirium tremens, 2589.

**PERMITTED TO ACQUIT—**

- not sufficient if plea of self defense is made out, jury should be ordered to acquit, e 4752.

**PERSON—**

- killing in defense of, self defense, 3181.
- robbery, taking must be from, 2896.
- taking from, or in his presence by putting in fear or by force and violence, 2899.
- what is meant, 2897.
- taking from, not necessary, 2898.

**PERSONAL ESTATE —**

- conveyance by married woman, consent of husband, e 3628.

**PERSONAL INDEBTEDNESS—**

- firm note given for, e 4222.

**PERSONAL INJURIES—**

- See DAMAGES.
- See NEGLIGENCE.
- admissions of defendant at time of accident, 333.
- apprehension of, carrying concealed weapons, 3275.
- burden of proof on plaintiff as to disabilities, 361.
- injured members of body may be shown jury, 146.
- knowledge, observation and experience of jury in business affairs of life, 937.
- fact of, admitted and assumed on both sides, negligence, street railroads, 2018.
- from runaway horse—series, 1689.

**PERSONAL MALICE—**

- need not be shown where injury done willfully for purpose of gain, 3283.

**PERSONAL PRIVILEGE—**

- defendant cannot be compelled to testify against himself, perjury, e 4795.

**PERSONAL PROPERTY—**

- building, when, 2218.
- damages, 795-801.
- cost of conveying same to replace loss—an element, 797.
- for failure to use diligence in caring for fruit, 796.
- injury to flowers by escaping gas, 798.
- property destroyed, 797.
- proximate cause can only be recovered, 801.
- wrongful seizing by sheriff, 807.
- no recovery for damages that could have been avoided by reasonable care of plaintiff, 801.
- owner must make reasonable efforts to prevent in order to recover, 795.
- where same can be repaired, e 3534.
- executory sale, resale by vendor, trover, 2331.
- generally—injuries to, 795.

[References are to sections; e refers to Erroneous Instructions.]

**PERSONAL PROPERTY**—Continued.

- goods lost by common carrier—market value, 800.
- growing crops, title to, sale of land, 2220.
- when, 2219.
- market value of property destroyed, 797.
- possession evidence of ownership, 2193.
- sale of, when trover maintainable by buyer against seller, 2330.
- trespass*,
  - justification, burden of proof on defendant, 2299.
  - no levy without officer taking possession, 2302.
  - one rightfully in possession may sue for, 2298.
  - ratification of wrongful distress, 2301.
  - wrongful levy, refusing to release property taken, 2300.
- whether fixtures are, 2217.

**PERSONALTY**—

- damaged in putting tenant out of possession, e 3533.

**PERSUASION**—

- wills, legitimate advice, 2405.

**PETIT LARCENY**—See LARCENY.

**PHOTOGRAPHS**—

- and experiments may be offered in evidence, 123.

**PHYSICAL CONDITION**—

- of testator, undue influence, 2412.
- present, measure of damages, personal injury, time lost, pain and suffering, e 3579.

**PHYSICAL INJURY**—

- personal injury without, measure of damages, e 3577.

**PHYSICAL POWER**—

- of deceased, self defense, may be considered, 3144.

**PHYSICIANS AND SURGEONS**—3284-3287, e 4809-4810.

See MALPRACTICE.

- appointed by court, expert opinion, e 3378.
- certificate from medical examiners and also diploma not required, e 4809.
- disintering dead bodies, intent, proof required, 3284.
- malpractice, 1289-1303, e 3721-3726.
- practice, diploma from accredited school required, 3286.
- of dentistry without license, receiving pay for work, e 4810.
- without certificate, reasonable doubt, 3285.
- sale of drugs without license, domestic remedies excepted, 3287.

**PICNIC GROUNDS**—

- manager carrying concealed weapons, e 4805.

**PISTOL**—

- attack with, no duty of retreat, 3163.
- discharging, justification, accident defined, e 4538.
- killing with, in mutual combat, not necessarily murder, e 4617.
- right to carry, homicide, e 4624.
- shooting with, loaded with powder and leaden balls, 2969.
- murder in second degree, 3005.

**PIT**—

- dangerous, nuisance, liability of owner, adjoining highway, 2196.

**PLAINTIFF**—

- although crippled and lamed, may be witness, 122.
- burden of proof on, 360, 361.
- court may compel submission of injuries, 148.
- dramatic exhibition of wounds, error, 122.
- how testimony should be weighed, 365.
- mourning or giving way to emotions not error, 122.
- must prove all material facts by a preponderance of the evidence, 356, 357, 360.
- opening statement, entitled to make, when, 70-71.

**PLAINTIFF'S SIDE**—

- believing evidence of, e 3314.



[References are to sections; e refers to Erroneous Instructions.]

**PLANS—**

defective, architect, e 3436.

**PLATS—**

dedication of streets, 1148.

difference between road and plat, what would be the true line, 1139.

filing of, 1140.

referred to in deed, 589, 996.

**PLATFORMS—**

freight trains not required to stop at, for passengers, 1772.

standing on platform of car, by passenger, 1816.

street car, contributory negligence, passenger standing on, by direction of employes, 2068-7.

**PLAYING CARDS—**

must show that it was a public house and that there was betting, e 4806.

playing a trick or joke, e 4807.

**PLEA—**

disparaging, self defense, caution as to, 3174.

of justification—must be filed in good faith in action for slander and libel, 810.

not guilty, 2776.

the general issue, slander and libel, facts admitted by withdrawing, justification, e 4268.

**PLEA OF SELF DEFENSE—See SELF DEFENSE.**

**PLEADINGS—**

admissions in, obviates necessity of proof, 387.

as conclusive evidence for opposite party, 120.

considered as admissions, 119.

contradictory defenses, alienation of affection, e 3427.

dismissed counts, 413.

even when withdrawn may be offered as evidence, 120.

jury should determine on what count defendant guilty, 413.

should not find on dismissed counts, 413.

material allegations in, not left to jury to determine, e 3384.

of the party as evidence of opposite party, 120.

party cannot put his own pleading in evidence, 120.

referring jury to without reference to issues, e 3841.

self defense, defendant at fault, barred, 3131.

should appear in the abstract of record, 316.

should not be referred to in instructions, 169.

underscored should not be taken to jury room, 216.

when jury may take upon retirement, 214.

written instruments attached may be used in evidence, 112.

**PLEDGING BONDS—**

embezzlement, held as treasurer, 2932.

**POISON—**

accessory, instrumental in communicating, e 4478.

administering, necessary intent to constitute murder, 3057.

death from, abortion, e 4506.

murder in first degree, essential facts, 2995.

instruction varying from indictment, e 4634.

**POISONING—**

of children by mother of suicidal tendency, 2604.

**POISONOUS GASES—**

from excavation, illness caused by, damages, 946.

**POLICEMAN—**

assault by, striking with hand or club, self defense, 2848.

homicide, preventing escape of prisoner, 2962.

killing in making arrest, not necessarily barred from pleading self defense, e 4738.

in pursuance of unlawful conspiracy, 2961.

of, after escape from custody, murder in first degree, e 4633.

attempting to arrest, self defense, e 4737.

[References are to sections; e refers to Erroneous Instructions.]

**POLICEMAN**—Continued.

- making arrest, not bound to retreat to avoid conflict, e 4743.
- illegal arrest, killing of, murder or manslaughter, e 4607.
- when not justified in killing citizen, 2960a.
- who kills in making arrest, manslaughter, e 4654.

**POLICE OFFICERS**—

- testimony of, greater care in weighing, 2768.
- not to be discarded or discredited, 2769.

**POLICY OF INSURANCE**—

- fire insurance, cancelled without return of premium, failure of consideration, e 3665.
- conditions of forfeiture not favored in law, e 3663.
- forbidding use of benzine, amount sufficient to avoid policy, e 3666.
- interpretation by court, 1167.
- life insurance, provisions construed against company, e 3672.

**POLICY OF THE LAW**—

- to protect the innocent, argumentative, e 4493.

**POLLING JURY**—

- need not be when verdict directed, 249.
- object of, 249.

**POLLUTING WATERCOURSES**—

- nominal and special damages, e 4281.

**POSITIVE EVIDENCE**—

- distinguished from circumstantial, 2495.

**POSSE**—

- right of sheriff to call, 2453.

**POSSESSION**—

- alone, sufficient to maintain trespass, e 4270.
- and claim under forged deed, strong evidence of guilt, 2948.
- burglary, explanation must be reasonable, 2886.
- by agent, 1069.
- deceased of deadly weapon, presumption as to self defense, 3123.
- mortgagee, must take possession of the property, when, 1317.
- mortgagor after default, 1316.
- before debt due, deeming himself insecure, 1318.
- prima facie fraudulent when, 1315, 1316.
- vendee subsequent loan to vendor, 1071.
- vendor of personal property as ostensible owner after an absolute sale renders sale fraudulent as against creditors, 1062.
- change of, assumption of ownership, 1067.
- must be open and visible, 1062-1064.
- what required when articles are heavy and cumbersome, 1066.
- deed not necessary to transfer, 456.
- defendant's replevin, not prima facie evidence of ownership, e 4238.
- embezzlement, obtaining by trick, device or fraud, 2927.
- good faith necessary, attachment, e 3448.
- in ejectment, oldest and best title prevails, 1041.
- larceny*,
  - and title obtained by fraud, 3241.
  - by one without claim, conversion, 3250.
  - defendant's house not used exclusively by him, 3248.
  - not with defendant, property found in barn, 3247.
  - of stock allowed to run at large, burden of explaining, exception, 3246.
  - person having, must be produced, 3227.
  - satisfactory account of, 3245.
  - special property sufficient, 3226.
  - under bill of sale, 3240.
  - unexplained, 3244.
- mortgagor retaining, 1315-1316.
- mortgages, right to, entry by mortgagee, levy of execution no bar, e 3728.
- must be taken by officer making levy, trespass, personal property, 2302.

[References are to sections; e refers to Erroneous Instructions.]

**POSSESSION—Continued.**

- necessary elements of to prove adverse possession, 434.
- obtaining by stealth or strategy, 1049.
- of deadly weapon, homicide, by deceased, no defense, 3075.
- forged instrument, as evidence of guilt, e 4606.
- lack of revenue stamp, invalid instrument, 2946.
- venue, 2947.
- fruits of larceny recently committed, presumption, e 4786.
- robbery, 2901.
- goods, burglary, reasonable and credible account, comment on weight of evidence, e 4570.
- growing crops, 1070.
- logs, title gained by limitation, e 3708.
- part constitutes whole—when, 449.
- personal property evidence of ownership, 1065, 2193.
- gives right to sue for trespass, 2298.
- whether subject to execution, 1065.
- property sold by debtor retained by him, knowledge of creditor, replevin, e 4239.
- property with another, obtaining credit thereon, 1125.
- real estate, trespass, with title, gives right to bring action, 2305.
- under rightful title, trespass, 2308.
- recently stolen property, burglary, must be exclusive as well as recent, e 4566.
- raises presumption of larceny, not of burglary, e 4565.
- stolen goods, as evidence of burglary, reasonable doubt arising from other facts, e 4569.
- explanation need only raise reasonable doubt, need not be satisfactory, larceny, e 4788.
- jury may determine weight as evidence, burglary, e 4564.
- not a material ingredient of larceny, e 4784.
- alone sufficient to convict of burglary, principal and accessory, e 4567.
- reasonable doubt, 2885.
- trespass, e 4811.
- unexplained, whether sufficient to convict of larceny, e 4787.
- when of effect as evidence of guilt, burglary, e 4563.
- third person, 1068.
- opening trunk left in defendant's, larceny, 3229.
- permissive is not hostile, 435.
- presumed to be under one holding legal title, 453.
- presumption of ownership may be rebutted, 1039.
- quiet and peaceable, unlawfully break, pull down or injure another's fence, 3298.
- recent, of stolen goods, larceny, presumption, good character, hypothesis must include evidence, e 4785.
- replevin, plaintiff consenting to defendant's demand necessary, 2238.
- taken in, levy on crops, 2244.
- tortious on defendant's part, demand not necessary, 2239.
- retained by mortgagor, stock of goods used in retail trade, e 3727.
- retaining property by assignor presumptive evidence of fraud, 1064.
- right of must be shown in ejectment, 1040.
- to immediate, requisite to maintain trover, possession evidence of title, 2328.
- rightful, entitles one to maintain trover, 2327.
- trespass, defined, e 4271.
- under claim of title, 457.
- warehouse receipts, 565.
- what constitutes, adverse possession, 437.
- forcible entry and detainer, 1052.
- what does not constitute, 1053.
- is, question of law, e 3407.
- See ADVERSE POSSESSION.

**POSSIBILITY—**

- rational, of defendant's innocence, not the measure of reasonable doubt, e 4448.



[References are to sections; e refers to Erroneous Instructions.]

**POVERTY AND WEALTH—**

reference to, error, 236.

**POVERTY OF PLAINTIFF—**

intoxicating liquor, when considered, e 3691.

**POWER—**

of testator to exclude relatives from share in his estate, e 4285.

physical, of deceased, self defense, may be considered, 3144.

to form intent to kill, destroyed by passion, murder in second degree, 3015.

intend but not to deliberate, insanity, e 4398.

realize nature and quality of act, want of, acquittal on ground of insanity, 2577.

**POWER OF ATTORNEY—**

in reference to mortgages, 1309.

**PRACTICABLE—**

to give warning before killing, self defense, duty to give when, 3171.

**PRACTICE—**

of dentistry without license, receiving pay for work, e 4810.

medicine, diploma and certificate from state board of examiners not both required, e 4809.

diploma from accredited school required, 3286.

without certificate, reasonable doubt, 3285.

**PRECEDENT—**

condition, contract for sale, mining claims, marking claim, 2267.

**PRECEDING—**

circumstances, manslaughter, provocation may arise from, e 4653

**PRECISE—**

crime charged, reasonable doubt, 2701.

**PREFERENCE OF CREDITORS—1079-1084, 1087.**

See FRAUD AGAINST CREDITORS.

of an insolvent corporation, series, 1084.

preferring wife as creditor, 1085.

**PREGNANCY—**

becoming pregnant after injury, not necessarily negligent, damages, 952.

preventing proper treatment of personal injury, measure of damages, e 3589.

**PREJUDICE—**

against street railroad corporation, negligence, reading instructions by lawyers, 2017.

cannot be thrown on defendant by admissions of his counsel, e 4374.

caution against conviction from, reasonable doubt, 2688.

instructions that favor either party erroneous, 197.

or passion in argument, 234.

reference to poverty and wealth erroneous, 236.

should not exist against street railroad, e 4119.

**PREJUDICED—**

prisoner not to be, because no one else is suspected of crime, e 4356.

**PREJUDICIAL—**

when erroneous instructions held not, 189.

**PREMEDITATED—**

deliberate and willful homicide must be a crime, e 4675.

design, homicide, distinguished from intent, 3056.

homicide, mutual combat, 3082.

not necessary to prove assault with intent to murder, e 4551.

**PREMEDITATEDLY—**

defined, homicide, 3058.

**PREMEDITATION—3080-3085, e 4672-4676.**

definition, 3080.

intoxication not consistent with, 2615.

knowledge of identity of person killed not essential, e 4676.

lack of, shown by intoxication, e 4414.

[References are to sections; e refers to Erroneous Instructions.]

# **PREMEDITATION—Continued.**

- murder in first degree, distinguishing characteristic, 3083.
- metal knucks or means unknown, stabbing with knife, 3002.
- necessary to constitute murder in first degree, e 4628.
- need not take any particular time, 3081.
- no presumption of, 3085.
- not necessary in murder in second degree, e 4636.
- reputation of deceased for violence immaterial, 2489.
- sedate and deliberate mind, Texas, 3084.
- time required for, e 4673.
- what amounts to, deliberation, e 4672.

# **PREMISES—**

- alterations in, increased risk, 1170.
- attacked on own, no duty of retreat, e 4746.
- condition of basement concealed fraudulently, liability of tenant for rent, 1236.
- diminished enjoyment of by tenant remaining, bound to pay rent, 1234.
- in dangerous condition, whether duty of landlord to keep in reasonably safe condition, e 3696.
- insufficient, manslaughter, e 4651.
- killing to prevent intrusion on, e 4763.
- leased for gambling purposes, e 3698.
- ownership of in application for insurance, 1177.
- reconstruction of, increased hazard, 1170.
- rendered untenable by fire or ice gorge, 1235.
- surrender of, 1243-1244.
- temporarily vacant, 1166.
- unoccupancy of, conditions under which plaintiff can recover, 1165.
- renders insurance policy void, 1164-1165.
- what is within the meaning of the law, 1164.
- use of, tenant not estopped to deny, by voluntary payment of rent, e 3697.

# **PREMIUM—**

- delay in payment of, 1212.
- fire insurance, non-payment, tender of, 1168, e 3659.
- giving note for, 1201.
- life insurance, receipt, singling out evidence, e 3677.
- return of upon cancellation of policy, 1202.
- tender of, 1200.
- waiving prompt payment of, 1168.

# **PREMONTION OF DEATH—**

- no guaranty of truth, credibility of dying declaration for jury, e 4687.

# **PREPARING—**

- for self defense, accidental killing while, e 4717.

# **PREPONDERANCE OF EVIDENCE—Chapter XVIII, 351-362, e Chapter CVI, 3332-3348.**

- accidental killing need not be established by, e 4613.
- alibi to be established by, but may raise reasonable doubt, e 4319.
- burden of proof is upon the plaintiff, 356.
- not on defendant, e 3346.
- on objectors, e 3348.
- plaintiff, e 3343.
- when evidence evenly balanced, 361.
- case should be established by fair weight of the evidence, 357.
- civil action of conspiracy, e 4311.
- clear, not required in slander and libel, e 4264.
- defined, 351, 1083.
- defined, illustration given, e 3332.
- degree required, e 3333.
- divorce, adultery, e 3623.
- does not depend on the number of witnesses, but on the weight of evidence, 355c.
- not mean greatest number of witnesses, 355, 1347.

[References are to sections; e refers to Erroneous Instructions.]

**PREPONDERANCE OF EVIDENCE—Continued.**

- element of number should be considered with all other elements, 354.
  - to be considered in determining, 3335, 351, 353.
- evidence equally balanced, e 3339.
- explained, 351, 358, e 3976.
- how determined, 335, 351.
- if plaintiff does not satisfy jury by, they must find for the defendant, 352e.
- in determining jury should consider all the evidence, 335.
- jury not at liberty to reject testimony of witnesses except for good cause, 335e.
  - not governed by number of witnesses but by weight of evidence, 355a.
  - should decide in civil cases, 198.
  - determine what evidence so proven, 327j.
- justification must be proved by defendant, e 3347.
- life insurance, no presumption of suicide, e 3682.
- malicious prosecution, 1267, 1272, 1282.
- means greater weight, 360.
- method of determining, 353.
- necessary to establish adverse possession, 444.
  - to establish damages for injuries from vicious animals, 827.
- overcome presumption of good faith in assignment of note, 2173.
- negligence, 1338.
- negligence, 1338.
- master and servant, defective scaffold, 2132.
- of warehousemen must be proven by, 561.
- negotiable instruments, duress, burden of proof, e 4113.
- not alone determined by number of witnesses testifying to particular fact or state of facts, 355.
  - convinced, e 3334.
  - necessarily the greater number of witnesses, 354, 355, e 3976.
- number of witnesses proper element to be considered, 354, e 3340.
- personal injuries to servants, e 3840.
- plaintiff must maintain his case by the greater weight of evidence, 355.
  - must prove all material facts, 360.
  - by greater weight of the evidence, 355.
- must satisfy jury by, 352.
- only required to make out case by, 352.
- proving case as alleged in the declaration, e 3345.
- material allegations, e 3344.
- quality, e 3342.
- reasonable certainty not required, e 3336.
- doubt not required in civil cases, e 3341.
- required in proving adverse possession, 430.
  - to establish claim that child entitled for services rendered parents, 728.
  - establish insanity of defendant, 2597.
  - open up settlement, 427.
  - prove incapacity to make contract, 612.
- should be a fair preponderance of the evidence, 357.
- slight, sufficient, 358.
- sufficient even though jury not satisfied, 198.
  - in action for causing intoxication, 1222.
  - to satisfy, e 3337.
- to establish fraud, 536.
  - satisfy minds of jury too high a degree of proof, wills, e 4303.
- what is required, e 3335.
  - jury should consider in determining the weight of evidence, 335a, b, c.
- when burden of proof is on defendant, 362.
  - evidence is equally balanced, 356.
  - jury in doubt, should find for the defendants, 356.
  - should find the defendant guilty, 352.
- which weighs more, e 3338.



[References are to sections; e refers to Erroneous Instructions.]

**PRESCRIBED RULES—**

of evidence must be followed, e 4495.

**PRESCRIPTION OF HIGHWAYS—See HIGHWAYS.**

**PRESENCE—**

actual or constructive, will render one a principal, 2732.  
 as affecting fact of being principal, e 4474.  
 assault and battery, aiding or abetting, 2851.  
 at time crime is committed, principals and accessories, conspiracy to rob, e 4476.  
 constructive, principal in larceny, e 4479.  
 lacking, principal and accessory, 2740.  
 not sufficient, principal and accessory, 2739.  
 of accessory, actual or constructive, 2731.  
     female, abusive language in, 3295.  
     officer, whether crime committed in, right of officer to arrest without warrant, e 4324.  
 taking in, robbery, by putting in fear, or by force and violence, 2899.  
     robbery, does not necessarily mean from the immediate view, 2895.

**PRESENT—**

aiding and abetting, principals and accessories, e 4475.  
 danger must seem, self defense, 3112.  
 without aiding or assisting, principal and accessory, 2741.  
 worth, of future earnings, measure of damages, personal injury, e 3581.

**PRESIDENT—**

of bank, liable for himself only, e 3456.  
 corporation, authority of, as to negotiable instruments, release of liability, e 4195.

**PRESUMPTION—**

abduction, previous chaste character, 2783.  
 adultery, conduct and situation, night time defined, 2788.  
 against adultery, divorce, e 3623.  
 as to continuance of insanity, e 4407.  
     conveyance between husband and wife, 1086.  
     deadly weapon, from killing, provocation, 3069.  
     degree of murder, burden of proof, 2475.  
     intent, homicide, blow with fist, 3053.  
     possession, not adverse, e 3403.  
 burglary, definition of in connection with possession of stolen goods, e 4569.  
 conclusive, that male under fourteen years of age cannot commit rape, e 4529.  
 court may properly instruct jury to draw such inference, 167.  
 credibility, none, conduct on stand, e 3312.  
 damages, eminent domain, burden of proof, e 3566.  
 deeds, as to truth of contents of certificate of notary public, e 3621.  
 fraud not presumed, 1099.  
 from attempt to utter forgery, intent to defraud, 2943.  
     good character, malicious prosecution, 1281.  
     laying out and working highway, 1137.  
     possession of fruits of larceny recently committed, e 4786.  
     sale of property alleged to be stolen, invading province of jury, e 4783.  
 homicide, no presumption of premeditated design, 3085.  
     that act was done advisedly, 3048.  
     death intended from use of deadly weapon, 3070.  
     one intends the natural consequences of his acts, 3047.  
 in favor of holder of negotiable instrument, 2134.  
 intoxication not amounting to insanity, no defense, 2612.  
 larceny, recent possession of stolen goods, good character, hypothesis must include evidence, e 4785.  
 law presumes necessary consequences of act, 1057.  
 murder in second degree, burden of proof, 3020.

[References are to sections; e refers to Erroneous Instructions.]

**PRESUMPTION—Continued.**

- murder from killing with billiard cues, 3021.
- necessarily arising only, should be considered in circumstantial evidence, 2503.
- negligence of master not presumed, 1387.
- negotiable instruments, good faith in assignment, 2173.
- none that defendant's reputation is good, e 4338.
- of chastity, seduction, weakened or destroyed, several acts under distinct promise of marriage, e 4532.
- continuation of insanity when once shown, 2593.
- criminal intent, from doing prohibited act, bigamy, 2798.
- danger, from electric wires, negligence, telegraph companies, 2123.
- death from seven years' absence, 1210.
- life insurance, absence for seven years, e 3684.
- dedication from space of time, 1142.
- due care, no eye witness to killing of person, 1936.
- by deceased when no eye witness of killing by train at railway crossing, e 4064.
- fraud against creditors, none exists, e 3630.
- fraudulent intent, embezzlement, from act, not conclusive, e 4594.
- guilt, not raised by indictment, e 4392.
- guilt, raised by flight, 2457, e 4326.
- habitual sexual intercourse, when one act is proved and parties reside together, e 4509.
- honesty, fraud, good faith between near relations, e 3646.
- intent, burden of disproving, 2471.
- burglary, prima facie case, 2876.
- element of libel, e 4260.
- law, as to authority of bartender to sell intoxicating liquor, none either way, 3190, 3191.
- liability, passenger injured in street car collision, 2032.
- malice, arson, from the deliberate, intentional, unlawful burning, e 4798.
- causing death of child after its birth by beating its mother before its birth, e 4609.
- from use of deadly weapon, 2633.
- homicide, death by violence, 3060.
- whether there is one from killing with deadly weapon, e 4668.
- negligence, collision, 1796, e 4132.
- derailment of car, 1797, 2031, e 4131.
- failure to comply with law, fencing track, e 4081.
- to obey ordinance, e 4036.
- falling elevator, e 4009.
- injury to passenger, e 4007, 4008.
- mere happening of accident to passenger, e 4125.
- of last connecting carrier, injury to carrier, e 3957.
- sparks from engine causing fire, e 4098.
- of unusual size and number being carried an unusual distance, e 4105.
- notice, to municipal corporations of defects in street, e 3924.
- ownership from possession, 1065.
- sanity, burden of proof does not shift in criminal cases, e 4395.
- proving insanity, 2569.
- capacity to make wills, e 4290.
- overcome by showing insanity to be probable, e 4396.
- requires insanity to be "clearly established," 2596.
- wills, 2368.
- suicide, life insurance, morphine or other narcotics, e 3682.
- partner giving note, burden of proof, 2208.
- perjury, as to authority of officer administering oath, 3265.
- person traveling on sidewalk may presume that it is reasonably safe for ordinary travel, e 3927.
- proof as to defective condition of machinery presumed to continue until rebutted, e 3786.
- rape, from failure to make complaint, e 4526.
- receipt for rent, law presumed that rent for back month has been paid, 1238.

[References are to sections; e refers to Erroneous Instructions.]

**PRESUMPTION—Continued.**

self defense, possession of deadly weapon by deceased, 3123.  
 slander and libel, good reputation, burden of proof on defendant, 2281.  
 that all items were included in an account stated, burden of proving contrary, e 3399.  
   good and collectible accounts continue so, 2427.  
   natural and probable consequences of wrongful act are intended, negligence, street railroads, 2055.  
   one intends the natural consequences of his act, forgery, 2944.  
   party stopped, looked and listened before crossing railroad track, 1921.  
 undue influence not presumed from unjustness of will, e 4302.  
 what will amount to presumption of fraud, 1072.  
 when city is presumed to have had constructive notice of defect in sidewalk, e 3929.  
   grant presumed, 458.  
   sale is presumed to be made with intent to hinder, delay or defraud creditors, 1064.  
 wills, insanity, settled, presumed to continue, 2378, e 4296.

**PRESUMPTION OF INNOCENCE—Chapter XC, 2634-2646, e Chapter CLXXI, 4420-4429.**

always with defendant, never shifts, 574.  
 argumentative instruction, e 4421.  
 attends accused throughout trial, e 4429.  
 burden of proof on state in criminal trial, 2465.  
 continues throughout the trial, 2646.  
   till every material element is proven, 2639.  
   overcome by evidence, must be substantial doubt, 2635.  
 defendant entitled to instruction as to action for deceit, 1133.  
   not entitled to most favorable aspect of evidence, e 4425.  
   relying upon failure of state to prove case, e 4428.  
   to be given full benefit of, 2636.  
 disregarding testimony not corroborated, duty to favor defendant's theory of innocence, e 4427.  
 duty of jury to construe evidence favorable to defendant, e 4424.  
   to infer innocence rather than guilt, 2641.  
 every ingredient of guilt must be proven beyond reasonable doubt, 2640.  
   material link in chain of circumstantial evidence must be proved beyond reasonable doubt, 2678.  
 forgery, not nullified by unexplained possession of forged instrument, e 4606.  
 imposing too great a burden on state, e 4420.  
 inconsistent acts construed accordingly, e 4426.  
 information no evidence of guilt, 2568.  
 jury compelled to bear in mind, 2643.  
 larceny, open taking, when, e 4782.  
 matter of evidence, 2637.  
 not a mere form, defendant must be given benefit, 2642.  
   shield from conviction, 2644.  
 overcome only by proof, what required, 2638.  
 placing obstruction on railroad, e 4819.  
 reasonable doubt, evidence required to convict, 2679.  
   rule where evidence is circumstantial, 2676, 2677.  
   suspicion or probability of guilt not sufficient, 2675.  
 refusal to instruct, error in many states, 2645.  
 seduction, jury must reconcile evidence and indictment, compromise, 2837.  
 self defense, reasonable doubt, e 4422.  
 until contrary appears beyond a reasonable doubt, 2634.  
 whether regarded as evidence, e 4423.

**PRESUMPTIVE EVIDENCE—**

illegal sale of intoxicating liquor, public resort, finding liquor, 3204.  
 when keeping is, 3188.



[References are to sections; e refers to Erroneous Instructions.]

**PRETENDED SALES—**

fraud, e 3652.

**PRETENSES, FALSE—**See FALSE PRETENSES, 2939.

**PREVENTING ATTACK—**

self defense, firing to scare, e 4736.

**PREVENTING ESCAPE—**

of prisoner, homicide, e 4608.

**PREVENTING NATURAL FLOW—**

of water, omitting element of ordinary care, diverting watercourse, e 4280.

**PREVIOUS—**

indebtedness, note of corporation given for, liability of directors, e 4194.

intercourse with others, defense, seduction, e 4533.

troubles, not considered as affecting motive for homicide, 3079.

**PREVIOUSLY ARMING HIMSELF—**

self defense, aggressor not necessarily barred from pleading, e 4720.

whether evidence of malice, e 4719.

**PREVIOUSLY FORMED DESIGN—**

bars plea of self defense, 3138.

definition of murder in second degree, e 4636.

does not bar plea of self defense, e 4727.

homicide, to use deadly weapon, 3071.

**PRIMA FACIE CASE—**

burglary, intent presumed, 2876.

negotiable instruments, proof of execution, e 4193.

**PRIMA FACIE EVIDENCE—**

burglary, definition of, in connection with possession of stolen goods, e 4569.

malicious prosecution, discharge, e 3709.

want of probable cause, dismissal of case, burden of proof, e 3710.

of conviction, records, e 4503.

location, 1140.

murder in first degree, killing with deadly weapon not, e 4631.

negligence, railroads, injury by fire, 1988.

replevin, defendant's possession, ownership, clearly wrong, e 4238.

**PRINCIPAL—**

accepting benefit of tort of agent, e 3421.

advances for, by agent, when statute of limitations begins to run, continuous agency, e 3706.

agency presumed to continue, 474.

agent bound to act solely for, 466.

of undisclosed liable, 490.

who buys piece of property guilty of constructive fraud, 466.

authority to invest funds limited to amount deposited with agent, 493.

bound by acts of agent, 470.

broker not allowed to purchase property of, 602.

consent to usages of agent's market, 472.

diligence, how determined, 486.

of as to acts of agents, how determined, 486.

duty of agent to inform consideration of sale, 467.

how ascertained, through acts of agent, 463.

keeping place for sale of intoxicating liquor, 3193.

knowing and voluntarily permitting another to hold himself out to the world as agent, 473.

knowledge of agent's acts essential to ratification, 486.

agent perpetrating fraud not imputed to, 494.

liable for fraud of agent, e 3426.

may rely upon representation of agent, 467.

must know material facts to ratify act of agent, suing out writ of attachment, e 3445.

[References are to sections; e refers to Erroneous Instructions.]

**PRINCIPAL—Continued.**

- not charged with knowledge gained by agent before employment, e 3418.
- notice to agent is usually notice to, 475, 476.
- ratification by failing to repudiate unauthorized acts of agents, 484.
  - of agent's acts by accepting benefits, 482.
  - assumed agent's contract must be entire, 485.
  - false representations of real estate agent, 492.
  - former acts may establish agency, 481.
  - unauthorized agents' acts, 480.
- secret profits of agent belongs to, 468.
- third party bound to take notice of agent's authority, 465.
- true criterion in determining who are, 2724.
- undisclosed, bound by acts of agent, 489.
- when bound by agent's warranty, 471.
- estoppel from denying acts of agent, 472.
  - liable for agent's torts, 488.
- where purchaser accepts goods of agent only, 491.
  - purchaser refuses to accept goods of, 491.
- who remains silent when he ought to speak may be bound by acts of agent, 600.

**PRINCIPALS AND ACCESSORIES—Chapter XCI, 2723-2753, e Chapter CLXXII, 4474-4492.**

- accessories may not be guilty of same crime as principals, e 4481.
- accomplice cannot corroborate self, extraneous evidence necessary, seduction, 2753.
  - guilty as principal, 2728.
- actual or constructive presence will render one a principal, 2732.
- advising and encouraging, not being present, 2740.
- aiding, abetting or consenting, 2733.
  - and abetting, accessory in homicide, e 4477.
  - principal in second degree, 2736.
  - may be by words or acts, 2735.
  - or encouraging, reasonable doubt, alibi, 2734.
- all persons concerned in commission of felony are principals, what to be alleged in indictment, 2725.
- assault with intent to kill, intent, 2747.
- assuming corroboration of testimony of accomplice sufficient to convict, e 4488.
- burglary, possession alone not sufficient to convict, e 4567.
- charging that it is unsafe to convict on testimony of accomplice, e 4490.
- co-defendant chargeable with wrong done by other, participation required, 2730.
- common purpose or design, 2737.
- concert of action need not be by express agreement, 2738.
- defendant indicted as principal cannot be convicted as accessory, e 4567.
- difficulty of convicting without testimony of accomplice, e 4491.
- distinction abrogated, 2727.
- encouraging another to kill, 2743.
- expressing opinion on what has been proved, e 4484.
- homicide committed while escaping from prison, 2745.
- instrumental in communicating poison, e 4478.
- intent, consent to criminal act, soaking person with turpentine and burning, e 4480.
- jointly indicted, 2729.
- larceny, what constitutes principal, e 4479.
- name of principal should be given in trial of accomplice, e 4482.
- no greater weight to testimony of accomplice because corroborated, e 4487.
- pouring gasoline and turpentine on person and igniting, commenting on evidence, e 4483.
- presence, actual or constructive, 2731.
  - conspiracy to rob, e 4476.
  - not sufficient, must have aided, counseled, abetted or encouraged, 2739.

[References are to sections; e refers to Erroneous Instructions.]

**PRINCIPALS AND ACCESSORIES—Continued.**

present, aiding and abetting, conspiracy, e 4475.

but not aiding or assisting, 2741.

robbery, murder committed, guilty though not consenting, 2746.

*testimony of accomplice,*

corroborated by confession, 2750.

must be corroborated, 2748, e 4485.

need not be corroborated, 2751.

should be received with caution, 2752.

sufficient where statute does not require corroboration, e 4486.

to be received with caution, omitting to define corroboration,  
e 4489.

what corroboration sufficient, 2749.

testimony of wife of accomplice, e 4492.

watching while another killed, 2744.

who are principals, 2723.

presence, e 4474.

without knowledge, connivance or assent of defendant, 2742.

**PRINCIPAL AND SURETY—**

liability of, on negotiable instrument, 2141.

**PRINTED CASE—**

purpose of, 317.

**PRIOR—**

common law marriage, bigamy, what would constitute, e 4514.

suit, settlement of, effect on subsequent proceeding, 673.

**PRIORITY—**

between buyer and execution creditor, 1324.

lien of judgment and chattel mortgage, 1310, 1311, 1315.

**PRISON—**

conspiracy to escape from, 2915.

homicide committed while escaping from, all who aid or abet are  
principals, 2745.

**PRISONER—**

keeping under strict guard, escape of, 2426.

preventing escape of, homicide, 2962, e 4608.

release attempted, sheriff killing person attempting, manslaughter,  
3042.

releasing from jail by delivering tools, 2464.

self defense, shooting officer making arrest, 3156.

**PRIVATE CITIZEN—**

killing of, by policeman, when not justifiable, 2960.

**PRIVILEGE—**

perjury, defendant cannot be compelled to testify, e 4795.

**PRIVILEGED COMMUNICATIONS—**

slander and libel, 2295.

general issue, e 4269.

whether malice implied, e 4265.

**PRIVILEGES—**

in restaurants, extending equal, e 4818.

**PROBABILITY—**

of guilt, high degree of, will not justify conviction, e 4449.

insanity, proof of, overcoming presumption of sanity, e 4396.

innocence, reasonable doubt, 2697.

**PROBABLE CAUSE—**

acquittal before justice of the peace, no indictment by grand jury,  
1275.

arrest upon suspicion, malice, e 3718.

arresting without warrant, when it may be done, 1286.

burden of proof on plaintiff to show want of, 1282.

defined, 1259-1262, 1284.

discharged by examining magistrate as *prima facie* evidence of  
want of, 1280.



[References are to sections; e refers to Erroneous Instructions.]

**PROBABLE CAUSE—Continued.**

- dismissal of civil suit, *prima facie* of want of, 1263.
- false imprisonment, defendant must have caused arrest, e 3716.
- full statement of facts to counsel, 1279, 1280.
- good reputation of plaintiff, knowledge of by defendant, proper for juror to consider, 1281.
- if proven, malice immaterial, 1268.
- jury may but need not necessarily infer malice from want of, 1271.
- may consider delay in commencing prosecution after alleged commission of offense, 1272.
- justification for beginning criminal proceedings, e 3712.
- malice may be inferred from want of, 1284.
- not necessary that a crime should have been committed, 1273.
- omitting malice in instruction, e 3713.
- person beginning criminal prosecution must exercise care of an ordinarily prudent man, 1276.
- prima facie* evidence, dismissal of case, burden of proof, e 3710.
- prosecution undertaken for public purpose, e 3711.
- proving a negative, 1284.
- swearing out search warrants without, 1278.
- what is a want of, 1262.
- want of, cannot be inferred from proof of malice, but may be considered, 1272.
- must be shown in malicious prosecution, 1284.
- must not be inferred from proof of malice, 1284.
- what defendant believed when he made complaint and not the guilt or innocence of plaintiff the true inquiry, 1266.
- is sufficient to show, 1261.
- may be admitted in evidence to show a want of, 1264.
- negatives the idea or want of, 1265.
- whether warrant to evict was procured without, 1247.

**PROBATE COURT—**

- appeal from, testamentary capacity, 2391.

**PROCESS—**

- abuse of, prosecution for purpose of collecting private debt is, 1270.
- limit of, attendance of witnesses, taking testimony by commission, 2775.
- property seized under, replevin, demand necessary, 2241.
- statute of limitations runs if process could be had, though plaintiff did not know defendant's residence, e 3705.

**PROCUREMENT OF ARMS—**

- self defense, as affecting motive, e 4721.

**PROCURERS—**

- statute against, prosecution under, e 4516.

**PRODUCTION OF EYE-WITNESS—**

- not necessary, state may rely on dying declaration, e 4690.

**PROFANE—**

- and obscene language improper in court, 240.

**PROFESSING—**

- to have supernatural powers, action for libel by "magnetic healer," e 4263.

**PROFITS—**

- loss of, may be considered in assessing damages in eminent domain, 848.
- peddling goods for, without license, what constitutes, e 4815.
- receiving, would constitute sale of intoxicating liquor, e 4768.

**PROHIBITION LIMITS—**

- sale of intoxicating liquor in, what constitutes sale, 3202.

**PROHIBITION, WRIT OF—**

- when writ of, may be issued, 290.

**PROMINENCE—**

- giving undue, to certain assumed facts, negotiable instruments, e 4208, 4209.
- to certain evidence, self defense, threats of deceased, e 4732.

[References are to sections; e refers to Erroneous Instructions.]

**PROMISE—**

- confessions made under, of immunity, e 3469.
- obtained by, 2526.
- for a promise not always good consideration, e 3477.
- of marriage, seduction, chaste character erroneously presumed, 2832.
- previous chaste character, reasonable doubt, 2833.
- refusal of prosecutrix to marry, proof required, 2831.
- several acts, presumption of chastity weakened or destroyed, e 4532.
- to repair by engineer, promise of defendant, e 3399.
- by master, continuing in employment, e 3827.
- defect in track, right to remain a reasonable time after promise, e 3900.
- operating dangerous machine, promise of master to supply device for lessening danger, 1468.
- reliance upon by servants, continuing work in dangerous place, 1467.
- right of servant to remain a reasonable time, 1468, e 3398.

**PROMISSORY NOTES—**See NEGOTIABLE INSTRUMENTS.

**PROMPT COMPLAINT—**

- prosecutrix, rape, 2810.

**PROMPTLY—**

- defendant may act, self defense, no duty to wait, 3170.

**PROOF—**

- degree of, based on crime, e 4494.
- circumstantial evidence, 2502, e 4351.
- divorce, adultery, e 3624.
- fraud, e 3656.
- required in criminal cases, e 4441.
- negotiable instruments, illegal consideration, intent, e 4215.
- disinterring dead bodies for surgical experiment, intent, 3284.
- extent and degree of required, libel, exact words, not clear preponderance, e 4264.
- "has sought to prove" considered, 2525.
- must be given, of fraud against creditors, e 3630.
- inconsistent with any reasonable hypothesis of defendant's innocence, 2710.
- correspond with allegation, negligence, railroads, death at crossing, 1933.
- of abduction, 2782.
- accidental death, accident insurance, 1204.
- actionable words, slander and libel, all the words need not be proved, 2280.
- adultery, clear preponderance required, divorce, e 3623.
- age of prosecutrix, rape, how made, 2817.
- alibi, easily made, caution in accepting, 2440.
- need not be to jury's satisfaction, e 4317.
- alleged testimony, required, perjury, 3260.
- arson, beyond reasonable doubt, 3269.
- assault with intent to kill, 2856.
- with intent to murder, 2857.
- authority of officer administering oath, perjury, 3265.
- bad condition of goods not prevented by former examination, e 3485.
- burglary, beyond reasonable doubt, 2888.
- conspiracy, beyond reasonable doubt, 2920.
- necessary, circumstantial evidence, 2905.
- of common design, 2906.
- what necessary to convict, 2904.
- contract must be the one sued on, e 3480.
- conviction, records, prima facie, e 4503.
- day when adultery took place, e 4510.
- defendant's statements, made by state, to be taken as true, instructing that, e 4366.
- delivery of deed, recording at request of grantor not conclusive, e 3620.

[References are to sections; e refers to Erroneous Instructions.]

PROOF—Continued.

- due care, vicious steer, knowledge of vicious disposition, 2349.
- execution of will, what is sufficient, e 4288.
- execution, negotiable instruments, prima facie case, e 4193.
- express malice, homicide, may be introduced though not charged, 3061.
- extenuating circumstances, burden on defendant, 2472.
- facts, inconsistent with defendant's guilt not necessary to raise reasonable doubt, e 4456.
- forgery, what necessary, 2941.
- good faith, required in transactions between near relatives, e 3646.
- guilt, flight as tending to, e 4326.
- whether flight so considered, motive, 2461.
- homicide, beyond reasonable doubt, 2979.
- insanity, direct evidence not necessary, 2599.
- need not be beyond reasonable doubt, e 4405.
- intent, assault and battery, 2839, 2858.
- homicide, concealment of body not conclusive, 3055.
- to defraud, not required from victim, e 3643.
- intercourse, not sufficient to convict of rape, 2806.
- justification, slander and libel, degree of, 2289.
- keeping a gambling house, what necessary, 3277.
- larceny, felonious intent, fraud, artifice, false pretenses, threats, 3212.
- what is necessary for, 3217.
- malice, homicide, by prior threats or seeking opportunity, 3066.
- homicide, how made, 3065.
- necessary, malicious mischief, 3280.
- when evidence of good character introduced, 2482.
- marriage, presumption of its continuance, 701.
- materiality, perjury, 3261, 3262.
- money expended in attempt to be cured, measure of damages, personal injury, e 3584.
- motive, homicide, failure of, 3076.
- in homicide, not necessary to convict, 3078.
- lacking, homicide, argumentative, e 4671.
- murder, by circumstantial evidence, absence of body, 2509.
- in first degree, poison, 2995.
- name of person injured, must be made, larceny, 3228.
- other embezzlements, as showing intent, comment on weight of evidence, e 4593.
- ownership, burglary, what sufficient, 2874.
- malicious mischief, how made, 3282.
- trover, required of plaintiff, 2326.
- perjury, more than one witness required, 3258.
- when one witness sufficient, 3259.
- probability of insanity, overcoming presumption of insanity, e 4396.
- reasonableness of charges, attorneys, e 3451.
- right to immediate possession, requisite to maintain trover, 2328.
- robbery, that money was "good and lawful" as described, not required, e 4576.
- self defense beyond reasonable doubt not necessary, need only raise, e 4755.
- beyond reasonable doubt, that defendant began fight, 3136.
- truth of confession, desirable, 2524.
- value necessary, larceny, 3218.
- of property, arson, must be given, e 4797.
- wrongful intent, necessary in conversion, 2333.
- presumption of innocence overcome only by, what required, 2638.
- required, attempt to bribe juror, other attempts incompetent, 3271.
- for conviction, principal and accessory, 2727.
- requiring too high a degree of, on the part of the state, e 4442.
- sufficient, obstructing highway, 3289.
- that accused was sworn, necessary, perjury, 3256.



[References are to sections; e refers to Erroneous Instructions.]

**PROOF**—Continued.

- that animal is vicious, necessary where recovery is sought, e 4277.
- defendant bought with knowledge that goods were stolen, not guilty of larceny, 3249.
- was aggressor beyond reasonable doubt, not necessary, e 4756.
- father of child, must first prove birth of child, e 4512.
- forged note was attempted to be passed for personal gain, 2945.
- homicide is criminal, must be introduced, 3172.
- killing in defense of sister was "necessary," not required, self defense, e 4760.
- money is genuine, larceny, 3224.
- part of forged handwriting was in same handwriting as balance, 2950.
- what necessary, seduction, promise of marriage, refusal of prosecutrix to marry, 2831.
- to convict on circumstantial evidence, 2505.

**PROOF, BURDEN OF**—See **BURDEN OF PROOF**.

**PROOFS OF DEATH**—

- must furnish before suit is begun, company must furnish blanks, 1187.

**PROOF OF LOSS**—

- burden on plaintiff, e 3671.
- false swearing as to, 1163.
- furnishing, 1157.
- waiving prompt compliance, 1159.
- if defendant denies liability plaintiff not obliged to furnish further proof, 1161.
- not in exact conformity with terms of policy, waiver of by company, 1158.
- should be made in accordance with the terms of the policy, 1157.
- contain what, 1157.
- waiver of, 1158.

**PROPER CARE AND DILIGENCE**—

- defined, e 4189.

**PROPERTY**—

- assuming broker had exclusive sale of, e 3464.
- attached to and part of real estate, not subject to replevin, 2245.
- bailee of, conversion of, 2334.
- burglary, necessary to state value and that it was in the building, e 4561.
- church, damaged by nuisance, railroad shops in neighborhood, 2197.
- defense of, guest in house may protect it from invasion, e 4764.
- killing to prevent intrusion on premises, e 4762.
- shooting trespasser, e 4765.
- when killing justifiable, landlord and tenant, 3182.
- delusion regarding, wills, of wife or child, 2334.
- false pretenses, some must have been obtained, 2939.
- force in retaking, e 3439.
- in possession of vendee, right of vendor's creditors to attach, 1094.
- injuries to, measure of damages, 795-806, e 3533-3537.
- jury may consider inequality of distribution under will, 2402.
- killing in defense of, not limited to force actually necessary, e 4766.
- self defense, e 4762.
- levy on proceeds arising from sale of, 1092.
- loaned to defendant, replevin, demand necessary, 2240.
- lost accidentally, rightfully in defendant's possession, trover and conversion, 2336.
- must be asportation of, to constitute larceny, e 4776.
- of railroad cannot be taken without compensation, e 3544.
- ownership of, embezzlement, intent, 2922.
- larceny, tax schedules admissible to attack credibility of prosecuting witness, e 4780.
- not necessary to maintain replevin, 2235.
- paid for with negotiable notes, 2165.

[References are to sections; e refers to Erroneous Instructions.]

**PROPERTY**—Continued.

- partnership, disposing of by one partner without knowledge or consent of other, e 4228.
- personal, building, when, 2218.
- growing crops, when, 2219.
- possession evidence of ownership, 2193.
- real or personal, fixtures, 2217.
- transferred by deed only, e 3619.
- right of officer to seize, attachment, e 3446.
- testator to dispose of as he pleases, capacity to make wills, e 4299.
- robbery, instruction should be confined to that described in indictment, e 4577.
- seized under process, replevin, demand necessary, 2241.
- sold from pecuniary necessity, fraud, e 3653.
- special, larceny, sufficient ownership, 3226.
- stolen, possession of, not a material ingredient of crime of larceny, e 4784.
- receiving, e 4791-4792.
- taken by trespasser, value of, identification not necessary, e 4812.
- for public use, damages, allowance for benefits, expense of adjusting land, e 3553.
- testator may dispose of as he pleases, 2401.
- transfer by insolvent debtor, motive immaterial if in payment of debt due, e 3632.
- transferred from husband to wife, fraud against creditors, e 3635.
- value of, arson, must be proved, e 4797.
- what not subject to execution, 1091.
- wills, right of testator to dispose of as he pleases, 2385.
- wrongfully taken and consumed, conversion, 2335.

**PROPORTIONAL DAMAGES**—

- for death caused by negligence, e 3613.

**PROPOSITION OF LAW**—

- abstract, correctly stated, sometimes error, e 4619.

**PROSECUTING ATTORNEY**—

- opinion as to guilt of defendant not to be considered by jury, 2755.
- statements not based on evidence, 2754.

**PROSECUTING WITNESS**—

- larceny, attacking credibility of, tax schedules admissible, e 4780.

**PROSECUTION**—

- extorting money by threats of, keeping bawdy house, 2801.
- for adultery, disposition or inclination, 2787.
- must be at instance of either husband or wife, 2790.
- witnesses for, particularizing, e 4496.

**PROSECUTION, MALICIOUS**—See **MALICIOUS PROSECUTION**.

**PROSECUTRIX**—

- adulterous disposition, rape, how material, 2814.
- age of, how proven, rape, 2817.
- character of, as affecting credibility, rape, e 4524.
- defense of consent, rape, 2808.
- failure to complain, rape, 2811.
- make outcry, rape, 2812.
- instruction not showing that she was not the wife of defendant, rape, 2826.
- intent to overcome with force, essential, rape, 2824.
- moral character of, reputation for chastity, 2807.
- only witness in bastardy proceedings, jury may disregard testimony, 2795.
- outcry prevented by fear, rape, 2813.
- prompt complaint by, rape, 2810.
- refusal to marry, proof required, seduction, 2831.
- statement of, whether complaint or confession, for jury, rape, e 4525.
- testimony of, rape, 2819.
- to be weighed as that of any other witness, rape, e 4527.

[References are to sections; e refers to Erroneous Instructions.]

**PROSECUTRIX—Continued.**

- under age of consent, rape, 2816.
- visiting defendant, assault and battery, 2846.
- whether corroboration necessary, rape, 2820.

**PROTECTING ANOTHER—**

- self defense, parent, 3179.

**PROTECTING THE INNOCENT—**

- policy of the law, argumentative, e 4493.

**PROTECTION—**

- from rain, duty to give, delivery of goods, sale, 2261.
- of a woman, attacking another in, may plead self defense, e 4761.
- father by son, killing in, self defense, e 4757.
- house from invasion, by guest, e 4764.

**PROTEST—**

- negotiable instruments, demand of payment, 2164.

**PROVINCE OF JURY—**

- charge invading, difference between slander and libel, e 4259.
- inference, etc., e 3385.
- insulting words, not necessarily guilty of murder, e 4620.
- little weight to testimony, because of ill will, e 4500.
- presumption from sale of property alleged to be stolen, e 4783.
- specifying what acts constitute provocation, e 4677.
- weight of evidence, e 3363.

**PROVOCATION—3086-3096, e 4677-4685.**

- and passion must concur, manslaughter, 3039.
- cooling time, facts constituting, question of law, 3096.
- hostile acts, e 4685.
- whether a question of fact or of law, e 4684.
- deadly weapon, presumption as to, 3069.
- discovery of wife in adultery not sufficient, e 4678.
- for killing, self defense, threat of arrest not sufficient, 3154.
- heat of blood, cooling time, 3095.
- insufficient, manslaughter, 3090.
- insulting words to relatives, 3087.
- jury to determine adequacy, 3093.
- killing traducer of daughter, omitting other provocation, manslaughter, e 4655.
- mere threats not sufficient, e 4682.
- words not sufficient, e 4681.
- must arise at time of killing, 3037.
- necessary to reduce grade of homicide, acting in self defense, e 4680.
- passion aroused by, insulting conduct, e 4683.
- past conduct of deceased as evidence, 3092.
- preceding as well as attending circumstances, manslaughter, e 4653.
- referring to great as slight, e 4679.
- slap with hand, when insufficient, 3091.
- slight or trivial, not sufficient, 3040.
- specifying what acts constitute, homicide, e 4677.
- standard for determining sufficiency, 3094.
- sudden and sufficient, homicide, 3038.
- sufficient, not for jury, assault, e 3441.
- threats not sufficient, 3088.
- violent passion, insulting words, may reduce grade of homicide, 3089.
- words not sufficient, 3086.
- of, mitigates damages in case of assault, 532.

**PROVOKING DIFFICULTY—**

- assault and battery, third party interfering in fight, e 4542.
- bar to plea of self defense, 3126-3133, e 4710.
- for purpose of killing, e 4713.
- mere intention of, does not bar plea of self defense, e 4715.
- slandering deceased's family, e 4730.
- what constitutes, e 4712.
- without felonious intent, e 4714.



[References are to sections; e refers to Erroneous Instructions.]

**PROXIMATE CAUSE—**

as basis of recovery for damages to personal property, 801.  
 child prematurely born, whether, e 3742.  
 collision, 1537, e 4177.  
 contributory negligence must be, 1474, e 3830.  
 damages cannot be allowed unless the injury is from the direct and proximate cause, 895.  
 defective condition of bridge must be the, injury to horse, 1665.  
 definition of, e 3742.  
 employing insufficient help, 1464.  
 failure of engineer to report defects at end of run as required by company, 1554.  
     to keep track in repair, 1520.  
 high rate of speed, e 4167.  
 injury to passenger, e 3991.  
 liquor sold must be the, 1221.  
 must be, to recover for negligence, e 3742, 3761, 3853, 3906, 4118.  
 negligence of fellow servants must be the, 1474.  
 of personal injury, negligence, street railroads, 2013.  
 whether blowing of whistle frightened the horses, e 4033.  
     falling derricks was, of injury, e 3773.

**PRUDENCE—**

juror must use all used in the most important affairs of life, reasonable doubt, e 4444.

**PRUDENT MAN—**

self defense, danger must be such as to arouse fear in a reasonably prudent man, e 4697.

**PUBLIC ENEMY—**

or "act of God" will excuse common carriers, 1691.

**PUBLIC HIGHWAYS—**See HIGHWAYS, NEGLIGENCE, PUBLIC HIGHWAYS.

**PUBLIC HOUSE—**

must show that card playing was at, and that there was betting, to establish gambling, e 4806.

**PUBLIC IMPROVEMENTS—**

benefits that may be deducted from amount of damages, 851-852.  
 damnum absque injuria, 865.  
 eminent domain, depreciation in value of property, 850.  
 when trial by jury allowed, 12.

**PUBLIC OFFICER—**

acting outside of his authority, 479.  
 as agent, 479.  
 bribery of, to do what they are already obligated to do, intent essential, series, 3273.  
 whose authority is conferred by statute or court, 479.

**PUBLIC POLICY—**

contract against void, 638.  
 limitation of rule that contract is void, 638.

**PUBLIC PURPOSE—**

prosecution undertaken for, malicious prosecution, probable cause, e 3711.

**PUBLIC RESORT—**

intoxicating liquors found, presumptive evidence of illegal sale, 3204.

**PUBLIC STREET—**

vile epithets on, breach of the peace, 3294.

**PUBLIC UTILITY CORPORATIONS—**

what are, 666.

**PUBLICATIONS—**

libelous, injury caused by more than one, e 4266.  
 slander and libel, in good faith or with intent to injure, question for jury, 2285-2286.  
 libel, whether malice may be implied from, privileged communications, e 4265.

[References are to sections; e refers to Erroneous Instructions.]

**PUBLICITY—**

of trials and proceedings, Chapter V, 63-69.

**PUNISHMENT—**

added, burglary, instruction for, though the former conviction not charged in indictment, e 4573.

assault in sudden affray, heat of passion, 2840.

corporal, killing by, 2959.

guilt must be determined before fixing, 2763.

**PUNITIVE DAMAGES—**See also **EXEMPLARY DAMAGES.**

eviction by landlord in wanton and unwarranted manner, e 3704.

master and servant, injury to employe, 962.

may be allowed for wrongful arrest of passengers, 789.

for wrongful attachment, 741, 742.

in action for fraud and deceit, 830.

malicious prosecution, 787.

of trespass, 821, 822.

in civil action of assault, 964.

negligence causing death, in discretion of jury, e 3618.

not allowed on suit on contract, 759.

to be given in actions for injuries causing death, 991.

personal injury when given, e 3585.

when not given, e 3586.

undue familiarity with female, e 3443.

when may be given in action for assault, 532d.

**PUPIL—**

assault, school teacher using unreasonable force, e 4539.

**PURCHASE—**

for value in good faith, stolen negotiable note, 2174.

good faith necessary, attachment, e 3448.

of corporation stock, ownership, burden of proof, 2420.

of stolen property, bona fide or sham, 3254.

**PURCHASING NOTES—**

at discount, e 4209.

**PURCHASER—**See also **INNOCENT PURCHASER.**

at tax sale, trespass, cutting timber, 2310.

bona fide, landlord's lien, notice, e 3734.

negotiable instrument, altered note, e 4219.

buys at his own risk, in absence of special contract, machinery installed on trial, 2277.

found by broker, compensation earned, e 3468.

fraudulent conveyance, must have notice or have knowledge of fraud to annul, 1074.

guilty of contributory negligence, expression of opinion may amount to warranty, e 4253.

in good faith, negotiable instruments, not bound to see to application of funds, e 4217.

innocent, negotiable instruments, security for pre-existing debt, 2171.

negotiable note taken in payment of existing debt, 2172.

knowledge of insolvency of assignor, 1077.

of machine, to give trial and notice, provision of returning, 2276.

school lands, abandoning homestead, e 4236.

**PURPORTING—**

to draw weapon, deceased, self defense, 3117.

**PURPOSE—**

abandonment of, assault with intent to commit rape, 2823.

assault and battery, purpose and intent may be shown by valentine, 2860.

common, principal and accessory, 2737.

of admissibility of evidence of good character, e 4346.

admitting evidence of threats of deceased, self defense, e 4733.

premises leased for gambling, e 3698.

previously expressed, wills, insanity, 2386.

[References are to sections; e refers to Erroneous Instructions.]

**PURPOSE**—Continued.

- public, prosecution undertaken for, malicious prosecution, probable cause, e 3711.
- special, implied warranty, samples, e 4251.
- to provoke difficulty, does not bar plea of self defense, e 4715.
- unlawful, conspiracy, killing as a natural and probable consequence of, e 4584.
- conspiracy, not necessary that meeting should have been for, 2912.

**PURSUING**—

- and beating with deadly weapon, self defense, e 4726.

**QUALIFICATION**—

- of common law doctrine of retreat, e 4740.

**QUALITY**—

- of evidence an erroneous term, e 3342.
- goods sold, not up to specifications, refusal, 2269.
- offense, want of power of defendant to realize, 2577.
- sale by sample, must be a real and substantial difference to justify rejection, 2257.

**QUANTITY**—

- to be ascertained, sale of certain subject matter, 2253.

**QUANTUM MERUIT**—

- builder cannot recover on breach of special contract, e 3516.
- damages cannot be recovered under special contract, e 3516.
- for work done and accepted, when, 718.
- may be recovered for substantial performance of contract, 718.
- when employe forced out, 720.
- on partial completion of contract of hiring, 719.

**QUARE CLAUSUM FREGIT**—

- trespass, when maintainable against owner, e 3702.

**QUARREL**—

- provoking, self defense, without felonious intent, e 4714.
- seeking, murder in first degree, 2993.
- sudden conflict arising from, manslaughter, 3025.

**QUARRELSOME**—

- disposition of deceased, self defense, 3143.

**QUARTZ MINING CLAIM**—

- what constitutes, 2430.

**QUESTION**—

- incriminating, witness excused from answering, 2764.
- suggestive, in charge, e 4502.

**QUESTION FOR JURY**—

- adequacy of consideration for homicide, 3093.
- authority of bartender to sell intoxicating liquor, 3190.
- duty of retreat, e 4745.
- intent, assault with intent to kill, e 4548.
- in homicide, 3049.
- murder in first degree, taking deceased to secluded place, e 4635.
- threats, self defense, 3153.
- truth of evidence, not whether it is just or not, e 3388.
- weight of dying declarations, 3097.
- what considered, 3098.
- whether decision of what is sufficient cooling time is, homicide, e 4684.
- instruments are deadly weapons, metallic knucks, gas pipe, 3068.
- who was the aggressor, self defense, 3135.

**QUESTION OF LAW**—

- cannot refer to jury, e 3383.
- cooling time, homicide, facts held to constitute, 3096.
- replevin, ownership, e 4241.
- what is actual possession, e 3407.
- whether decision of what is sufficient cooling time is, homicide, e 4684.



[References are to sections; e refers to Erroneous Instructions.]

**QUIET POSSESSION—**

unlawfully break, pull down or injure another's fence, 3298.

**QUIETUDE—**

reputation for, criminal defense, e 4336.  
homicide, 2484.

**QUO ANIMO—**

not proper in instructions, 184.

**QUO WARRANTO—**

right to trial by jury does not extend, 12.

**RACE—**

extending equal privileges in restaurants to persons of color, e 4818.

**RACING HORSES—**

on public highway, manslaughter, Alabama, e 4657.

**RAILROADS—See NEGLIGENCE and DAMAGES.**

OPERATION AND MANAGEMENT—1529-1547, 1770-1798, e 3857-3868, 3980-3990.

backing train through populous part of town, e 4010.

carrying passenger past destination or platform, e 3983.

changing cars, announcement of, e 3982.

circumstantial evidence as to application of brake, e 3861.

collision at crossing with train of another railroad, e 3889.

failure of engineer to give signal, 1536.

of passenger train with loose car, 1537.

coupling cars, throwing wrong switch, causing injury, 1538.

crossing track at place other than customary crossing, care used by railroad, e 4013.

degree of care due towards children on track, e 4014.

required, e 3983.

duty of railroads to exercise ordinary care in keeping a lookout for employes on or in close proximity of the track, 1529.

of section foreman towards servant while unloading car, 1547.

to look out for persons on track, e 4015.

set brake while couplings are being adjusted, 1539.

stop train a reasonable time for passengers to get on, e 3981.

use reasonable care to avoid injuring person on track, e 4012.

engine following train at short distance, e 4011.

leaving track, brakeman locking switch to wrong track, 1544.

failure of engineer or fireman to obey signal to slow up train, 1532.

to give signal causing collision, e 3860.

give warning, 1534, e 4010.

obey ordinances as to speed and ringing bells, 1531.

provide step box or stool for passengers to alight, e 3986-3987.

falling of transom, injuring passenger, e 3990.

freight trains not required to stop at platform to receive or discharge passengers, e 3980.

general practice of yard crew in giving signals, e 3868.

helping passengers to alight, e 3986.

injury in manner and form as charged in declaration, e 3857.

through act of God and concurrent negligence of the company, 1530.

to passenger through defective construction, operation or maintenance of rolling stock or road-bed, burden of proof, 1840.

jury may infer that engineer saw person on track, e 4016.

laborers working on or about gravel cars, duty of company to exercise care to avoid injury, 1546.

launching ties from moving car, whether proximate cause, e 3867.

necessity of look-out at points where employes commonly pass in discharge of their duties, 1529.

[References are to sections; e refers to Erroneous Instructions.]

# RAILROADS—Continued.

- neglect of engineer to obey signal to stop train, run at dangerous rate of speed, 1533.
- operating car at dangerous rate of speed, e 3858.
- overcrowding cars, e 3988.
- projecting door of car causing injury, e 3866.
- recklessly running train at high rate of speed through a crowd of workmen, e 3859.
- removing ties, servant being injured while, 1545.
- sending hand-cars at great speed immediately after one another, 1541.
- servant being struck by car propelled on track at dangerous rate of speed without warning, 1542.
- starting car before plaintiff had reasonable time to board it, e 3865.
- car without warning to servants, e 3866.
- train before passenger has alighted, e 3985.
- telegraph operator delivering order to engineer, injured by another train on returning, 1535.
- third person unsettling brakes on cars, injury by reason of, e 3862.
- train striking person repairing track, 1543.
- using hand-car without a brake, 1540.

# RAILWAY CROSSINGS—See also CROSSINGS, HIGHWAY CROSSINGS and STREET CAR CROSSINGS.

- approaching crossing at high rate of speed, e 4059.
- attempting to cross although view obstructed, e 4058.
- cattle guards, e 4086.
- collision at with train of another railroad, e 3989.
- comparative negligence, e 4080.
- comparing affirmative and negative testimony in regard to giving warning, e 4043.
- contributory negligence, burden of proof, e 4078.
- no defense if defendant could have avoided injury after discovering peril, e 4073.
- of driver in crossing will prevent recovery, e 4062.
- person injured, e 4069.
- crossing track at place other than customary, care used by railroad, e 4013.
- defective bridge at, e 4114.
- condition of, causing collision, e 4029.
- driving across track in a reckless manner, e 4072.
- with baby in arms, e 4053.
- duty to give warning by bell or whistle, e 4025.
- keep lookout, e 4025, 4031.
- look and listen for approach of trains, e 4052, 4055, 4070.
- ring bell and blow whistle, e 4038, 4052.
- effect of plaintiff's deafness, e 4076.
- failure of employe to avoid injury when possible, e 4051.
- to discover approaching train, e 4071.
- hear noise of approaching train, e 4060.
- lower gates, e 4049.
- ring bell, e 4063.
- sound whistle or ring bell, e 4049.
- stop, look and listen, e 4056.
- flagman motioning to cross, effect of, e 4048.
- signaling not to cross, effect of, e 4049.
- frightening horses by blowing steam from engine at, e 4034.
- by blowing whistle unnecessarily, e 4033.
- giving warning at crossing as required by law, e 4035.
- injury to live stock, failure to give warning, e 4090-4091.
- intoxication as contributory negligence, e 4075.
- liability of railroads for failure to give warning, e 4042.
- looking and listening for approach of trains before crossing, e 3944n.
- lulling plaintiff into a feeling of security by failure to give signals, e 4042, 4044.
- made public by customary use, e 4027.

[References are to sections; e refers to Erroneous Instructions.]

# **RAILWAY CROSSINGS—Continued.**

- making flying switches at crossing, e 4050.
- must be put in safe condition, e 4024.
  - exercise reasonable care in driving across track, e 4067.
- necessity of greater caution in populous district, e 4026.
- need not blow whistle and ring bell at same time, e 4040.
  - blow whistle or ring bell continuously, e 4041.
- no eye witness to killing, presumption of due care by deceased, e 4064.
- noise of approaching train as substitute for blowing whistle or ringing bell, e 4060.
- observance of ordinances, effect of, e 4035.
- obstruction of by bushes and grass, e 4045.
  - view of, running train at great speed over crossing, e 4032.
- plaintiff must exercise ordinary care for his own safety, e 4063, 4066.
- plaintiff's knowledge of dangerous character of, e 4054.
- reckless conduct of plaintiff not necessarily a defense, e 4077.
- rescuing child on track, e 4068.
- right of employe to assume that driver will remain at safe distance from crossing, e 4061.
- rights and liabilities of railroad and travelers at, are equal and mutual, e 4030.
- running train over at greater speed than allowed by ordinance, e 4036.
- speed of train, in absence of ordinance, e 4037.
- turning back toward track on sudden approach of train, e 4074.
- unsuitable cattle guard, injury to live stock, e 4094.
- watchman standing at, whether sufficient warning, e 4047.
- when duty to stop, look and listen is excused, e 4057.
  - failure to ring bell is excused, e 4039.
- whether negligence not to have flagman at, e 4046.

# **RAIN—**

- duty to protect goods from, sale, delivery, 2261.

# **RAISING REASONABLE DOUBT—**

- self defense, sufficient, need not prove beyond, e 4755.

# **RAPE—2805-2828, e 4519-4529.**

- adulterous disposition of defendant and prosecutrix, how material, 2814.
- age of prosecutrix, how proven, 2817.
- assault with intent to commit*,
  - abandonment of purpose, 2823.
  - definition, 2821, 2828.
  - essential elements, 2822.
  - force necessary, feeling or sense of shame insufficient, e 4523.
  - murder committed, 2999.
- burden of proof, defendant need not prove consent, e 4520.
- character of force used, e 4522.
  - of prosecutrix affecting credibility, e 4524.
- circumstances summed up by the court, 2815.
- defense of consent by prosecutrix, 2808.
- defined, 2805.
- definition of carnal abuse, 2827.
- distinguished from seduction, 2830.
- failure of prosecutrix to complain, 2811, e 4526.
  - of prosecutrix to make outcry, 2812.
- instruction not showing prosecutrix not wife of defendant, 2826.
- intent to use force essential, 2824.
- involuntary consent induced by fear, 2809.
- lesser offense excluded, e 4519.
- moral character of prosecutrix, reputation for chastity, 2807.
- must make active resistance unless overcome by drugs, e 4521.
- outcry by prosecutrix prevented by fear, 2813.
- presumption that male under fourteen years cannot commit, e 4529.
- prompt complaint by prosecutrix, 2810.
- proof of intercourse not sufficient, 2806.



[References are to sections; e refers to Erroneous Instructions.]

**RAPE**—Continued.

- prosecutrix under age of consent, 2816.
- reasonable doubt as to age of girl, 2818.
- as to intention to use force, 2825.
- self defense in resisting, 3158.
- statement of prosecuting witness, whether complaint or confession, for jury, e 4525.
- testimony not to be taken as true because not denied, e 4528.
- of prosecuting witness to be weighed as that of other witnesses, "implicated," 2819, e 4527.
- whether prosecutrix need be corroborated, 2820.

**RATIFICATION**—

- attachment sued out by agent, e 3445.
- by partnership, partner's unauthorized acts, 2213.
- suit, 483.
- city council receiving report of city engineer, whether amounting to, e 3936.
- ignoring issue, agency, e 3420.
- knowledge of principal of agent's acts essential, 486.
- negotiable instruments, waiver of fraud, e 4212.
- of agent's transactions, must cover all or none, negotiable instruments, e 4197.
- agent's warranty, sale of machinery, 2272.
- assumed agent's contract, 485.
- deed, made while intoxicated, 1135.
- former acts may establish agency, 481.
- tort of agent, e 3421.
- unauthorized agent's acts, 480.
- voidable note, duress, 2153.
- wrongful distress, trespass, personal property, 2301.
- levy, trespass, personal property, refusing to release property taken, 2300.

**RATIONAL CONCLUSION OF GUILT**—

- wholly inconsistent with every other rational conclusion, e 4468.

**RATIONAL POSSIBILITY**—

- of defendant's innocence, not the measure of reasonable doubt, e 4448.

**READ**—

- inability to, negotiable instruments, fraud, mistake, relying on another, 2146.

**READING IN NEWSPAPERS**—

- swearing to lack of knowledge, perjury, e 4794.

**REAL**—

- danger need not be, self defense, may act upon appearances, 3110, e 4699.
- or apparent danger, self defense, 3109.

**REAL ESTATE**—Chapter LXXVI, 2217-2234, e 4231-4236.

See ADVERSE POSSESSION.

EJECTMENT.

EMINENT DOMAIN.

STATUTE OF LIMITATIONS.

- accretions, riparian owner, rights defined, 2233.
- agent or broker, to recover commission must show that he is ready, able and willing to take the property, 593.
- assumpsit for value of party wall, 2223.
- brokers, licensed at time of sale, e 3463.
- building on public highway, assessment of taxes by city, adverse possession, equitable estoppel, e 4233.
- conversion of part of, trespass, not necessary, e 4813.
- conveyance, valuable consideration, 2222.
- damage by fire, measure of, 802.
- by fire, value of land before and after fire, 802.

[References are to sections; e refers to Erroneous Instructions.]

**REAL ESTATE—Continued.**

- damage for injury to trees, putting up telephone wire, 803.
- measure of, may include value for subdivision purpose, 803.
- to growing timber, 802.
- drains, duty to keep open and free from obstructions, 2229.
- falling of party wall, duty of owner to protect and maintain, 2224.
- generally, injuries to, 802-806.
- growing crops, when personal property, 2219.
- homestead, abandonment, use for other purposes, e 4235.
- place of residence, ejectment, damages, 2234.
- injuries to dock by vessel—measure of damages, 805.
- market value of acreage for purpose of subdivision—an element of damage, 804.
- method of estimating damages to reversionary interest, 806.
- notice of defect in title, heirs, facts calling for inquiry, 2228.
- oral contract, statute of frauds, 2227.
- replevin, property attached to and part of, not subject to, 2245.
- reversionary interest—damages to, 806.
- sale of, recital of consideration, circumstances, e 4231.
- title to growing crops, 2220.
- withdrawal of offer, 2221.
- special assessment, railroad company restricted in use of right of way, 2230.
- special benefits, 2231.
- sub-let premises, trespass against lessor, 2317.
- taxation, fixing valuation, 2232.
- of ditch upon land already taxed, e 4234.
- title to, purchase by father with money of children, 2226.
- transfer by married woman, positive fraud, e 3627.
- by deed only, e 3619.
- trespass to, 2303-2319.
- both parties having title, 2306.
- claim of title, warning from owner, 2318.
- cutting trees for telephone system, 2311.
- damages, no effort to prevent, 2316.
- definition, break and enter, force and arms, 2304.
- disputed fence line, arbitration, 2319.
- entry upon land obtained by fraud, 2312.
- one having title and possession of part may bring action, 2305.
- purchaser at tax sale cutting timber, 2310.
- title in third person, no defense for one without title, 2307.
- trespassers are jointly and severally liable, 2303.
- unlawful cutting of timber, 2309.
- upon possession under rightful title, 2308.
- when defendant liable for act of independent contractor, 2314.
- writ of sequestration, burden of proof, 2315.
- trespassers, right to eject by force, 2313.
- vendor and vendee, ground for non-performance, e 4232.
- when building personal property, 2218.
- whether fixtures are personal or real property, 2217.
- widow's title, separation of spouses during life, 2225.

**REASON—**

- any in whole evidence, for not finding defendant guilty, not rule as to reasonable doubt, e 4435.
- for evidence of good character, should not be stated by court, e 4443.
- reasonable doubt, must arise from evidence, e 4434.
- rule as to reasonable doubt, 2647.
- juror must use all used in the most important affairs of life, reasonable doubt, e 4444.

**REASONABLE AND CREDIBLE—**

- account for possession of stolen goods, burglary, commenting on weight of evidence, e 4570.

**REASONABLE BELIEF—**

- belief of danger must be reasonable, self defense, 3106, 3121, e 4696.
- of defendant that he is in imminent peril, necessary element of right of self defense, e 4695.

[References are to sections; e refers to Erroneous Instructions.]

**REASONABLE BELIEF**—Continued.

self defense, insufficient grounds for, guilty of murder, 3104, 3108.  
of great bodily harm, acting on, 3107.

**REASONABLE CARE**—1337.

defined, 1685.  
of employe defined, 1594.  
person passing over sidewalk, 1685.  
unless exercised—cannot recover for damages to personal property, 801.

**REASONABLE CERTAINTY**—

not required in evidence, e 3336.

**REASONABLE DILIGENCE**—

in seeking employment—defined, 721.

**REASONABLE DOUBT**—Chapter XC, 2647-2722, e Chapter CLXXI, 4430-4473.

absolute certainty not required to convict, 2680.  
act surrounded in a degree of doubt, not sufficient, e 4453.  
alibi, defendant should have benefit of, 2445.  
duty to acquit if it exists, e 4320.  
not raised necessarily, 2443.  
sufficient to acquit, 2444.  
appealing to individual jurors, 2689.  
applying doctrine to subsidiary facts, e 4439.  
arson, elements to be proved beyond, 3269.  
arising from argument of counsel, should not acquit, e 4463.  
from part of evidence after consideration of whole, 2692.  
out of part of evidence, does not acquit, e 4459.  
as to any material fact, 2694.  
malice, 2716.  
mental capacity, must be raised by evidence of drunkenness, 2619.  
sanity of defendant, acquits him, 2594, 2714.  
which of several killed deceased, 2704.  
assault with intent to kill, included crimes, 2869.  
must be as to whole evidence, not only as to intent, e 4557.  
belief beyond, not the same as fully satisfied, e 4450.  
burglary, arising from other facts than possession may prevent evidence having any weight, e 4569.  
breaking and entering must be proved beyond, e 4568.  
caution against conviction from prejudice, 2688.  
circumstantial evidence, guilt must be proved beyond, but not each circumstance, e 4353.  
should be so strong as to exclude every reasonable hypothesis of innocence, e 4436.  
comment on evidence and argumentative, e 4454.  
conscientious belief, 2687.  
of guilt is not sufficient to convict, e 4445.  
conspiracy, 2719.  
intent to defraud, e 4590.  
construed in defendant's favor, 2634.  
conviction of guilt must arise from evidence, not from lack of it, e 4461.  
defendant need not prove facts inconsistent with his guilt to raise, e 4456.  
defense of alibi established by, 2713.  
defined and explained, reason for rule, 2647.  
compared to conduct in important affairs of life, 2686.  
in various states, 2648-2674, e 4430, 4431.  
not necessary to put finger on particular evidence, e 4431.  
definition of moral certainty, e 4464.  
degree of proof required in criminal cases, e 4441.  
doubt must be reasonable to acquit defendant, e 4433.  
doubting as juror what one believes as a man, 2705.  
elements of homicide, 2979.  
establishing self defense beyond, burden of proof, e 4472.  
every ingredient of guilt must be proven beyond, to overcome presumption of innocence, 2640.



[References are to sections; e refers to Erroneous Instructions.]

**REASONABLE DOUBT—Continued.**

- every material link in chain of circumstantial evidence must be proved beyond, 2678.
- every reasonable hypothesis of innocence excluded, 2708.
- evidence required to convict, 2679.
  - sufficient to convict may come from either side, e 4457.
- exclusion of every hypothesis but that of innocence, e 4467.
- forgery, intent to defraud must be proved beyond, 2943.
- guilty only as to count proven, 2702.
- high degree of probability of guilt will not justify conviction, e 4449.
- homicide, 2720.
  - that killing was accidental, e 4613.
- hypothesis of innocence, reconciliation of testimony with, e 4469.
- if single juror has, cannot convict, e 4462.
- independent circumstances identifying defendant, 2699..
- insanity, defendant need only raise, e 4406.
  - need not be proven beyond, e 4405.
- instruction involved and confusing, e 4473.
- insufficient that evidence necessarily leads to a conclusion of guilt, e 4451.
- intimation that burden of proof shifts from state to defendant, e 4465.
- jurors cannot doubt if they believe as men, usually error, e 4446.
- jury must acquit if evidence consistent with defendant's innocence, 2711.
  - need not have all facts and circumstances before them, e 4471.
  - should acquit when, 409.
  - should adopt hypothesis of defendant's innocence, 2709.
  - unable to find in whole evidence any reason for not finding defendant guilty, e 4435.
- larceny, burden of proof, 3252.
  - honest belief of ownership, intent, burden of proof, e 4779.
  - husband and wife, 2721.
- leaving mind of jury in state of confusion, e 4455.
- may arise by reason of lack of evidence, e 4460.
  - from evidence of previous good character, 2698.
  - want of evidence, 2695.
- may be generated by evidence of good character and absence of motive, e 4341.
  - raised by defense of alibi, though not established by preponderance of evidence, e 4319.
  - mitigating circumstances need not be proved beyond, e 4470.
  - murder in first degree, taking deceased to secluded place, question for jury as to intent, e 4635.
  - in second degree, killing must be malicious, Alabama, 3009.
  - or manslaughter, resolved in favor of defendant, 3035.
- must arise from evidence as a whole, possibility of innocence will not warrant acquittal, 2693.
  - be actual, substantial, fixed and reasonable, not imaginary, conjectural, vague or whimsical, 2683.
  - reasonable, e 4433.
  - substantial, not mere possibility of innocence, 2635.
  - within the evidence, 2696.
  - not be mere speculation, 2684.
  - relate to precise crime charged, 2701.
- not one produced by undue sensibility or trivial or fanciful suppositions, 2681.
  - required in civil cases, e 3341.
- object of law, e 4432.
- of degree of offense, guilty of less offense, 2706.
  - each link, not necessary, e 4437.
  - one juror will prevent conviction, 2690.
  - the material facts, e 4440.
- one having a reason based on evidence, e 4434.
- only allegations of indictment need be proven beyond, 2703.
- placing obstruction on railroad, e 4819.

[References are to sections; e refers to Erroneous Instructions.]

**REASONABLE DOUBT—Continued.**

- possession of stolen goods, 2885.
- practicing medicine without certificate, 3285.
- presumption of innocence, circumstantial evidence, links in chain of circumstances, 2676.
- self defense, e 4422.
- principal and accessory, alibi, 2734.
- prisoner need only create to cast burden on state of proving sanity, 2595.
- should be given benefit of, 181.
- probability of innocence, 2697.
- proof beyond, burglary, 2888.
- conspiracy, 2920.
- required, self defense, that defendant began fight, 3136.
- proof must be inconsistent with any reasonable hypothesis of defendant's innocence, 2710.
- of every necessary fact, inconsistent with every other reasonable hypothesis, 2712.
- raised by considering evidence of good character with other evidence, e 4334.
- rape, as to age of girl, 2818.
- as to intent to use force, 2825.
- rational possibility of defendant's innocence, not sufficient, e 4448.
- requiring too high degree of proof on the part of the state, e 4442.
- rule where evidence is circumstantial, 2677.
- sale or gift of intoxicating liquor, must be on whole evidence, e 4774.
- same as interposed in "graver transactions of life," e 4443.
- used in the most important affairs of life, e 4444.
- sanity must be proved beyond, where insanity shown to have existed, 2593.
- satisfaction beyond, belief not sufficient to convict, e 4447.
- seduction, complainant's contradictory evidence, 2836.
- promise of marriage, previous chaste character, 2833.
- self defense, defendant need only create, 2718.
- honest belief in danger, 3120.
- instruction may assume admitted facts, 2717.
- need only raise, not prove beyond, e 4755.
- slander, 2722.
- "slightest," e 4458.
- state must overcome presumption of innocence by proof beyond, e 2638.
- need not prove defendant the aggressor beyond, e 4756.
- subsidiary evidence, 2691.
- substantial doubt arising from evidence, 2685.
- sufficient if explanation of possession of stolen goods raise, need not be satisfactory, e 4788.
- suspicion or probability of guilt not sufficient, 2675.
- that charge was caused by hallucinations, 2715.
- to what extent character evidence considered in raising, e 4339.
- well founded doubt of defendant's guilt of any offense not good, e 4452.
- when there is one fact proved inconsistent with guilt, e 4438.
- where testimony is limited by election, 2700.
- whether defendant or another was guilty agent, e 4466.
- murder or manslaughter, verdict should be manslaughter, first or second degree, 2707.
- wholly inconsistent with every other rational conclusion than guilt, e 4468.

**REASONABLE EXPLANATION—**

- of possession of stolen goods, 2886.

**REASONABLE FREEDOM—**

- from fault, self defense, not enough, e 4723.

**REASONABLE GROUNDS—**

- for fear, self defense, defendant must have, e 4697.
- perjury, for believing statements to be true, 3257.

[References are to sections; e refers to Erroneous Instructions.]

**REASONABLE MEANS—**

to avoid necessity of killing, self defense, 3119.

**REASONABLE MOTIVES—**

for flight, other than guilt, argumentative, e 4328.

**REASONABLE VALUE—**

of services, malpractice, action for fees, burden of proof, e 3723.

**REASONABLE WAY—**

of escape, self defense, duty of retreat, 3161.

**REASONABLENESS OF CHARGES—**

attorneys, e 3451.

**REASONABLY SAFE PLACE FOR WORK—See NEGLIGENCE, MASTER AND SERVANT.**

**RECEIPTS—**

as evidence, embezzlement, 2933.

common carrier, for goods shipped need not be in writing, 1694.

for rent, presumption as to back rent, 1238.

life insurance, premium, singling out evidence, e 3677.

not conclusive—may be contradicted by parol evidence, 426, e 3486.

obtained by duress, 424.

of payment, genuineness of signature, 2145.

prima facie correct, 425.

warehouse receipts assignable, 564.

**RECEIVING PROFITS—**

from transaction would constitute sale, intoxicating liquor, e 4768.

**RECEIVING STOLEN PROPERTY—3253-3255, e 4791, 4792.**

criminal intent must exist at instant of receiving, 3253.

defendant has right to be confronted with witnesses, record of former trial not sufficient, e 4792.

direct or absolute knowledge that goods were stolen not required, e 4791.

left at man's house without his knowledge, 3255.

purchase, bona fide or sham, 3254.

**RECENT POSSESSION—**

of stolen goods, larceny, presumption, good character, hypothesis

must include evidence, e 4785.

satisfactory account of, 3245.

unexplained, 3244.

**RECITAL OF CONSIDERATION—**

sale of real estate, circumstances, e 4231.

**RECKLESS DRIVING—**

of horses, death caused, 2964.

**RECKLESS SHOOTING—**

assault with intent to kill, e 4559.

**RECOGNIZING—**

paramount title, when tenant bound, e 3700.

**RECOMMENDING—**

a person to mercy, homicide, 2980.

**RECONCILIATION—**

homicide, motive, in good faith lived up to, previous troubles not considered, 3079.

**RECONCILING TESTIMONY—**

credibility, duty of, e 3302.

with hypothesis of innocence, e 4469.

**RECORD—**

errors complained of should appear, 296.

must be filed within time prescribed, 307.

must show on appeal that errors complained of were passed upon by trial court, 296.

no presumption given, not in record, 307.

of former trial, receiving stolen property, not sufficient, defendant's right to be confronted with witnesses, e 4792.



[References are to sections; e refers to Erroneous Instructions.]

**RECORD—Continued.**

- on appeal should show not only objections but exceptions to ruling of court, 296.
- prima facie proof of conviction, e 4503.
- should contain all given or all refused instruction, 309.
  - all the evidence, 307.
  - assignment of errors, 308.
  - instruction asked by both parties, 307, 309.
  - modified instructions, 307, 309.
  - refused instructions, 307, 309.
- should disclose the pleadings, 309.

**RECORDING—**

- as to creditors, mortgage must be recorded, 1311.
- deed, at request of grantor, not conclusive proof of delivery, e 3620.
- mortgage good between the parties without, 1310.

**RECOUPMENT—**

- damages from defective plans, e 3436.
- of damages, action on bond, 2139.

**RECOVERY—**

- negotiable instruments, evidence required, 2135.
- on express or implied warranty, e 4254.
- suit for, from agent, e 3422.

**REDEMPTION—**

- right of, by mortgagor, 1317.

**REDUCING CRIME—**

- from murder to manslaughter, intoxication, absence of malice, 2618, 3064.
- mitigating circumstances need not be proved beyond reasonable doubt, e 4470.
- of homicide, provocation sufficient for, acting in self defense, e 4680.
- violent passion aroused by insulting language, 3089.

**REFERENCE—**

- to Biblical laws, 2756.

**REFERRING—**

- competency of evidence to jury, dying declaration, e 4688.
- to another person of similar name, libel, e 4267.
- onlookers as lobby, e 3394.
- probabilities and circumstances not in the case, e 3395.

**REFUSAL—**

- of court to listen to argument, 220.
- election judges to receive vote, e 4817.
- sales, order not complied with, tender back, 2269.
- to accept, sale, excuse for non-delivery, 2260.
- assist in making arrest, when justified, 2454.
- deliver up property of another, evidence of conversion, 2339.
- instruct on presumption of innocence, error in many states, 2645.
- take residue of goods ordered, resale without notice, 2258.

**REFUSE—**

- coal, nuisance, polluting stream, 2198.

**REGARDLESS—**

- of human life, killing, with depraved heart, correct principle misapplied, e 4619.

**REGULATIONS—**

- as to transfers, negligence, street railroads, 2059.

**REINSTATEMENT—**

- application of, 1191.
- of insured, 1212.

**REJECTION—**

- sale by sample, must be real and substantial difference, 2257.

**RELATIONS—**

- previous, homicide, 2965.

[References are to sections; e refers to Erroneous Instructions.]

**RELATIONSHIP—**

incest, admission of competent evidence, 2804.  
whether admission, uncorroborated, will warrant conviction, argumentative, e 4517.

**RELATIVES—**

defense of, self defense, son, 3180.  
fraud, more convincing proof of good faith required than in transactions between strangers, e 3646.  
insulting words to, provocation for homicide, 3087.  
insurable interest, 1205.  
of accused, weight of testimony, e 4497.  
deceased, attacked by defendant, self defense, 3130.  
power of testator to exclude, from share in his estate, e 4285.  
sale to not necessarily fraudulent, 1087.  
wills, no legal or natural rights under, 2364.

**RELEASE—1494.**

action for negligence, 1368.  
by wife, illegal sale of liquor to husband, e 3686.  
from false imprisonment, obtained by defendant, does not waive claim for damages, e 3717.  
mental incapacity to execute, negligence, 1368.  
obtained by fraud or misrepresentation, 1369, e 3754.  
of contract—obtained by fraud, 659.  
guarantor, negotiable instruments, extending time, surety, 2186.  
liability, negotiable instruments, president of corporation, e 4195.  
prisoner, sheriff killing one who attempts, manslaughter, 3042.  
property taken under wrongful levy, refusal, trespass, personal property, 2300.  
right of action by servant, 1494, e 3838.  
tenant by assignment of lease, acceptance of rent, e 3699.  
plea of, in personal injury case, burden of proof, damages, 947.  
retaining partial made in settlement of disputed claim will operate as, 675.

**RELIGIOUS MEETING—**

keeping order in, assault and battery, 2843.

**RELYING—**

in good faith upon a valid claim of right, trespass justified, e 4814.  
on dying declarations, state need not produce eye-witness, e 4690.  
upon failure of state to prove case, e 4428.

**REMAINDER—**

when statute of limitations does not run against remainder-man, 1255.

**REMEDY—**

additional, eminent domain, damages, statutory, e 3565.  
domestic, sale of drugs without license, excepted, 3287.

**REMOTE DAMAGES—**

eminent domain, inconvenient cutting of farm, e 3559.

**REMOVAL—**

of goods insured, threatened fire, cost of removal, e 3664.  
property as affecting risk of insurance, 1179.  
stolen property and sale in another county, belief of jury must be limited to evidence, e 4777.

**RENT—**

acceptance of, release of tenant by assignment of lease, e 3699.  
action for, lease taken in name of tenant's agent, 1237.  
voluntary payment of, does not estop from denying use of premises, e 3697.  
whether payments considered as, sale intended, installments, 2254.

**RENEWAL AGREEMENT—**

liability for failure to renew insurance, 1178.

**RENEWAL OF CONTRACT—**

evidence must not be ignored, e 3489.

[References are to sections; e refers to **Erroneous Instructions.**]

**REPAIR—**

covenant to, landlord and tenant, what is, e 3694.  
 duty to, negligence, railroads, bridge over farm crossing, 2011.  
 of tracks at crossings, liability of railroad and street car companies, 1938.  
 premises out of, landlord leasing, whether his duty to keep in reasonably safe condition, e 3696.

**REPAIRS—**

action for, failure of tenant to keep in repair, measure of damages, e 3695.  
 landlord not bound to make, in absence of express agreement, 1232.

**REPAYMENT—**

of money advanced for freight, not necessary before bringing action of replevin, e 4242.

**REPEATING REPORT—**

no defense, slander and libel, 2292.

**REPELLING—**

assault, self defense, killing in revenge after, 3125.  
 seizure of dog, assault and battery, 2844.

**REPETITION—**

in single instructions erroneous, 186.  
 of dying declarations, how considered compared with other repetitions, e 4689.  
 form of verdict, murder in first degree, e 4630.

**REPLEVIN—Chapter LXXVII, 2235-2245, e Chapter CLIX, e 4237-4245.**

bond—in action on for wrongful levy by sheriff—measure of damages, 809.  
 burden of proof, issue of detention, 2242, 2243.  
 by mortgagee after default, 2236.  
 debtor selling property and retaining possession, knowledge of creditor, e 4239.  
 defendant's possession is not prima facie evidence of ownership, e 4238.  
 demand necessary when plaintiff consented to defendant's possession, 2238.  
 necessary when plaintiff loaned property to defendant, 2240.  
   where property seized under process, 2241.  
 not necessary when defendant's possession tortious, 2239.  
   where taking wrongful, otherwise if taking not wrongful, e 4237.  
 does not relieve from charge of larceny, 3251.  
 exemption given to head of family, e 4244.  
 levy on crops and taking possession, 2244.  
 liability of officer for taking insufficient bond, e 4245.  
 mortgagor consuming mortgaged crops, e 4243.  
 no demand necessary when defendant claims title, 2237.  
 plaintiff need not own property, 2235.  
 property attached to and part of real estate not subject to, 2245.  
 question of ownership is a question of law, e 4241.  
 seller may replevy goods from fraudulent purchaser, 1116.  
 vendor need not repay money advanced for freight before bringing action, e 4242.  
 wrong to submit to jury question what constitutes a wrongful taking, e 4240.

**REPORT—**

repeating, slander and libel, 2292.

**REPRESENTATIONS—**

as to incendiarism, 1176.  
 false, commercial agency, fraudulent intent presumed, e 3644.  
   must be made knowingly, with intent to deceive, e 3645.  
   to defraud party to constitute fraud, e 3648.  
 fraudulent, ground for rescinding sale, must be as to existing or past fact, e 3638.  
   knowledge of falsity is material, e 4816.  
   negotiable instruments, signature obtained through, 2147.



[References are to sections; e refers to Erroneous Instructions.]

**REPRESENTATIONS**—Continued.

insurance on live stock, application, e 3679.  
 sale of partnership interest, predicting determination of character of, e 4227.  
 sales, must be relied on to constitute a warranty, 2274.

**REPUDIATION**—

of trusts, words necessary to create, limitations, 2428.

**REPUTATION**—

as a good citizen, penitentiary sentence as affecting, e 4348.  
 dangerous and violent man, self defense, prior threats, purporting to draw weapon, 3151.  
 competent evidence as to, e 3357.  
 evidence as to, limiting its scope and effect, e 4347.  
 for honesty, character evidence, homicide, 2486.  
 peace and quietude, homicide, 2484.  
 truth and veracity, method of impeachment, 373.  
 general, impeachment in general, contradictory statements, e 3353-60.  
 good, slander and libel, presumption, burden of proof on defendant, 2281.  
 in community for peace and quietude, defense to criminal charge, e 4336.  
 of defendant, no presumption that it is good, e 4338.  
 dog, vicious, not competent, 2348.  
 drunkard, credibility of witnesses testifying, e 4342.  
 prosecutrix, rape, chastity, 2807.  
 when bad, may be shown in mitigation of damages, 811.

**REQUISITE DEGREE**—

of proof in criminal cases, e 4441.

**REQUISITES**—

insanity caused by use of drugs, burden of proof, 2590.  
 of defense of insanity or idiocy, must be clearly proved, 2591.

**RE-SALE**—

damages for breach of contract, e 3510.  
 rejection of goods sold by sample, in good faith, 2257.  
 without notice, refusal to take residue of goods ordered, 2258.

**RESCISSION**—

of contract, by mutual consent, 650.  
 for non-performance, 651.  
 of extension of loan by reason of fraud, demanding immediate payment, 1131.  
 fraud, 1129-1131.  
 promptness of, 1129.  
 fraudulent contract must be as to the whole of it, 1129.  
 return of consideration, 1129.  
 rights of vendor as against the attacking or execution creditor, 1130.  
 sale, fraud, elements necessary, e 3642.  
 fraudulent representations, must be as to existing or past facts, e 3638.  
 though shown must not ignore evidence of renewal, e 3489.

**RES GESTAE**—

statements of defendant as part of, 2528.

**RESIDENCE**—

and domicile—must be the actual removal with intention to constitute change, 1029.  
 district, what constitutes, intoxicating liquor, 3208.  
 husband's right to select, 1030.  
 neighborhood, factory a nuisance, 2194.  
 or domicile—what constitutes, 1028.  
 place of, homestead, ejectment, measure of damages, 2234.  
 plaintiff ignorant of defendant's, statute of limitations runs if process could be had, e 3705.  
 refusal of wife to remove with husband—desertion, 1030.

[References are to sections; e refers to Erroneous Instructions.]

**RESIDENCE—Continued.**

statute of limitations, what absence from state sufficient to constitute, e 3707.

when a person not a resident of the state, 1032.

**RESIDING TOGETHER—**

one act of sexual intercourse proved, presumption of illicit co-habitation, e 4509.

**RESISTANCE—**

larceny, forcible taking, 3221.

taking too sudden to permit, 3222.

rape, necessary unless overcome by drugs, e 4521.

reasonable doubt as to defendant's intention to overcome, 2825.

robbery, taking so suddenly as not to allow of, considering condition of prosecuting witness, e 4575.

self defense, proportioned to danger, honest belief, reasonable doubt, 3120.

**RESISTING—**

assault, self defense, accidental killing, e 4716.

officer, in execution of writ, personal animosity immaterial, 2455.

rape, self defense, 3158.

unlawful expulsion from another's house, self defense, 3159.

**RESORT—**

public, intoxicating liquors found, presumptive evidence of illegal sale, 3204.

to all other means before killing, self defense, not necessary, e 4748.

**RESPECTFUL CONSIDERATION—**

of court's instruction, Indiana, 2625.

**RESPONSIBILITY—**

criminal, test of, insanity, 2570.

for conspiracy, before and after withdrawal, 2908.

**RESPONSIBLE—**

liquor dealer, for acts of bartender though without his knowledge and contrary to orders, e 4771.

**RESTAURANTS—**

extending equal privileges in, e 4818.

**RESTITUTION—**

no defense to crime of embezzlement, e 4601.

**RESTORING WATER—**

to original bed, duty of, right to use water passing over land, 2354.

**RESTRAINT ON JURY—**

in reaching verdict, e 3391.

**RESULT OF TRIAL—**

interest in, credibility, e 3304.

**RETAIL OF SPIRITOUS LIQUORS—**

place for, playing cards in, e 4807.

**RETAIL TRADE—**

mortgagor retaining possession of stock of goods used in, e 3727.

**RETAINING—**

commission, embezzlement, right of agent, 2935.

plaintiff under void warrant of arrest, malicious prosecution, e 3719.

possession of property sold, by debtor, knowledge of creditor, replevin, e 4239.

**RETRACTION—**

slander and libel, effect of, charge of fornication or adultery, 2293.

**RETREAT—**

common law doctrine of, qualified by modern cases, e 4740.

doctrine does not apply to policeman making arrest, e 4743.

self defense, ignoring, acting upon mere threats or appearances, e 4698.

[References are to sections; e refers to Erroneous Instructions.]

**RETREAT—Continued.**

- duty of—See also DUTY OF RETREAT.
  - assault with intent to kill, bringing on difficulty, e 4558.
  - question for jury, e 4745.
  - self defense, when none, 3160-66.
- inability to, burden of proof on defendant, e 4333.
- no duty of, inhabitants of town driving persons out, e 4541.
  - when attacked on own premises, e 4746.
  - when attacked without fault on public highway, e 4744.
- self defense, assault with deadly weapon, e 4739.
  - necessary unless it would increase defendant's peril, e 4741.
  - unnecessary when more dangerous than to fight, e 4742.

**RETURN OF OFFICER—**

- negotiable instruments, not conclusive diligence unavailing, 2179.
- not conclusive proof of insolvency, negotiable instruments, 2183.

**RETURNING STOLEN PROPERTY—**

- larceny, does not divest taking of felonious character, 3234.

**REVENGE—**

- killing in, self defense, after repelling assault, 3125.
- passion and excitement distinguished from insanity, 2579.
- revengeful purpose, assuming existence of, self defense, when evidence does not show it, e 4750.

**REVENUE STAMP—**

- failure to use, on negotiable instrument, e 4198.
- lacking on forged instrument, invalid, possession, 2946.

**REVERSAL OF JUDGMENT—**

- grounds for, 299.

**REVERSING CONVICTION—**

- murder in second degree, erroneous definition of murder in first degree not sufficient, e 4627.

**REVOCATION—**

- of license to cross railroad track, 1861.

**REVOLVER—**

- assault with, deadly weapon, e 4544.
- homicide with, assuming facts, argumentative, e 4614.
- self defense, deceased attempting or purporting to draw, 3117.
  - no duty of retreat when attacked with, 3163.
- shooting with, murder in second degree, 3005.

**RHODE ISLAND—**

- statute relating to instructions, 153, p 140.

**RIDING—**

- on coal car without consent, contributory negligence, 1957.
- railroad locomotive, contributory negligence, 1956.

**RIGHT—**

- larceny, taking under mistaken claim of, 3229.
- of attaching creditor, 535.
- to argue case to the jury, 220.
  - be confronted with witnesses, receiving stolen property, record of former trial not sufficient, e 4792.
  - carry arms, homicide, e 4624.
  - continue firing, self defense, till safe, 3169.
  - dam water, flooding land, liability, what constitutes a stream, e 4279.
  - fire first, self defense, e 4749.
- prefer creditors—See FRAUD AGAINST CREDITORS, PREFERENCE OF CREDITORS.
- use more force than actually necessary, self defense, e 4709.

**RIGHT AND WRONG—**

- distinguishing between but not able to choose, insanity, e 4404.
- insanity, matters which acquit stated conjunctively, e 4397.
- knowing, irresistible impulse, 2583.
- knowledge of, test of insanity, 2574.
- obliterating sense of, insanity, 2575.
- test of insanity, distinguishing, 2573.



[References are to sections; e refers to Erroneous Instructions.]

**RIGHT OF ENTRY—**

of landlord for condition broken, 1239.

**RIGHT OF TESTATOR—**

to dispose of property as he pleases, capacity to make wills, e 4299.

**RIGHT OF WAY—**

injury by fire, building on railroad land, 2003.

of street car over other vehicles, collision, 2092, e 4169.

railroad company restricted in use of, special assessment, 2230.

**RIGHTS—**

civil, extending equal privileges in restaurants, e 4818.

**RINGING BELL—**

failure to obey ordinances as to, causing injury, 1531.

**RIPARIAN OWNER—**

real estate, rights defined, accretions, 2233.

**RIPARIAN RIGHTS—**

boundaries on watercourses, 582.

damages for erosion of shore lines, 869.

gradual accretions, 582.

owner entitled to exclusive right to middle of stream, 868.

entitled to use of dock, 868.

sudden changes of stream, 582.

**RISK—**

increase of, knowledge of, 1170.

removal of property as affecting, 1179.

**RISK, ASSUMPTION OF—See ASSUMPTION OF RISK.**

**RIVER—**

putting body in, circumstantial evidence, e 4359.

**RIVERS—**

riparian owners entitled to ice to the middle of stream, 868.

**ROAD BEDS—**

street railroad, negligence in care of, 2083.

**ROADS—See HIGHWAYS.**

**ROBBERY—2889-2902, e 4574-4577.**

case of each co-defendant to be considered separately, common enterprise, 2902.

conspiracy for, former acquittal, testimony of conspirator, 2914.

to commit, principals and accessories, presence at time crime is committed, e 4476.

defined, 2889.

elements, omission of intent, e 4574.

force not necessary, 2891.

holding up train, intent, 2894.

instruction should be confined to property described in indictment, e 4577.

intending to use whatever force necessary, 2893.

murder committed, accomplice guilty though not consenting, 2746.

first degree, 2997.

while engaged in, e 4622.

possession of fruits of, 2901.

proof that money was "good and lawful" as described, not required, e 4576.

retaking of one's own property, force and putting in fear, 2900.

taking from immediate presence does not necessarily mean the immediate view, 2895.

from person, or in his presence by putting in fear or by force and violence, 2899.

very person not necessary, 2898.

must be from person of another, 2896.

so suddenly as not to allow of resistance, considering condition of prosecuting witness, e 4575.

violence must not be subsequent to taking, 2892.

what acts would constitute, 2890.

[References are to sections; e refers to Erroneous Instructions.]

# **ROBBERY—Continued.**

what is meant by taking from person, 2897.  
necessary to constitute, 2873.

# **ROLLING STOCK—1500-1515, e 3845-3850.**

allowing steel plates on engine to rust, e 3850.  
assumption of risk as to cars received by company, e 3839.  
cars must be in condition to be uncoupled with reasonably safety, 1503.  
construction, operation or maintenance of, injury to passenger, burden of proof, 1840.  
couplings of unequaled height, not necessarily negligence to use, 1504.  
defects in coupling apparatus, 1505.  
in engine, notice of engineer to foreman of roundhouse, 1513.  
hand-hold of car, competency of inspector, 1510.  
defective brake staff, injury to servant, 1507.  
draw bars or draw heads, 1506, e 3847.  
step on engine, injury to engineer, 1512.  
duty of inspection of cars received from other roads, 1501, e 3846.  
railroads to examine, supervise and test engines, 1513n.  
to furnish cars properly equipped and supplied with appliances reasonably necessary and proper, 1509.  
furnish rolling stock in a reasonably safe condition for use, 1502.  
inspect hand-holds of cars, e 3849.  
provide safe, 1500, e 3845.  
their cars with handholds, e 3848.  
street railroads to provide reasonably safe cars, e 4121.  
furnishing cars strong enough to transportation of steel rails, 1502.  
trucks for removal of trestles from round-house, 1515.  
latent defects in brake rods, 1508.  
providing steps at end of freight cars for use of employes, 1511.  
side rod on engine breaking, injury to fireman, 1514.

# **ROUND-TRIP TICKETS—See TICKETS.**

# **RULE—**

as to burden of proof, capacity to make wills, in Illinois, e 4292.  
for determining value, larceny, 3219.  
in various states, weighing defendant's testimony, e 4376-4390.  
reason for, reasonable doubt, 2647.  
to stop, look and listen, contributory negligence, street railroads, 2104.

# **RULES—**

of evidence, must be followed, jury cannot use rules they would use anywhere else, e 4495.

to govern jury, common sense and experience, e 3386.

# **RULES AND REGULATIONS—1548-1553, 1819-1821, 1943-1944, e 3869-3874.**

admitting written rules of street car company in evidence, e 4134.  
against coupling cars in motion may be waived, e 3871.  
authority of one who occasionally runs engine, e 3874.  
brakeman disobeying by remaining on locomotive, e 3870.  
by master, for employes, effect of habitual violation, e 3762.  
complying with, prevented by negligence of master, e 3873.  
coupling cars, 1550.  
disobeying a rule as to cars being left uncoupled, e 3872.  
duty of master to adopt to avoid injuries to employes, 1437.  
master to make for the guidance of employes, 1381.  
passenger to obey instructions, e 4126.  
railroad to make proper rules for safety of servants, 1548.  
engineer violating, knowledge of by fireman whether he assumes risk, e 3887.  
failure of engineer to report defects at end of run as required by company, 1553.  
prohibiting conductor from letting persons ride in caboose, e 3974.  
purchaser signing round-trip ticket, effect of, 1825.  
railroads not liable for injury through disregard of, 1549, e 3869.

[References are to sections; e refers to Erroneous Instructions.]

# **RULES AND REGULATIONS—Continued.**

- requiring higher fares of passengers when paid on train, objection of passenger, 1823.
- right of railroad to establish and enforce reasonable rules and regulations for its employes, 1548.
- to prescribe for employes and passengers, 1827.
- to make, reasonable, railroads, negligence, 1943.
- prescribe for railroads for passengers, 1819-1821.
- rule against coupling cars in motion may be waived, 1551.
- validity of reduced rate round-trip tickets, identification and stamping, 1824.

# **RUMORS—**

- hearing, perjury, swearing to lack of knowledge, e 4794.

# **RUNNING BOARD—**

- riding on, of street car, contributory negligence, 2069.
- street railroads, letting it extend over sidewalks, 2087.

# **SABBATH DAY—**

- verdicts may be returned on, 280.
- not good if opened on in some jurisdictions, 280.

# **SACRIFICE OF PROPERTY—Pecuniary necessity, fraud, e 3653.**

# **SAFE—See also APPLIANCES.**

- condition, highway crossings must be in, 1862.
- whether duty of landlord to keep premises in reasonably, e 3696.
- to act upon appearances, self defense, though they turn out to be false, 3111.
- way of escape, self defense, duty of retreat, 3161.

# **SAFETY—**

- of highway crossing not proved by proof that some persons crossed in safety, 1865.
- passengers, not insured by street railroad, degree of care required, 2021.

# **SALES—Chapter LXXVIII, 2246-2278, e CLX, 4246-56.**

- acceptance waives implied warranty, 2273.
- agreement for, consideration paid in installments, 2249.
- between husband and wife, 1086.
- bill of—See BILL OF SALE.
- broker cannot be agent of both parties, etc., e 3466.
- must be procuring cause to recover for, e 3469.
- by assignee, guaranty, trust property, agreement to buy back, 2266.
- mortgagor, with the consent of the mortgagee for the benefit of mortgagee, 1319.
- sample, rejection, real and substantial difference, resale in good faith, 2257.
- sheriff, payment of proceeds to creditor, after appointment of trustee, good faith, burden of proof, 2424.
- coming up to test, waiver, 2264.
- commission broker, diligence required, e 4249.
- completed between parties when agreement made, 2247.
- by transfer of bill of lading, 2252.
- construction under vendee's orders and superintendence, 2268.
- contract for, mining claims, condition precedent, marking claim, 2267.
- of, shipping more goods than ordered, delivery, acceptance, refusal and tender back, sale for vendee's benefit, 2269.
- to manufacture, changes, additional compensation, e 4248.
- conversion of proceeds of, embezzlement, 2936.
- definition of sale, 2246.
- delivery, duty to protect goods from rain, 2261.
- to third person, price to be determined by measurement, consideration, existing debt, 2251.
- examining part of goods does not prevent proof of bad condition, e 3485.



[References are to sections; e refers to Erroneous Instructions.]

**SALES—Continued.**

- expression of opinion may amount to warranty, purchaser guilty of contributory negligence, e 4253.
- failure to deliver on specified time, 749.
- fraud against creditors, rights of creditors, e 3636.
  - performance after knowledge, damages, e 3639.
  - vendee's failure to notice defects no bar to recovery, e 3650.
- fraudulent, not void but voidable, 1127.
  - representations as ground for rescinding, must be as to existing or past facts, e 3638.
  - to hinder creditors, burden of proof, e 3629.
- fulfillment of specific conditions before title passes, e 4247.
- future delivery—goods damaged prior to, 632.
- illegal, intoxicating liquor found in public resort, presumptive evidence, 3204.
- implied warranty of manufactured article, 2275.
- in fraud of creditors, vendee must have part in fraud to make sale void, e 3633.
- intended, installments of payments whether considered as rent or not, 2254.
- of intoxicating liquors*—See also INTOXICATING LIQUORS.
  - assuming tricks or evasion without evidence, e 4772.
  - by druggist, 3189.
  - purchased for medicinal purposes but diverted to other uses, e 4773.
  - causing death—damages, 778.
  - degree of intoxication immaterial if it causes the injury, e 3688.
  - drunkenness must exist at time of, 3199.
  - in club house, without license, 3205.
  - prohibition limits, what constitutes, no words necessary, 3202.
- keeping or using place for, 3203.
  - place for, as agent, clerk, servant or principal, 3193.
- knowledge or criminal intent necessary, 3201.
- liability for act of servant, 3192.
- local option, 3209.
- not necessary that defendant be owner, e 4767.
  - sufficient, injury must be caused by intoxication, e 3687.
- on prohibited days, in side or rear rooms, 3206.
- one, delivered at different times, 3194.
- order by agent not, 3207.
- poverty of plaintiff, when considered, e 3691.
- presumption bartender has authority only to make lawful sales, 3191.
- to minor, knowledge and intent material, 3195.
  - knowledge of minority immaterial, 3196.
- to one already a drunkard, e 3685.
  - person in habit, intent necessary, 3200.
  - what constitutes, 3186.
  - when keeping is presumptive evidence of, 3188.
- market value defined, 2263.
- measure of damages, 744-764, e 3505-3519.
  - for failure to furnish goods of the quality provided in the contract, 756.
  - on breach of contract on property bought for resale, 750.
    - to ship coal—series, 752.
  - preventing performance of contract, 751.
- merchandise sold but not delivered prior to levy of attachment, 541.
- of drugs* without a license, domestic remedies excepted, 3287.
- goods, knowledge of special purpose necessary to justify special damages, e 3508.
  - measure of damages for false representations, 831.
- grapes, to be resold, merchantable condition when loaded, 2265.
- land, title to growing crops, 2220.
- merchandise void by debtor without change of possession, 543.
- mortgaged property, liability for damages, e 3729.
- stock of goods in the usual course of trade, 1322.

[References are to sections; e refers to Erroneous Instructions.]

**SALES—Continued.**

- partnership interest, misrepresentation, fact or opinion, intent, 2212, e 4227.
- personal property—purchaser must show readiness to perform, 667.
- property after execution delivered to officer, 1324.
  - alleged to be stolen, presumption from, invading province of jury, e 4783.
  - assuming broker had exclusive, e 3464.
  - levy on proceeds arising from, 1092.
- real estate, broker licensed at time of, e 3463.
- recital of consideration, circumstances, e 4231.
- withdrawal of offer, 2221.
- on credit, application of proceeds, 1078.
- or gift of intoxicating liquor, reasonable doubt must be on whole evidence, e 4774.
- place of, intoxicating liquor, is material, receiving profits would constitute sale, e 4768.
- “pretended,” fraud, e 3652.
- procured by fraud, 1116.
- purchaser to give trial and notice, provision of returning machine, 2276.
- ready and willing to deliver, failure to accept, 2259.
- recovery on expressed or implied warranty, e 4254.
- refusal to accept, excuse for non-delivery, 2260.
  - accept personal property on contract—measure of damages, 745.
  - buy property on contract—measure of damages, 747.
  - deliver personal property on contract—measure of damages, 748.
  - take merchandise on contract—measure of damages, 746.
  - residue ordered, resale without notice, 2258.
- rescission of, fraud, elements necessary, e 3642.
- resulting from introduction by broker, e 3467.
- subject matter certain, quantity to be ascertained, 2253.
  - destroyed before delivery, title where, 2255.
- suit on special warranty, not on written guaranty, e 4252.
  - to recover proceeds of, from agent, e 3422.
  - tax, adverse possession, minors, e 3408.
  - purchaser at, cutting timber, trespass, 2310.
- thief acquires no title and can convey none, 2256.
- time of payment, when interest begins to run, 2262.
- title passes when, e 4246.
- to relatives not necessarily fraudulent, 1087.
- under lien for storage, notice, e 3731.
- upon condition, price paid in full, 2250.
- vendor reselling property, trover maintainable, 2331.
- warranty, 2270-2278, e 4251-4256.
  - assuming facts in issue, instruction must be based on evidence, e 4256.
  - burden of proof, 2278.
  - by agent, ratification, 2272.
  - implied, fit for special purpose intended, samples, e 4251.
  - in absence of special contract, purchaser buys at his own risk, machinery installed on trial, 2277.
  - must be relied on, 2274.
  - of live stock, option to return stock or sue for damages, e 4255.
    - title by vendor, 2271.
  - what constitutes, 2270.
- when title passes, difference between sale and agreement to sell, 2248.
  - trover maintainable by buyer against seller, 2330.
- whether fraudulent as against creditors, 1073.
- with intent to defraud creditors, 1057.
- without license, one sufficient if intention to continue exists, 3288.

**SALOON—**

- open on prohibited days, unlawful sales in side or rear rooms, 3206.

[References are to sections; e refers to Erroneous Instructions.]

**SALOON-KEEPER—**

liability of, illegal sale to husband, release by wife, e 3686.  
suit against for selling intoxicating liquors—See INTOXICATING LIQUORS.

**SAME CRIME—**

principal and accessory may not be guilty of, e 4481.

**SAME TIME—**

larceny of cattle of different owners at, one offense, 3232.

**SAMPLES—**

implied warranty, fit for special purpose intended, e 4251.  
sale by, rejection, must be real and substantial difference, 2257.

**SANITY—**

burden of proving on state, when prisoner has created reasonable doubt, 2595.  
is presumed, capacity to make wills, e 4290.  
unless evidence clearly establishes insanity, 2596.  
presumption of, burden of proof does not shift in criminal cases, e 4395.  
overcome by showing insanity to be probable, e 4396.  
reasonable doubt of, acquits defendant, 2594, 2714.

**SATISFACTION—**

accord and, definition, e 3401.  
without, e 3402.  
beyond reasonable doubt, belief not sufficient to convict, e 4447.  
of jury, error to so instruct, 198.  
jury, proof of alibi need not be to, e 4317.

**SATISFACTORILY ESTABLISHED—**

criminal defense need not be, e 4331.

**SATISFACTORY ACCOUNT—**

of recent possession, larceny, 3245, e 4788.

**SATISFACTORY CHARACTER—**

of confessions, illustrating, e 4363.

**SATISFIED—**

by evidence, preponderance sufficient, e 3334, 3337.  
fully, not the same as belief beyond reasonable doubt, e 4450.  
judgments not appealable, 298.

**SAVING LIFE—**

of another, included in self defense, 3178.  
possibility of, murder, not good defense, 2974.

**SAW-MILLS—**

providing foundations for lumber stack to prevent personal injuries, e 3783.  
saw-mill machinery, conversion, 2345.

**SCAFFOLD—**

defective, master and servant, elements of negligence, 2132.  
injury from falling of brick through insufficient, 1393.  
insecure condition of, knowledge of, by servant if he had exercised ordinary care, e 3821.  
insufficient fastening of, 1391.  
servant may assume that master has furnished safe, 1392.

**SCARING ANOTHER—**

self defense, preventing attack by firing, e 4736.

**SCENE OF ACCIDENT—**

view by jury, as evidence of negligence, 1350.

**SCHEDULE—**

railroad train not on time, stock, 1982.

**SCHEDULES—**

tax, larceny, admissible to attack credibility of prosecuting witness, e 4780.

**SCHOOL—**

accredited, diploma from, required for practice of medicine, 3286.  
of medicine, in regard to malpractice, 1295.



[References are to sections; e refers to Erroneous Instructions.]

**SCHOOL CERTIFICATE—**

employing child without, 1386.

**SCHOOL LANDS—**

adverse possession, actual settlers, e 3409.

purchaser of, abandonment of homestead, e 4236.

**SCHOOL TEACHER—**

right to dismiss, when reviewable by court, ground for dismissal, 2432, 2433.

using unreasonable force, e 4539.

**SCIENTIFIC—**

and medical books as evidence, 128.

**SCINTILLA OF EVIDENCE—**

will not support verdict, 256.

**SCOPE—**

of evidence as to reputation, limiting, e 4347.

partnership business, acts beyond, 2209.

**SEALED VERDICTS—278-279.**

should be opened in open session of court, 279.

**SEARCH—**

duty to, finder of lost property, for owner, 3215.

**SEARCH WARRANT—**

maliciously swearing out, 1278.

**SECLUDED PLACE—**

taking deceased to, murder in first degree, intent question for jury, e 4635.

**SECOND DEGREE OF MURDER—See MURDER.**

**SECRET—**

embezzlement must be done in, with intent to defraud, 2921.

understanding, negotiable instruments, agreement as to security, e 4205.

**SECRETION OF MONEY—**

embezzlement, must be fraudulent, e 4597.

**SECURITY—**

agreement as to, negotiable instruments, secret understanding, e 4205.  
collateral, liability of bank director for allowing improper loans upon, e 3455.

for pre-existing debt, negotiable instruments, innocent purchaser, 2171.

treasurer pledging bonds in, embezzlement, 2932.

**SEDATE—**

and deliberate mind, premeditation, Texas statute, 3084.

**SEDUCER—**

of daughter, killing of, manslaughter, e 4655.

**SEDUCTION—**

**CIVIL,**

accomplished through her love and confidence, 503.

after contract of marriage, aggravation of damages, 767.

promise of marriage, an element of damage, 699.

as an element in action for breach of promise of marriage, series, 699.

consent obtained through affection and confidence, 503.

defined, 502.

element of damage in action for breach of promise, 767.

in action for breach of promise, offer of marriage by defendant must be made in good faith, 699.

measure of damages, 773-777.

what may be considered in assessing, 777.

not liable for act of another, e 3432.

**CRIMINAL—2829-2837, e 4530-4536.**

accomplice cannot corroborate self, 2753.

assuming that the words and acts of defendant amounted to a temptation, e 4535.

[References are to sections; e refers to Erroneous Instructions.]

# **SEDUCTION—Continued.**

- birth of child as evidence, e 4531.
- circumstantial evidence sufficient to corroborate, acquaintance and opportunity not sufficient, 2835.
- complainant's contradictory evidence, reasonable doubt, 2836.
- corroborative testimony, e 4536.
- defined, e 4530.
- illicit intercourse not sufficient, definition, 2829.
- intimacy with others, e 4534.
- not when by force against her will, 2830.
- presumption of innocence, reconciling evidence and indictment, compromise cannot bar prosecution, 2837.
- previous chaste character, promise to marry, reasonable doubt, 2833.
- intercourse with others as a defense, e 4533.
- promise of marriage, chaste character erroneously presumed, 2832.
- refusal of prosecutrix to marry, proof required, 2831.
- several acts under distinct promise of marriage, presumption of chastity weakened or destroyed, e 4532.
- voluntary consent as a defense, 2834.

# **SEEING DECEASED—**

- not essential for conviction of defendant of murder, e 4618.

# **SEEKING OPPORTUNITY—**

- homicide, proof of malice, 3066.

# **SEEKING QUARREL—**

- murder in first degree, 2993.

# **SEIZURE—**

- of dog, repelling, assault and battery, 2844.
- property, right of officer, attachment, e 3446.

# **SELF DEFENSE—Chapter XCIX, 3101-3183, e Chapter CLXXX, 4691-4766.**

- a right and a duty, 528.
- accident resulting therefrom, 527.
- accidentally killing another while preparing for, e 4717.
- acting on reasonable belief of great bodily harm, 3107.
- upon mere threats and appearances, ignoring doctrine of escape, e 4698.
- actual assault not necessary, e 4702.
- against rape, 3158.
- aggressor, abandoning conflict, when may avail of plea of, 3134.
- cannot plead, 3126-3133, e 4710.
- must give deceased to understand he has abandoned the contest, e 4725.
- not necessarily person who strikes first blow, 3135.
- previously arming himself not necessarily barred from pleading, e 4720.
- aiming at aggressor, killing another, 3167.
- all other means need not be resorted to before killing, e 4718.
- apparent danger, deceased shooting first, 3118.
- assault by deceased with deadly weapon, 3116.
- by policeman, striking with hand or club, 2848.
- on defendant need not have been felonious, interfering in combat, 3173.
- with deadly weapon, retreat, e 4739.
- intent to kill, duty to retreat, bringing on difficulty, e 4558.
- assaulting trespasser, instructions ignoring part of the evidence, e 4543.
- assuming that a revengeful and unlawful purpose existed without evidence to show it, e 4750.
- that danger existed, defendant's belief, e 4694.
- deceased was aggressor must rest upon evidence, e 4722.
- attack with pistol, no duty of retreat, 3163.
- belief of danger must be reasonable, 3106.
- blow need not have been struck, attack with knife, 3124.
- both parties to mutual combat may act in, e 4729.

[References are to sections; e refers to Erroneous Instructions.]

**SELF DEFENSE—Continued.**

- bringing on difficulty for purpose of killing, e 4713.
- burden of proof, 2470, 3175.
- circumstances insufficient to induce a reasonable belief of danger, guilt of murder, 3108.
- commencing difficulty, several persons on each side, 3127.
- common law doctrine of retreat qualified by modern cases, e 4740.
- counter assault, bringing on difficulty, 2849.
- danger, apprehension of, must act upon honest belief, 3113.
  - must be shown by overt acts and must be imminent, e 4700.
  - seem actual, present, and urgent, 3112.
  - need not be manifest, e 4701.
  - real, may act upon appearances, 3110, e 4699.
- dangerous character of deceased, overt acts, e 4731.
- deceased acting with other persons, 3115.
  - attempting or purporting to draw weapon, 3117.
- defendant at fault, abandoning the conflict, may plead, e 4724.
  - at fault, cannot plead, 3131.
  - attacking another to protect a woman, not estoppel to plead, e 4761.
  - brother of deceased, 3130.
- must have reasonable grounds for his fear, e 4697.
  - reasonably believe himself in peril, e 4695.
- need not act as a brave man, must be some overt act, e 4706.
  - not believe death of assailant necessary, 3114.
- not obliged to wait, may act promptly, 3170.
- previously arming himself, whether evidence of malice, e 4719.
- provoking affray, 3126.
  - attack by slandering family of deceased, e 4730.
- pursuing and beating with deadly weapons, e 4726.
- right to fire first, e 4749.
- seeking deceased with malice and inducing deceased to assault him, 3128.
  - meeting to provoke difficulty, killing unavoidable, 3129.
  - to be judged from his standpoint, 3122.
- defense of daughter by father, e 4753.
  - habitation, 3183, e 4762.
  - property, shooting trespasser, 3181, e 4765.
- deliberately shooting not necessarily a crime, e 4616.
- disparaging plea of, caution, 3174.
- distinguished from manslaughter, 3033.
- doctrine of retreat does not apply to policeman making arrest, e 4743.
  - stated, 3102.
- does not depend on correctness of defendant's apprehension of danger, e 4705.
- drawing of gun by deceased, no duty of retreat, 3164.
- duty of retreat, burden of proof, 3166.
  - not when attacked in own dwelling, 3165.
  - question for jury, e 4745.
  - when there is any reasonable way of escape, 3161.
  - without increasing danger to life, 3162.
- elements of, e 4691.
- error to omit duty to retreat in instruction to acquit, e 4747.
- essential elements, 3101.
- establishing beyond reasonable doubt, burden of proof, e 4472.
- evidence equally balanced acquits, 3176.
- excusable homicide defined, state must prove homicide a crime, 3172.
- fear not sufficient, overt act necessary, what constitutes, 3147.
- gives no right to kill former assailant on sight, e 4718.
- guest in house may protect it from invasion, e 4764.
- honest belief in danger not enough, must be reasonable, e 4696.
- husband striking in defense of wife, e 4759.
- if danger actual, appearance and strength of deceased are immaterial, e 4707.
  - plea made out, jury must be ordered to acquit, e 4752.
- ignoring theory of, e 4753.



[References are to sections; e refers to Erroneous Instructions.]

**SELF DEFENSE—Continued.**

- ill-will, abuse, threats, 3145.
- imminence of peril must be submitted to jury, e 4703, 4708.
- in cases of assault, 526.
- includes saving life of another, 3178.
- instructing on part of evidence, e 4754.
- instructions in words of statute not always correct, e 4751.
- justification, unlawful occupation immaterial, 3140.
- killing accidentally in resisting assault, e 4716.
  - by son to protect father, e 4757.
  - in defense of domicile, 3183, e 4762.
    - defense of person or property, 3181, e 4765.
    - property, not limited to force actually necessary, e 4766.
    - sister need not be proven "necessary," e 4760.
    - son, 3180.
  - mutual combat, not necessarily murder, e 4617.
  - not manslaughter in third degree, e 4659.
  - revenge after repelling assault, 3125.
  - officer without knowledge of his character, 3157.
  - policeman who attempts to arrest, e 4737.
  - to prevent intrusion on premises, e 4763.
- law of necessity, reasonable cause to apprehend immediate personal injury, 3104.
  - stated, 3103.
- lawful to fire to scare another and prevent attack, e 4736.
- may act on appearances, though they turn out to be false, 3111.
- mere intent to provoke difficulty does not bar plea of, e 4715.
  - threats not sufficient, must await overt acts, e 4735.
- motives of defendant not determined from motives of deceased, e 4704.
- must be defined or explained to jury, e 4693.
- need only raise, not prove beyond reasonable doubt, e 4755.
- no duty of retreat, when, 3160-3166.
  - when attacked on own premises, e 4746.
  - without fault on public highway, e 4744.
- no more force to be used than apparently necessary, 3121.
- not available to one who kills from previously formed design, 3138.
  - barred by insulting words, 3139.
  - depending on whether deceased had deadly weapon, may use more force than actually necessary, e 4709.
  - enough that defendant reasonably free from fault, e 4723.
  - good, killing through cowardice, 3137.
- officer making arrest for misdemeanor, 2451.
- omitting an essential element, e 4692.
- physical power of deceased may be considered, 3144.
- plea barred by defendant's agreeing to fight, 3132.
  - not necessarily barred because policeman kills in making arrest, e 4738.
- possession by deceased of deadly weapon, presumption, 3123.
- presumption of innocence, reasonable doubt, e 4422.
- previous threats indicating who was aggressor, 3149.
  - threats or malice do not bar plea, threats a question of fact, 3153.
- previously formed design does not bar, e 4727.
- prisoner shooting officer making arrest, 3156.
- procurement of arms as affecting motive, e 4721.
- proof that defendant began fight beyond reasonable doubt, 3136.
- provoking quarrel without felonious intent, e 4714.
- real or apparent danger, 3109.
- quarrelsome disposition of deceased, 3143.
- reasonable doubt, defendant need only create, 2718.
  - doubt, instruction may assume admitted facts, 2717.
  - means to avert necessity of killing, 3119.
- reduction of grade of homicide, provocation sufficient for, e 4680.
- resistance in proportion to danger, honest belief, reasonable doubt, 3120.

[References are to sections; e refers to Erroneous Instructions.]

**SELF DEFENSE—Continued.**

- resisting unlawful expulsion from another's house, 3159.
- retreat necessary unless it would increase defendant's peril, e 4741.
- unnecessary when more dangerous than to fight, e 4742.
- right not lost because of a conspiracy formed to commit a felony, no act having been yet done, e 4582.
- of officer to arrest, believing conspiracy between union miners, e 4323.
- to continue firing till safe, 3169.
- protect and defend another, parent, 3179.
- series approved in Missouri, 3177.
- state need not prove that defendant was aggressor beyond reasonable doubt, e 4756.
- threats as evidence of state of feeling or who was aggressor, 3150.
- by deceased, for what purpose admissible, e 4733.
- singling out and giving undue prominence, e 4732.
- when not admissible, e 4734.
- defendant entitled to separate instruction as to, 3155.
- not sufficient to justify, overt act necessary, 3146.
- of arrest not sufficient, 3154.
- purporting to draw weapon, reputation as dangerous and violent man, 3151.
- with acts, 3148.
- trespass by deceased, 3168.
- uncommunicated threats, admissible when, 3152.
- warning should be given before killing, if practicable, 3171.
- what acts make one the aggressor, felonious intent not necessary, e 4711.
- constitutes provoking the difficulty, e 4712.
- is sufficient and what insufficient to show, 3105.
- jury may consider in determining, 3142.
- when killing justifiable in defense of property, landlord and tenant, 3182.
- malice in slayer immaterial, 3141.
- whether engaging in mutual combat bars plea, e 4728.

**SELLER—**

- broker introducing buyer to, e 3467.

**SELLING—**

- homestead during temporary absence, abandonment, e 4236.
- intoxicating liquor, or giving it away is sufficient, e 4770.
- property and retaining possession, knowledge of creditor, replevin, e 4239.

**SENSE—**

- of right and wrong, obliterated, test of insanity, 2575.

**SENSIBILITY—**

- undue, reasonable doubt must not be based on, 2681.

**SENTENCE—**

- penitentiary, evidence of, as affecting reputation as a good citizen, e 4348.

**SENTIMENT—**

- jury should not be actuated by, 409.

**SEPARATE—**

- consideration, for case of each co-defendant, robbery, 2902.
- instruction, as to threats, defendant entitled to, self defense, 3155.

**SEPARATION—**

- of spouses during life, widow's title to real estate, 2225.
- white and colored passengers, negligence, street railroads, 2058.

**SEQUESTRATION—**

- writ of, trespass to real estate, burden of proof, 2315.
- wrongfully sued out, damages, e 3504.

**SERIES—**

- adverse possession, 447.
- assault, civil, 534.

[References are to sections; e refers to Erroneous Instructions.]

**SERIES—Continued.**

banks and banking, 575, 576.  
 board of trade transactions, 610.  
 bribing public officers to do what they are already obligated to do,  
   intent essential, 3273.  
 brokers, 593, 604, 610.  
 collision between street car and vehicle, right of way, e 4169.  
 commissions, brokers must have license, 604.  
 contracts, 660.  
   of service, 731.  
 damages, measure of, contracts and sales, 760.  
 due care and skill required of dentist, 1302.  
 fire insurance, 1185-1186.  
 forgery of telegram, 2952.  
 fraud, 1135.  
 furnishing cars strong enough for the transportation of steel rails,  
   1502.  
 homicide, various elements, 2984.  
 injury to child on track, degree of care required by railroad, e 4014.  
 lien on product or rented lands, knowledge of purchaser, 1333.  
 life insurance, 1205.  
 malicious prosecution, 1284.  
 malpractice, 1302-1303.  
 murder in first or second degree, 2983.  
 railroads, negligence, passengers riding on freight or mixed trains,  
   1750.  
 self defense, approved in Missouri, 3177.  
 using cars without hand-holds, 1509.  
 want of ordinary care of both master and servant, going under dan-  
   gerous roof in coal mine, 1486.

**SERVANTS—**

See FELLOW SERVANTS.  
 See NEGLIGENCE, MASTER AND SERVANT.  
 assault by, railroads, person getting freight, 1942.  
 cannot maintain trover, 2329.  
 care due from hotel keepers toward, in operation of elevator, 1842.  
 in place for sale of intoxicating liquor, 3193.  
 killing, by cruel treatment, 2960.  
 sale of intoxicating liquor by, liability of master, 3192.  
 vicious animals, knowledge of party injured, e 4278.  
 wrongful discharge of, measure of damages, 762.

**SERVICE—**

continuous, statute of limitations runs from the last item, 1253.  
 inattention to business, e 3498.  
 expert opinion as to value of, e 3377.  
 implied contract for, e 3497.  
 of child, relationship of grandparent and grandchild, e 3500.  
   surgeon, action for fees, malpractice, reasonable value, burden  
     of proof, e 3723.  
 rendered plaintiff while in defendant's employ, e 3501.  
 suit between members of family, e 3499.

**SETTLED INSANITY—**

wills, presumed to continue, e 4296.

**SETTLERS—**

school lands, e 3409.

**SETTLEMENT—**

See also RELEASE.  
 accepting and retaining part in offer of, 428, 675.  
 account of partnership presented, failure to make objection, e 4229.  
 and receipt, obtained by duress, 424.  
 can only be set aside by proof of fraud or mistake, 423.  
 evidence of proposed settlement not admissible, 676.  
 negotiable instruments, burden of proof, e 4211.  
 negotiations for, in disputed claim not binding, 716.  
 of account, interest on amount agreed, e 3400.



[References are to sections; e refers to Erroneous Instructions.]

**SETTLEMENT—Continued.**

criminal charge, negotiable instruments, consideration, 2160.  
 old debt, negotiable instruments, consideration, 2156.  
 on board of trade made on differences on price, 609.  
 out of court are favored, 676.  
 presumed to include all items, 426.  
 proposition to compromise not an admission, 389.  
 requires preponderance of the evidence to open up, 427.  
 retaining partial payment in disputed claim will operate as release,  
 675.  
 what would be insufficient, 674.  
 constitute, 674.

**SET-OFF—**

action on account, e 3487.  
 burden of proof on person claiming, 668.  
 claimed by tenant, for work done on premises under agreement,  
 e 3703.

**SETS OF WORDS—**

slander and libel, words must be proved as charged, 2279.

**SEVERAL—**

defendants, degree of homicide, 3036.  
 offense, trespass, joint and several, e 4811.  
 persons on each side, self defense, commencing difficulty, 3127.

**SEWER—**

cover, injuries through defective, 1394.  
 municipality liable for allowing to remain out of repair, 1662.

**SEXUAL INTERCOURSE—**

one act proved, parties reside together, presumption of illicit co-  
 habitation, e 4509.  
 with other men about time bastard was begotten, 2793.

**SHAFT—**

of coal mine, duty of owner to fence, 2126.

**SHAM—**

purchase of stolen property, 3254.

**SHAME—**

feeling or sense of, insufficient, assault with intent to commit rape,  
 e 4523.

**SHARE—**

in his estate, power of testator to exclude relatives from, e 4285.

**SHIPS—**

collision of, e 4192.

**SHERIFF—**

action on replevin bond, measure of damages, 809.  
 authority to levy attachment on property in vendee's hands for ben-  
 efit of vendor's creditors, 1094.  
 damages for taking property wrongfully, 807.  
 for wrongful seizure of mortgaged goods, when interest may be  
 allowed, 808.  
 deputy, making arrest for misdemeanor, can kill only in self de-  
 fense, 2451.  
 diligence required of, in making levy, e 4313.  
 interest allowed on wrongful levy, 2425.  
 killing one who attempts to release prisoner, manslaughter, 3042.  
 measure of damages for wrongful levy, 807-809, e 3538.  
 right to call posse in making arrest, 2453.  
 to make levy on property fraudulently conveyed, 1061.  
 sale by, payment of proceeds to creditor, after appointment of trus-  
 tee, good faith, burden of proof, 2424.

**SHIELD—**

from conviction, presumption of innocence not, 2644.

**SHIFTING BURDEN OF PROOF—**

none in criminal cases, presumption of sanity, e 4395.  
 from state to defendant, e 4465.

[References are to sections; e refers to Erroneous Instructions.]

**SHIPPER—**

- common carrier, assent must be shown to conditions on receipt, 1714-1715.
- except in case of fraud will be presumed to agree to terms of shipment, 1713.
- not bound by notice printed on receipt, 1716.
- duty of railroad to, negligence, 1939.

**SHOOT—**

- using the word "shoot" instead of kill, e 4555.

**SHOOTING—**

- at one man, killing another, 2966.
- violator of ordinance, profane swearing, 2847.
- bystander accidentally, as evidence of murder, e 4612.
- deliberately, not necessarily a crime, e 4616.
- in defense of daughter by father, self defense, e 4758.
- officer for purpose of escape, right to make arrest, 2452.
- making arrest, self defense, 3156.
- recklessly, assault with intent to kill, e 4559.
- seeking quarrel with intention of, murder in first degree, 2993.
- self defense, deceased shooting first, 3118.
- to cripple or disable, e 4659.
- trespasser, defense of property, e 4765.
- with gun or pistol, loaded with leaden balls, 2969.

**SHOPS—**

- railroad, nuisance, neighborhood of church, 2197.

**SHOULD—**

- used instead of "might," e 3319.

**SICKNESS—See ILLNESS.****SIDEWALK—**

- constructed by private persons, when municipal corporations liable, 1623.
- constructive notice of defect, 315.
- liability of municipal corporations, 1667.
- liability of person making excavations, 1684, 1686.
- municipal corporation, loose board in sidewalk, 1671a.
- must be kept in reasonably safe condition for travel, 1611.
- negligence of contractor, 1367.
- slippery condition from ice in winter, 1649.
- street railroads, letting running board extend over sidewalks, 2087.
- using ordinary care to prevent injury when passing over, 1336.

**SIDEWALKS AND STREETS—See NEGLIGENCE, MUNICIPAL CORPORATIONS.****SIGN—**

- measure of damages for destroying, 826.

**SIGNAL—**

- See also WARNING.
- burden of proof, ringing bell, 1985.
- duty of railroad to give, crossing made public by use, 1890.
- failure to give, causing collision, 1536, e 3860.
- causing injury of telegraph operator, 1535.
- stock injured at crossing, 1984.
- traveler not excused from using ordinary care, 1905.
- flagman's, does not excuse want of ordinary care, 1906.
- general practice of yard crew in giving, e 3868.
- of train, failure to heed, driver of vehicle, 1922.
- watchman, failure to heed, 1924.
- suit for failure to give, recovery must be for same omission, 1888.
- to go ahead while passenger is alighting, negligence, street railroads, 2044.
- slow up train, failure of engineer to obey, 1532.
- stop train, run at dangerous rate of speed, failure of engineer to obey, 1533.

[References are to sections; e refers to Erroneous Instructions.]

# SIGNATURE—

- genuineness of, negotiable instruments, bona fide holder, 2144.
- negotiable instruments, delay in payment, e 4208.
- receipt of payment, 2145.
- negotiable instruments, artifice or fraudulent representations, 2147.

# SIGNING—

- contract without reading, negligence, e 3476.
- firm name, by partner borrowing money, 2205.
- names of witnesses to get fees, forgery, verbal agreement to give defendant the fees, e 4604.
- without knowledge of contents, fraud, e 3657.

# SILENCE—

- admission by, when reply is called for, e 3365.
- not enough to infer waiver of policy, 1162.
- fraud, when, 1104.
- when accused, arson, evidence of innocence, e 4799.

# SIMILAR LITIGATION—

- interest of party in, credibility, e 3305.

# SIMILAR NAME—

- referring to another person of, libel, e 4267.

# SINGLE FACT—

- verdict based on, note paid by check, statute of limitations, e 4200.

# SINGLING OUT—

- agent for comment as to credibility, e 3415.
- defense of alibi, e 4322.
- life insurance, e 3677.
- self defense, threats of deceased, e 4732.
- facts, eminent domain, damages, benefits of drainage, e 3557.
- part of evidence, negotiable instruments, e 4209.
- witness as having sworn falsely, e 3331.
- believing theory of either side, e 3316.
- expert testimony, e 3378.

# SISTER—

- criminal intimacy of deceased with, of defendant charged with murder in second degree, no defense, 3018.
- killing in defense of, need not be proven "necessary," self defense, e 4760.

# SKILL—

- requisite to defeat charge of malpractice, e 3721.

# SLANDER AND LIBEL—Chapter LXXIX, 2279-2297, e Chapter CLXI, 4257-4269.

- action by one claiming supernatural powers, statements must agree with laws of nature, e 4263.
- anger, no justification, in mitigation, 2288.
- burden of proof as to damages, function of jury, e 4258.
- charge of adultery, measure of damages, 820.
- dishonesty, 2294.
- fornication, e 4261.
- or adultery, effect of retraction, 2293.
- damages, injury to reputation or character, elements, 812.
- measure of, 810-820, e 3539-3540.
- mental suffering produced by slanderous words, 812.
- when presumed, 812.
- where plea of justification is filed, 810.
- definitely pointing out person libeled, 2296.
- definition of, e 4257, 4258.
- degree and extent of proof required, exact words, clear preponderance not required, e 4264.
- differing from slander, charge invading the province of jury, e 4259.
- distinction between, charge invading province of jury, e 4259.
- drunkenness in mitigation of damages, 813.
- exemplary damages may be given when, 815.
- facts admitted by withdrawing the plea of general issue, justification, e 4268.



[References are to sections; e refers to Erroneous Instructions.]

**SLANDER AND LIBEL—Continued.**

- for reiteration of, vindictive damages may be allowed, 817.
- words spoken without malice, damages compensatory only, 814.
- imputing commission of crime, whether malice implied, privileged communications, e 4265.
- injury caused in part by other libelous publications, e 4266.
- intent as an element in libel, presumption of intent, e 4260.
- malice and damage presumed from speaking actionable words, 2283.
- what considered, 2287.
- plaintiff's bad reputation may be shown in mitigation of damages, 811.
- conduct suspicious, privileged communications, general issue, mitigation of damages, e 4269.
- plea of justification, how proved, 2289.
- in good faith, not an aggravation of damages, 810, 2290, 2291.
- presumption of good reputation, burden of proof on defendant, 2281.
- privileged communications, 2295.
- general issue, plaintiff's conduct suspicious, e 4269.
- proof of actionable words, all the words need not be proved, 2280.
- publication in good faith or with intent to injure, question for jury, 2285.
- reasonable doubt, 2722.
- referring to another person of similar name, e 4267.
- repeating report, 2292.
- truth of words a defense, 2297.
- wanton and malicious publication, element of damages, 819.
- wealth of defendant may be considered in assessing damages, 819.
- what to consider in assessing damages, 818.
- where no malice shown, damages compensatory only, 814.
- words imputing dishonesty in business, e 4262.
- must be proved as charged, "sets of words," 2279.
- not spoken maliciously, 2284.
- presumed to be used in their ordinary meaning, 2282.

**SLANDERING FAMILY OF DECEASED—**

- self defense, provoking difficulty, e 4730.

**SLAP WITH HAND—**

- provocation for homicide, when insufficient, 3091

**SLAYER—**

- malice in, when immaterial, self defense, 3141.

**SLEEPING CAR COMPANY—**

- care due property of passenger by, 1837-1838.
- loss of pocket book, negligence of person occupying berth with plaintiff, e 4005.
- placing pocket book in berth, liability for the loss of, e 4003.
- ring in pocket book, liability for loss of, e 4004.
- porter going to sleep, liability of sleeping car company, for loss of pocket book, e 4006.

**SLIGHT NEGLIGENCE—e 4144.**

**SLIGHT PROVOCATION—**

- manslaughter, not sufficient, 3040.

**"SLIGHTEST" REASONABLE DOUBT—**

- held misleading, e 4458.

**SMART MONEY—**

- See also DAMAGES, EXEMPLARY DAMAGES and PUNITIVE DAMAGES.
- for personal injuries, civil assault, 963.
- may be allowed as damages in assault and battery, 963.
- in suit against corporation, when, 823.
- when may be allowed, 738.
- for trespass on land, 822.

**SMELLS—**

- element of damage for causing nuisance, 794.

**SMOKE—**

- nuisance, stationary steam engine, 2195.

**SNOW—See ICE AND SNOW.**

[References are to sections; e refers to Erroneous Instructions.]

**SOAKING—**

person with turpentine, consent to criminal act, principals and accessories, e 4480.

**SOCIAL PLEASURES—**

excess in, school teacher, what may be demanded in absence of special contract, 2433.

**SOCIETY OF WIFE—**

measure of damages, personal injury, action by husband, e 3587.

**SOLICITATION—**

means to detect crime must not amount to, 2780.

**SON—**

killing by, to protect father, self defense, e 4757.

killing in defense of, self defense, 3180.

**SOOT—**

nuisance, stationary steam engine, 2195.

**SOUND AND DISPOSING MIND AND MEMORY—**

capacity to make wills, 2372, e 4293.

**SOUND DISCRETION OF JURY—**

damages for personal injury, 936.

**SOUTH CAROLINA—**

railroads, rule as to obviously defective appliance, 1573.

reasonable doubt defined, 2667.

rule as to negligence, railroads, injury by fir., 1993.

**SOUTH DAKOTA—**

reasonable doubt defined, 2668.

statute relating to, 153, p 139.

weighing defendant's testimony, e 4386.

**SPARK ARRESTER—**

use of on engines, 1767.

**SPARKS—**

danger of fire from escape of, negligent operation of mill, 2123.

engine emitting unusual quantity, negligence, 1995.

injury by fire, rule in Texas, 1992.

reasonable care to prevent escape of, negligence, railroads, 2004

starting fire in cotton, 1996.

**SPECIAL ASSESSMENT—**

railroad company restricted in use of right of way, 2230.

special benefits, what considered, 2231.

**SPECIAL BENEFITS—**

may be considered in assessing damages for change of street grade, 872.

**SPECIAL CONTRACT—**

for building, measure of damages, e 3516.

prevents recovery of damages on quantum meruit, e 3516.

school teacher, what may be demanded in absence of, excess in social pleasures, 2433.

**SPECIAL DAMAGES—**

polluting watercourse, e 4231.

**SPECIAL DEPOSIT—**

embezzlement, 2933.

**SPECIAL FINDINGS—**

failure of jury to report, 271.

not conclusive, 271.

when inconsistent with special verdict, 270.

should be asked, 268.

**SPECIAL INTERROGATORIES—**

may be leading, 269.

when may be asked, 268.

submitted to jury, 268, 269.

**SPECIAL OFFICER—**

liability of justice of the peace for act of, e 3449.

[References are to sections; e refers to Erroneous Instructions.]

**SPECIAL PROPERTY—**

larceny, sufficient ownership, 3226.

**SPECIAL PURPOSES—**

intended, implied warranty, samples, e 4251.

**SPECIAL TAX—**

cost of improvement of street not to be considered in assessing damages for change of grade, 872.

**SPECIAL VERDICTS—**

defined, 268.

should not find evidence equally balanced, e 356.

**SPECIAL WARRANTY—**

suit on, not on written guaranty, e 4252.

**SPECIALIST—**

degree of skill and care required, 1296.

**SPECIFIC—**

conditions, sales, fulfillment of, before title passes, e 4247.

facts, if proven, sufficient to raise reasonable doubt, e 4454.

intent, assault with intent to kill, not necessary, e 4549.

homicide, deliberately formed, ignoring lower degree of homicide, e 4661.

homicide, malice aforethought, e 4660.

intoxication as affecting, e 4413.

**SPECIFYING—**

what acts constitute provocation, homicide, e 4677.

**SPECULATIONS—**

not admissible, credibility, e 3317.

reasonable doubt must not be, 2684.

**SPEED—**

approaching crossing at high rate of, e 4059.

danger, train run at, failure to slacken speed when able to do so, e 3904.

dangerous rate of, car striking servant, 1542.

failure of engineer to obey signal to stop train, 1533.

engine running at excessive speed, injuries by fire, e 4102.

failure to obey ordinances, causing injury to servants, 1531.

high rate of, by engine, injuries by fire, e 4096.

by street car, e 4123, 4166-4167.

on wrong track, e 4165.

by train, causing injury to live stock, e 4093.

collision street car with vehicle crossing track, e 4171.

in absence of ordinance, injury at railway crossing, e 4037.

negligence, street railroads, circumstances to be taken into consideration, 2025, 2026.

recklessly running train through crowd of workmen, e 3859.

street railroads, duty to infant trespassers, 2089.

want of ordinary care, railroads, 1903.

whether proximate cause of injury, e 4167.

high speed of train over crossing, e 4032.

law regulating, contributory negligence, railroads, wanton misconduct, 1960.

of railroad trains, negligence, ordinances of cities and villages, 1848, 1881, 1987.

of street car, failure to check, negligence, danger imminent to person on track, 2099.

operating car at dangerous rate of, e 3858.

ordinance, railroad violating, negligence per se, 1880.

reckless, negligence, street railroads, failure to slow down approaching car, 2049.

relative rate of, in city and suburb, e 4166.

running at dangerous rate, blowing whistle insufficient distance from crossing, 1887.

train over crossings, at greater speed than allowed by ordinance, e 4036.



[References are to sections; e refers to Erroneous Instructions.]

**SPEED**—Continued.

sending hand-cars at great speed immediately after one another, 1541.

street railroads, running too fast, 2088.

**SPOILIATION OF WILLS**—

effect of, e 4310.

**SPONTANEOUS**—

confessions, entitled to great weight, 2520.

**SPOUSES**—

separation of, during life, widow's title to real estate, 2225.

**SPRINKLERS**—

fire insurance, negligence of employe, e 3669.

**STABBING**—

with knife, murder in first degree, 3002.

**STALLION**—

injury by, necessary to prove animal is vicious, e 4277.

**STAMP**—

revenue, failure to use, on negotiable instrument, e 4198.

**STANDING**—

financial, negotiable instruments argumentative, e 4202.

**STANDPOINT**—

of defendant, self defense, to be judged from, 3122.

**STARTING STREET CAR**—

suddenly, after slowing down for passenger to board, negligence, 2034.

violently, negligence, knowledge of either conductor or motorman that plaintiff is boarding, 2037.

**STATE**—

duty to prove homicide a crime, 3172.

imposing too great a burden on, presumption of innocence, e 4420.

need not furnish evidence upon which conviction is based, may be furnished by defense, e 4457.

of confusion, leaving mind of jury in, reasonable doubt, e 4455.

feeling, self defense, threats as indicating, 3150.

requiring too high a degree of proof on the part of, e 4442.

**STATEMENTS**—

by one defendant, when not admissible against co-defendants, 2527.

casual, by defendant to third party, weak as evidence, 2521.

contradictory and inconsistent, 2530, 2765, 2766.

false, fraud, omission to correct though innocently made, e 3649.

fraud, not mere matter of belief, e 3637.

of attorney in argument, corrected in instruction, reference to Biblical laws, 2756.

counsel not evidence against accused, 2567, e 3322.

defendant as part of *res gestae*, 2528.

at time of arrest, 2529.

explaining his conduct, should not be called confessions, e 4371.

satisfactory as evidence, 2519.

to be taken as true, instructing that, e 4366.

intoxicated person, value as evidence, action for sale of liquor, e 3690.

law, jury has no right to disregard, e 3382.

prosecuting attorney, not based on evidence, 2754.

prosecutrix, whether complaint or confession, rape, for jury, e 4525.

opening, not binding as admission, e 3369.

out of court, contradictory, e 3359.

unsworn, or defendant, Georgia statute, 2552.

**STATING**—

objections to evidence, 129.

**STATION**—

damages may be allowed for failure to construct, e 3505.

[References are to sections; e refers to Erroneous Instructions.]

**STATION—Continued.**

railroad, degree of care required as to platform, approaches and facilities, 1757.

passenger negligently failing to hear announcement, 1777.

**STATIONAL FACILITIES—**

railroads, 1757-1761.

degree of care required, 1757-1758.

failure to heat waiting room, e 3977.

passenger using unsafe platform, e 3976.

railroads using unsafe or dilapidated platform, 1758.

**STATUTE—**

against procurers, prosecution under, e 4516.

Alabama, manslaughter, horse racing on public highway, e 4657.

California, murder in second degree, elements to be considered, 3007.

duty imposed by, maintenance of track, 1846.

eminent domain, damages, right of property owner, waiver, e 3565.

Idaho, murder in first degree, 2990.

Illinois, embezzlement by banker, 2937.

instructions in words of, not always correct, self defense, e 4751.

Missouri, manslaughter in second degree, deceased striking defendant's father with fence rail, e 4658.

negligence, railroads, fencing track, 1962.

not requiring corroboration, testimony of accomplice sufficient, e 4486.

ordinance must be consistent with, arrest for vagrancy, malicious prosecution, e 3720.

South Carolina, negligence, railroads, injury by fire, 1993.

Texas, homicide, premeditation, meaning of sedate and deliberate mind, 3084.

**STATUTE OF FRAUDS—**

promise to pay third person, 628.

real estate, oral contract, 2227.

**STATUTE OF LIMITATIONS—See LIMITATIONS, STATUTE OF.**

**STATUTORY DEFINITION—**

manslaughter, not always applicable, e 4643.

murder in second degree, Texas, e 4641.

variance from, Florida, e 4640.

of murder used, and conclusion that there was no crime, e 4675.

**STATUTORY LIEN—**

on logs, e 3736.

**STATUTORY PLEA—**

of insanity, Alabama, burden of proof, 2598.

**STATUTORY PROVISIONS—**

as to instructions, 153.

**STEAL—**

intent to, necessary element, burglary, 2875, e 4560.

necessary part of crime, intoxication preventing formation of intent, e 4412.

**STEALING—See LARCENY.**

**STEAM ENGINE—**

stationary, nuisance, smoke and soot, 2195.

**STEER—**

vicious, due care of plaintiff, knowledge of disposition, 2349.

**STENOGRAPHER—**

minutes of, not competent, 128.

**STICKS—**

pursuing and beating with, self defense, e 4726.

**STIPULATION—**

testimony brought into case by, credibility, 2771.

**STOCK—**

agreement to purchase, 645.

corporation, ownership by purchase, burden of proof, 2420.

**STOCK, LIVE—See LIVE STOCK.**

[References are to sections; e refers to Erroneous Instructions.]

**STOCK PENS—**

carrier's duty to furnish at point of shipment, 1733.

**STOCK TRAINS—**

carrying passengers, duty as to operation of, 1793.

**STOLEN PROPERTY—**

action of replevin, does not relieve from charge of larceny, 3251.

buying with knowledge, not guilty of larceny, 3249.

*possession of,*

alone not sufficient to convict, principal and accessory, e 4567.

as evidence of burglary, reasonable doubt arising from other facts, e 4569.

explanation need only raise reasonable doubt, need not be satisfactory, e 4788.

jury may determine weight as evidence, e 4564.

larceny recently committed, presumption, e 4786.

must be exclusive as well as recent, e 4566.

not a material ingredient of larceny, e 4784.

presumption, good character, hypothesis must include evidence, e 4785.

reasonable doubt, 2885.

unexplained, whether sufficient to convict of larceny, e 4787.

removed and sold in another county, larceny, belief of jury must be limited to evidence, e 4777.

sale of, presumption from, invading province of jury, e 4783.

**STOLEN PROPERTY, RECEIVING—See RECEIVING STOLEN PROPERTY.**

**STONE—**

murder by striking with, deadly weapon, 3001.

**STOP, LOOK AND LISTEN—See NEGLIGENCE.**

**STORAGE LIEN—**

notice, sale, e 3730, 3731.

of bailee for charges, 1326.

warehouseman, 1325.

what may be allowed in mitigation of damages, e 3507.

**STORIES—**

exaggerated, insanity from blow on head, commenting on evidence, e 4408.

**STORM—**

extraordinary force of, destroying bridge, causing wreck of train, 1527.

unprecedented, collision of trains, act of God and negligence of company, 1530.

**STRANGER—**

living as member of family, when cannot recover for services, 732.

**STREAM—**

navigable, building docks, 2360.

floatage of logs down, use of banks, 2359.

obstruction willfully placed in, 3290.

polluting, nuisance, coal refuse, 2198.

what constitutes, right to dam water flooding land, liability, e 4279.

**STREETS—**

appropriation of by railroad, damages to adjacent property, 870.

change of grade, general benefits not to be considered, 871.

when municipality liable and when not liable for changing, 1653.

damages, measure of, for change of grade, 873.

to adjoining property by change of grade, 873.

what may be considered in assessing for change of grade, 871-2.

dedication of, See HIGHWAYS.

duty of city to maintain streets so that children may be upon them in safety, 1617.

eminent domain, possible benefit to be excluded, 852.

include sidewalks, 1638.

municipal corporations must keep in reasonably safe condition, 1612.

not liable for unknown defects, 1613.



[References are to sections; e refers to Erroneous Instructions.]

**STREETS—Continued.**

must be kept reasonably safe for travel, 1611.  
 persons knowingly permitted to obstruct, city liable for, 1626.  
 presumption that they are reasonably safe for ordinary travel, 1640.  
 special benefits may be allowed in changing grade, 872.  
 telegraph companies, care due while working with cable above, 2121.  
 vile epithets on, breach of the peace, 3294.  
 widening of, benefit may be deducted from amount of damages, 851.

**STREETS AND SIDEWALKS—**

See HIGHWAYS.

See NEGLIGENCE, MUNICIPAL CORPORATIONS.

**STREET CAR—**

duty of servant as to examination of, 1460.  
 injury to conductor of, defective rail, 1404.  
     grip-man, defective brake, 1426.  
 motorman of, failing to reduce speed at dangerous places, injury  
     to conductor, 1438.

**STREET CAR CROSSING—**

See also CROSSINGS and NEGLIGENCE, STREET RAILROADS.  
 collision of street car with vehicle, e 4171.  
 pedestrian crossing track, 2093, e 4170.  
 vehicles crossing track, 2094, e 4171.

**STREET RAILROADS—See NEGLIGENCE, STREET RAILROADS.**

**STRENGTH—**

of deceased, self defense, immaterial if danger is actual, e 4707.

**STRIKING—**

blow, self defense, not necessary, attack with knife, 3124.  
 deceased with fist does not make defendant liable for killing by  
     another, manslaughter, e 4656.  
 father of defendant with fence rail, killing in resistance, man-  
     slaughter, Missouri, e 4658.  
 first blow, self defense, person not necessarily aggressor because,  
     3135.  
 in defense of wife, by husband, self defense, e 4759.  
 with billiard cues, fatally wounded, 3000.

**STRONG—**

circumstantial evidence, so that it is incompatible with any reason-  
     able hypothesis of innocence, e 4352.

**STRUCK JURIES—**

described and method of exercising, 60.  
 manner of striking, 61.  
 waives peremptory challenge, 61.

**SUB-AGENT—**

binds agent of undisclosed principal for goods bought, 490.  
 goods bought for undisclosed principal, 490.

**SUB-LET PREMISES—**

trespass against lessor, 2317.

**SUBJECT MATTER—**

of sale, certain, quantity to be ascertained, 2253.  
 destroyed before delivery, title where, 2255.

**SUBSCRIPTION—**

cannot be withdrawn after work is completed, 681.  
     after work is begun, 681.  
 consideration for, who may perform, 673.  
 liability for work done on faith of, 680.  
     on limited to pro rata share, 679.  
 proof of substantial compliance sufficient in action on contract, 682.  
 what must be proven in action on, 681.  
 when plaintiff demands additional writing, 682.

**SUBSIDIARY EVIDENCE—**

doctrine of reasonable doubt does not apply, 2691, e 4439.

**SUBSTANTIAL—**

damages, disease causing death accelerated by personal injury, e 3617.

[References are to sections; e refers to Erroneous Instructions.]

**SUBSTANTIAL**—Continued.

reasonable doubt must be, 2683, 2685.

**SUTERRANEAN WATER**—

owned by owner of soil, 2355.

**SUBURBS**—

sidewalks and crossing must be kept reasonably safe, 1624.

**SUCCESS**—

doubts of, expression by attorneys, compensation, e 3450.

false pretenses, some property must have been obtained, 2939.

of conspiracy, not necessary, 2911.

fraudulent attempt, necessary, e 3647.

**SUDDEN**—

and uncontrollable passion, homicide, 3038.

conflict, manslaughter, arising from quarrel, 3025.

heat of passion, or sudden affray, either sufficient to reduce killing to manslaughter, e 4647.

taking, larcency, resistance not possible, 3222.

robbery, so that resistance impossible, considering condition of prosecuting witness, e 4575.

**SUFFERING**—See DAMAGES, PAIN and SUFFERING.

**SUFFICIENCY**—

of indictment, not for jury, e 4393.

proof as to due execution of will, e 4288.

provocation for homicide, standard for determining, 3094.

testimony as to alibi, singling out defense, e 4322.

witnessing of will, e 4287.

**SUFFICIENT**—

evidence, as to self defense, 3105.

one witness, perjury, when, 3259.

proof, obstructing highway, 3289.

common design, conspiracy, 2906.

provocation for homicide, slap with hand, when not, 3091.

**SUGGESTED BY DETECTIVE**—

burglary, to entrap defendant, e 4562.

**SUGGESTIVE INTERROGATORIES**—

in charge, e 4502.

**SUICIDE**—

accident insurance, 1204.

committing, in sane state of mind, no liability for insurance, 1208.

not proof of insanity, 1209.

definition of, 1207.

life insurance, burden of proof, e 3676.

coroner's verdict, e 3683.

must be sane in order to commit, 1207.

not necessarily evidence of insanity, 2603.

no presumption of, life insurance, morphine or other narcotics, e 3682.

**SUICIDAL TENDENCY**—

mother with, poisoning children, 2604.

**SUIT ON SPECIAL WARRANTY**—

not on written guaranty, e 4252.

**SUMMING UP**—

of circumstances by court, rape, 2815.

**SUNDAY**—

contract made on, 642, 643.

intoxicating liquor sold, in side or rear rooms, 3206.

negotiable instruments, void consideration, liquor sold and note given on Sunday, 2158.

**SUPERINTENDENCE**—

of construction of goods sold, by vendee, 2268.

**SUPERNATURAL POWERS**—

action for libel by one claiming, statements must agree with laws of nature, e 4263.

[References are to sections; e refers to Erroneous Instructions.]

**SUPERSEDEAS—**

- application for, 325.
- bond for, when waived, 325.
- exemptions of bond, 325.
- follows writ of error, 324.
- granting of writ in discretion of court, 325.
- how and when granted, 325.
- operates to preserve the matter in status quo, 324.
- what parties not required to give bond, 325.

**SUPPLYING OMITTED ELEMENTS—**

- by other instructions, murder in first degree, e 4628.

**SUPPORT—**

- loss of of means of intoxicating liquor sold to husband, 1218.
- minor's claim for, not forfeited by voluntary absence from home, e 3625.

**SUPPOSITIONS—**

- trivial or fanciful, no basis for reasonable doubt, 2681.

**SUPREME COURT OPINION—**

- should not be read in argument, 128.

**SURETIES, 2183-2193.**

- and principal, liability of, on negotiable instrument, 2141.
- lien of, negotiable instruments, bills of lading held by title to the goods, 2192.
- negotiable instruments, title to goods, 2191.
- negotiable instruments, partners, co-sureties, 2190.
- released, negotiable instruments, extending time, 2186.
- signing in blank, space may be filled out above, 508b.

**SURFACE WATER—**

- diversion of, measure of damages, elements of injury, 2353.
- owned by owner of soil, 2355.
- watercourses, dominant heritage, e 4284.

**SURGEONS—See PHYSICIANS and SURGEONS.**

See MALPRACTICE.

**SURRENDER OF PREMISES—**

- how effected, 1243.
- moving away, giving up the keys, 1244.
- must be assented to by landlord, 1243.

**SURRENDER, VOLUNTARY—**

- flight as evidence of guilt, e 4327.
- no proof of innocence, 2463.

**SITUATION—**

- adultery presumed from, 2788.

**SURROUNDED IN A DEGREE OF DOUBT—**

- criminal act, jury may convict nevertheless, e 4453.

**SURROUNDING CIRCUMSTANCES—**

- directing jury to consider, e 4353.

**SURVEYS—**

- deeds, disregarding monuments, e 3461.
- field notes must yield to natural monuments, 446.
- filing of, 1140.
- what would be the true line in case of difference from road surveyed and plat, 1139.

**SUSPECTED—**

- no one else, circumstantial evidence, e 4356.

**SUSPICION—**

- arrest upon, malicious prosecution, malice, probable cause, e 3718.
- defendant not to be tried on, by evidence only, evidence excluded or stricken out, 2762.
- groundless, not necessarily insane delusion, capacity to make wills, e 4298.
- wills, not necessarily insane delusion, 2383.
- not to be cast on testimony of police officers, 2769.



[References are to sections; e refers to Erroneous Instructions.]

**SUSPICIOUS—**

facts, negotiable instruments, assignee with notice of, 2167.  
 plaintiff's conduct, libel, mitigation of damages, e 4269.

**SWEARING FALSELY—**Chapter XVII, 341-350, e Chapter CV, 3323-3331.  
 See also CREDIBILITY.

made knowingly, must be as to material facts, e 3301.

Missouri Rule, 341.

must be corroborated, e 3324.

perjury, must be to a matter material to the issue, e 4793.

no reasonable grounds for believing statements to be true, 3257.

singling out witness for, e 3331.

touching fire insurance, e 3668.

in proofs of loss, 1163.

willful, of defendant, 2561.

perjury, must be to a matter material to the issue, e 3329, 4793.

**SWEARING—**

in jury, form of oath, 63.

omission of oath, 63.

profane, violating ordinance, attempted arrest, 2847.

to lack of knowledge, perjury, when he had read it in newspapers  
 and heard rumors, e 4794.

**SWITCHES—**

duty of street railroads to keep in reasonably safe condition, e 4127.

making flying, at crossings, e 4050.

of railroad, injured while coupling cars while throwing wrong  
 switch, 1538.

removing, negligence, railroads, measure of damages, 2007.

thrown by unauthorized act of stranger, liability of company, e 4142.

**SWITCHING—**

railroads, care required in, 1899.

**SWITCHMAN—**

railroads, assumed risk, when company liable, 1570.

**SWORN—**

perjury, must be proof that accused was, 3256.

**SYMBOLICAL DELIVERY—**1063.

**SYMPATHY—**

advising jury not to be swayed by, polluting stream with coal  
 refuse, 2198.

jury not to be governed by, 1379.

**TABLES—**

mortuary, measure of damages, personal injury, e 3580, 3614.

**TAR AND FEATHER—**

conspiracy to, 2917.

**TAKING—**

embezzlement, need not be felonious, gist of offense is conversion,  
 2928.

*larceny,*

forcible, resistance necessary, 3221.

must be with felonious intent, 3211.

obtaining property by threats of great bodily harm, 3223.

openly, presumption of innocence, when, e 4782.

too sudden to permit resistance, 3222.

under mistaken claim of right, 3229.

what constitutes, 3220.

*replevin,*

what constitutes a wrongful, submitting question to jury, e 4240.

wrongful, demand not necessary, otherwise if taking not wrong-  
 ful, e 4237.

*robbery,*

from person, what is meant, 2897.

must be from person, 2896.

need not be from person, 2898.

so suddenly as not to allow of resistance, considering condition  
 of prosecuting witness, e 4575.

[References are to sections; e refers to Erroneous Instructions.]

**TAKING UP—**

cattle, trespass, party doing so must care for, 2325.  
estrays in good faith, subsequent intent to convert, 3231.

**TANK—**

for carrying oil, not a part of wagon, 3296.

**TAX DEED—**

as a basis for adverse possession, 440.

**TAX SALE—**

adverse possession, minors, e 3408.  
purchaser at, cutting timber, trespass, 2310.

**TAX SCHEDULES—**

larceny, admissible to attack credibility of prosecuting witness, e 4780.

**TAXATION—**

forest products in transit, 2431.  
of ditch upon land already taxed, e 4234.  
real estate, fixing valuation, 2232.

**TAXES—**

assessed on road by city, building on public highway, adverse possession, equitable estoppel, e 4233.

**TEACHER—**

school, right to dismiss, when reviewable by court, ground for dismissal, 2432-2433.  
using unreasonable force, e 4539.

**TEAM—**

unmanageable, personal injury, railroads, 1927.

**TELEGRAMS—**

companies not insurers of absolute safety and accuracy of telegrams, 2116.  
damages for failure to deliver, 835.  
may be recovered for mental suffering, sorrow and anguish, 836, 921.  
delivery of, negligence defined, 2114.  
duty of company to make prompt delivery, 2115.  
failure to deliver, damages for mental suffering, 921.  
negligence, causing business deal to fall through, 2119.  
forgery of name, inducing girl to marry through, 2952.  
incorrect or insufficient address, negligence, 2117.  
measure of damages for failure to deliver, 835.  
mental anguish may be considered for failure to deliver, 835.  
notice of importance of on face, 835.

**TELEGRAPH COMPANIES—**Chapter LXXI, 2114-2123, e Chapter CLIV, 4183-4186.

care due while working with cable above public street, 2121.  
duty to make prompt delivery of telegram, 2115, e 4183.  
failure to consummate business deal through non-delivery of telegram, 2119.  
incorrect or insufficient address of telegrams, 2117, e 4184.  
knowledge of agents of purpose of telegram, 2118, e 4185.  
importance of message, e 4186.  
negligence in delivery of telegram, defined, 2114.  
no duty on agent to disclose agency to company, 2120.  
not insurers of absolute safety and accuracy of telegrams, 2116.  
presumption of danger from electric wires, 2123.  
to exercise ordinary and reasonable diligence to find plaintiff and deliver message, e 4183.

**TELEGRAPH OPERATOR—**

delivering order to engineer, injured by another train on returning, 1535.

**TELEPHONE COMPANIES—**

negligence, care required of lineman while working near electric wires, 2122.

[References are to sections; e refers to Erroneous Instructions.]

TELEPHONE CONSTRUCTION—

damages for unnecessary trimming of trees, 875.

TELEPHONE SYSTEM—

trespass, cutting trees, 2311.

TELEPHONE WIRES—

burden of proof as to negligence of adjusting, 1405.

damages for injury to trees, 803.

TELLING—

exaggerated stories, insanity from blow on head, commenting on evidence, e 4408.

truth, no presumption that witness is telling, conduct on stand, e 3312.

TEMPORARY ABSENCE—

from state, statute of limitations, not deducted, e 3707.

selling homestead during, abandonment, e 4236.

TEMPORARY INSANITY—

distinguished from permanent, delirium tremens, 2589.

intoxication from liquor or morphine, homicide, e 4416.

produced by intoxicating liquors, mitigation, murder, 2614.

TEMPTATION—

assuming that words or acts may be temptation, seduction, e 4535.

TENANT—See LANDLORD and TENANT.

TENDER—

back, sales, order not complied with, 2269.

of premium, 1200, e 3659.

trover and conversion, as good as payment, not good if conditional, 2342.

waiver of production of money, 2343.

TENDING TO SHOW—

conspiracy, what facts, 2909.

TENNESSEE—

error to compel defendant to put foot in foot-print, 150.

reasonable doubt defined, 2669.

statute relating to instructions, 153, p 140.

TERMS OF CONTRACT—

compliance with, e 3431.

for the jury, 629.

TERROR—

effect of in sudden emergency, contributory negligence, 1358.

TEST—

of criminal responsibility, insanity, 2570.

goods sold, coming up to, waiver, 2264.

insanity, right and wrong, 2573-2575.

malpractice, care, skill and diligence required, e 3721.

materiality, perjury, 3264.

testamentary capacity, 2373-2374.

TESTAMENTARY CAPACITY—

See also WILLS.

appeal from probate court, 2391.

contest in chancery, 2392.

letters as evidence, 2375.

not necessarily affected by old age, 2382.

right of testator to dispose of property as he pleases, 2385.

test of, 2373, 2374.

TESTATOR—

declarations and previously expressed purposes of, undue influence, 2413.

destruction of free agency of, undue influence, 2396.

instilling false beliefs in, undue influence, 2406.

may dispose of property as he pleases, 2401.

give property as he pleases, jury may consider inequality of distribution, 2402.

physical condition of, undue influence, 2412.



[References are to sections; e refers to Erroneous Instructions.]

**TESTATOR**—Continued.

power of, to exclude relatives from share in his estate, e 4285.  
right of, to dispose of property as he pleases, capacity to make wills, e 4299.

**TESTIFY**—

compelling defendant to, against himself, perjury, e 4795.  
defendant's failure to, not to be taken against him, rule in various states, 2556-2560.  
failure of defendant to, court should not mention, e 4390.

**TESTIMONY**—

alibi, weight or sufficiency of, singling out defense, e 4322.  
confessions not considered as any other, e 4632.  
conflict of, duty of jury to reconcile, 330a.  
corroborative, seduction, e 4536.  
credibility, affirmative stronger than negative, e 3303.  
duty to reconcile, e 3302.  
See CREDIBILITY.  
defendant's, see DEFENDANT'S TESTIMONY.  
cannot be convicted on own alone, confession must be corroborated, e 4373.  
weighing, rule in various states, 2535-2552.  
disregarded, view of jury, e 3379.  
when willfully false, e 3323.  
expert, weak and unsatisfactory, e 3375.  
weight of, for jury, e 3372.  
wills, insanity, 2389.  
fabrication of, by defendant, 2562.  
false, corroboration required, 3325.  
swearing must be corroborated, e 3324.  
falsus in uno, falsus in omnibus, e 3327, 3328.  
giving full faith and credit to an impeached and uncorroborated witness, e 3354.  
impeachment must be as to a material matter, e 3356.  
jury may disregard, prosecutrix only witness, 2795.  
knowingly false, must be as to material facts, e 3301.  
largely circumstantial, 2511.  
limited by election, reasonable doubt, 2700.  
little weight to, because of ill will, e 4500.  
*of accomplice*,  
assuming corroboration sufficient to convict, e 4488.  
calling attention to difficulty of convicting without, e 4491.  
charging that it is unsafe to convict on, e 4490.  
corroborated by confession, 2750.  
incest, e 4518.  
must be corroborated, 2748, e 4485.  
need not be corroborated, 2751.  
no greater weight because corroborated, e 4487.  
should be received with caution, 2752.  
sufficient, where statute does not require corroboration, e 4486.  
to be received with caution, omitting to define corroboration, e 4489.  
what corroboration sufficient, 2749.  
*of conspirator*, former acquittal, 2914.  
defendant and wife, weighing, rule in Missouri, 2554.  
conviction of former offense, admitted to affect credibility, e 4391.  
not necessary, 2555.  
expert witness not to be disparaged, e 3373.  
hired detectives, different from that of other interested witnesses, e 4498.  
impeached witness credible even when uncorroborated, e 3355.  
parties, Chapter XIX, 363-372, e Chapter CVII, 3349-3352.  
plaintiff consistent with both diligence and negligence of defendant, e 3350.  
police officers, greater care in weighing, 2768.  
not to be discarded or discredited, 2769.

[References are to sections; e refers to Erroneous Instructions.]

**TESTIMONY—Continued.**

- prosecutrix, rape, 2819.
- relatives of accused, weight of, e 4497.
- wife of accomplice, e 4492.
- on former trial, all must be considered together, 2516.
- palpably false, e 3326.
- perjury, absence of motive, 3266.
- that alleged must be proved, 3260.
- when material, 3263.
- purpose of impeaching, e 3353.
- rape, not to be taken as true because not denied, e 4528.
- of prosecuting witness to be weighed as that of any other witness, "implicated," e 4527.
- reconciling with hypothesis of innocence, e 4469.
- right of jury to disregard, e 3381.
- stipulated into case, credibility, 2771.
- stricken out, should not be considered, 2567.
- taking by commission, limit of process, 2775.
- weight of, fire insurance, proof of loss, e 3671.
- when conflicting, what jury should consider, 332.
- willful and knowing exaggeration, e 3330.
- willfully sworn falsely, e 3331.

**TEXAS—**

- defendant's failure to testify not to be alluded to in jury's deliberations, 2560.
- homicide, premeditation, definition of sedate and deliberate mind, 3084.
- manslaughter, intent to kill necessary element, e 4645.
- murder in second degree, malice necessary, but will be implied, 3010.
- reasonable doubt defined, 2670.
- rule as to measure of damages where carrier furnishes filthy or unfit cars, and permits improper persons therein, 1764.
- negligence, railroads, injury by fire, 1992.
- statute relating to instructions, 153, p 141.
- weighing defendant's testimony, e 4387.

**THEFT—**

- of negotiable note, 2174.
- other property, larceny, effect of proving, e 4790.
- proved by circumstantial evidence, e 4361.

**THEORY—**

- defendant may rely on any, trumped-up charge of conspiracy, 2761.
- of conspiracy, burglary, instruction cannot ignore, e 4587.
- either side, believing, singling out witness, e 3316.
- innocence, favoring, disregarding testimony unless corroborated, e 4427.
- self defense, ignoring, e 4753.

**THIEF—**

- acquires no title, can convey none, 2256.

**THIRD PERSON—**

- holding oneself out as partner to, may hold as partner, 2201.

**THREATS—**

- as proof of malice, homicide, 3066.
- burglary, entry must be by, force or fraud, e 4571.
- confession obtained by, 2526.
- larceny, obtaining property by, 3223.
- showing felonious intent, 3212.
- of attachment, to extort money, e 3444.
- imprisonment, negotiable instruments, 2151.
- submission is not a consent to restraint, 1287.
- provocation for homicide, not sufficient, 3088.
- self defense,*
  - acting upon, ignoring doctrine of escape, e 4698.
  - defendant entitled to separate instruction as to, 3155.
  - do not bar plea of, question of act, 3153.
  - evidence of state of feeling or who was aggressor, 3150.

[References are to sections; e refers to Erroneous Instructions.]

**THREATS—Continued.**

- ill-will, abuse, 3145.
- indicating who was aggressor, 3149.
- not sufficient, must await overt acts, e 4735.
- to justify, overt act necessary, 3146.
- of arrest not sufficient, 3154.
- deceased, for what purpose admissible, e 4733.
- singling out and giving undue prominence, e 4732.
- when not admissible, 4734.
- purporting to draw weapon, reputation as dangerous and violent man, 3151.
- with acts indicating intention to carry them out, 3148.
- to kill, mutual, carrying deadly weapons, 2968.
- uncommunicated, self defense, admissible when, 3152.
- weight to be given, provocation, homicide, e 4682.

**THROUGHOUT TRIAL—**

- presumption of innocence attends accused, e 4429.

**THROWN—**

- from platform of street car, negligence, high rate of speed, 2026.

**TICKETS, 1822-1825.**

- effect of purchaser signing round-trip tickets, 1825.
- failure of passengers to produce, right of company to eject, 1827, 1830.
- limitation of liability in, burden of proof, 1841.
- of passenger carriers, negligence, 1822-1825.
- reduced rate for round-trip, 1824.
- representation of ticket agent, binding on carrier, 1822.
- requiring higher fare when paid on trains, ejection of passenger, 1823.
- right to eject passenger for failure to produce, e 3999.
- whether a contract, e 3998.

**TIMBER—**

- cutting, eminent domain, damages, market value, e 3560.
- purchaser at tax sale, trespass, 2310.
- measure of damages for cutting carrying away and destroying, 771.
- unlawful cutting, trespass, real estate, 2309.

**TIME—**

- alleged in bill, divorce, acts of cruelty must be limited to, e 3622.
- cooling, homicide, hostile acts, e 4685.
- provocation, facts constituting question of law, 3095, 3096.
- whether a question of fact or of law, e 4684.
- day or night, burglary, 2884.
- extension of, negotiable instruments, 2180.
- larceny, not of the essence of the crime, 3238.
- lost in search for lost goods, damages allowed, e 3511.
- necessary to be covered by alibi, need not be proved to jury's satisfaction, e 4317.
- to constitute premeditation, homicide, 3081, e 4673.
- need not be proved in charge of adultery, e 4510.
- of filing petition determines date of assessment of damages, e 3543.
- receiving stolen property, criminal intent must exist at instant of receiving, 3253.
- when burglary committed, generally immaterial, may be material, 2883.
- crime committed, 2781.
- completed, larceny, 3237.
- intent formed, homicide, immaterial, 3054.

**TITLE—**

- attachment, good faith necessary, e 3448.
- bailee cannot deny bailor's, 554.
- by adverse possession, e 3407.
- prescription, 454.
- claim of, trespass on real estate, warning from owner, 2318.
- color of, larceny, belief as to ownership, e 4778.
- damages for breach of warranty, e 3514.



[References are to sections; e refers to Erroneous Instructions.]

**TITLE**—Continued.

- in ejectment, 1034-1045.
- intent to acquire, adverse possession, e 3404.
- larceny, and possession obtained by fraud, 3241.
- paramount, when tenant bound to recognize, e 3700.
- passes when, sales, e 4246.
- possession prima facie evidence in ejectment, 1038.
- prescriptive, adverse possession, e 3406.
- replevin, claimed by defendant, demand not necessary, 2237.
- sales, fulfillment of specific conditions before it passes, e 4247.
- subject matter destroyed before delivery, 2255.
- tenant cannot deny landlord, 1241.
- thief acquires none, can convey none, 2256.
- to goods, bills of lading held by, negotiable instruments, lien of surety, 2191, 2192.
- transferred by transfer of bill of lading, 2252.
- logs, gained by possession and limitation, e 3708.
- part of real estate, trespass, and possession of all, gives right to bring action, 2305.
- personal property, sale, when trover maintainable by buyer against seller, 2330.
- to real estate,*
  - both parties having, trespass, 2306.
  - in third person, trespass, no defense for one without title, 2307.
  - notice of defect, heirs, facts calling for inquiry, 2228.
  - purchase by father with money of children, 2226.
  - rightful, trespass upon possession, 2308.
  - widow's, separation of spouses during life, 2225.
- traced to state, adverse possession, e 3410.
- trover, evidenced by possession, 2328.
- warranty of, by vendor, 2271.
- when passes, sale, agreement to sell, 2248.
- consideration paid in installments, 2249.

**TOO HIGH A DEGREE OF PROOF**—

- requiring, on the part of the state, e 4442.

**TOOLS**—

- delivering to prisoners in jail, 2464.

**TORTS**—

- of agent, when principal liable for, 488.
- party cannot sue for and recover in contract, 1132.
- ratification of, by principal, e 3421.
- self defense, trespass by deceased, 3168.
- when principal liable for agent's, 488.

**TORTIOUS**—

- possession, replevin, demand not necessary, 2239.

**TOTAL DISABILITY**—1215.

- company or society not liable if insured is able to do any work, 1216.

**TRACK**—

- animals coming on so suddenly that accident cannot be prevented, e 4092-4093.
- injured on, burden of proof, 1981.
- care due from driver of vehicle crossing, ordinary care defined, 2107.
- careless driving across, contributory negligence, 1955.
- child on, degree of care due towards, 1852, e 4014.
- contributory negligence,*
  - crossing knowing that cars were shifted there, 1951.
  - fence defective, 1968.
  - going upon, without warning to motorman, 2108.
  - vehicle crossing, 1932.
- crossing,*
  - duty to stop, look and listen, 1910.
  - failure of railroad servants to avoid threatened injury, 1896.
  - in buggy, contributory negligence, 1917.
  - swiftly on bicycle, negligence, 1915.
- danger imminent to person on, failure to check speed of street car, negligence, 2099.

[References are to sections; e refers to Erroneous Instructions.]

**TRACK—Continued.**

- driving over, with lines hanging loose, 1926.
- upon although view obstructed, 1919.
- duty of fencing, for benefit of children, 1970,
- of person crossing, 1882.
- railroad in crossing, 1937.
- failure of driver of vehicle to use reasonable care on, 2106.
- fencing, negligence per se, railroads, statute, 1962.
- fire engines crossing at street crossing, 2095.
- flagman's signal to cross, does not excuse want of ordinary care, 1906.
- going on, after discovery of approaching train, 1923.
- notwithstanding obstruction and noise, 1920.
- helpless person on, duty of railroads, 1853.
- horse injured in flangeway, 1980.
- injured on, reasonable care, 1977.
- injuring persons on, 1851.
- liability for repairs, of railroad and street car companies, 1938.
- license to cross, temporary revocation of, 1861.
- licensees on, duty of railroad to maintain lookout, 1860.
- lookout for horses on, 1976.
- maintenance of, 1846.
- obstructing view of, at crossing, by cars, 1878.
- parallel, street railroads, passenger alighting, 2046.
- person assuming risk of crossing, 1869.
- colliding with street car, 2097.
- crossing, "kicking" car, 1895.
- trespasser, 1859.
- placing obstruction on, reasonable doubt, e 4819.
- presumption that party stopped, looked and listened before crossing, 1921.
- proclamation of danger in itself, 1908.
- reasonable care, fencing, 1963.
- right of railroad to raise and lower, 1900.
- standing on, contributory negligence, 1952.
- stock coming suddenly upon, negligence, 1978.
- unlawfully running at large, 1965.
- vehicle crossing at street crossing, 2094.
- voluntarily crossing to dangerous place, 1907.
- weeds obstructing view of, negligence, 1877.

**TRACK AND ROADBED—**

- of railway companies, 1516-1528, 1846-1847, e 3851-3856.
- allowing clinker to remain at side of track, causing injury, 1526.
- derrick to swing over track, 1525.
- timber to stick out of shed and over tracks of transfer table, causing injury, 1524.
- construction, operation or maintenance of, injury to passenger, burden of proof, 1840.
- defective bridge, wreck of train on, 1527.
- track at crossing, injury to engineer, assumption of risk, 3885.
- risks assumed by engineer, e 3884.
- duty to have the yard suitably lighted, e 3855.
- to keep free from obstruction, 1516, 1525.
- in reasonably safe condition, 1525, e 4122, 4127.
- provide safe material in construction of its road and appurtenances, 1499.
- use reasonable care to avoid injuring person on track, e 4012.
- reasonable care to see that they are safe, e 3851.
- failure to keep track in repair, as proximate cause of injury, 1520.
- insufficient ballasting of road, injury to employe, 1521.
- latent defects in lock of switch, e 3856.
- maintaining portable coal chutes too near track, e 3852.
- posts in dangerous proximity to track, e 3853.
- master must use ordinary care to see that they are safe, 1517.
- negligence in care of, 2083.
- no fixed standard for height of bridges over, e 3854.
- protruding cross-tie and hole in track, 1523.

[References are to sections; e refers to Erroneous Instructions.]

**TRACK AND ROADBED—Continued.**

right of engineer to assume that track is reasonably safe, 1518.  
servant not having equal opportunity to know of danger, 1521.  
slanting side-track, injury to servant, 1522.  
tracks and sidings must not be in too close proximity to other structures, 1519.  
train leaving the track, injury to servants, 1520.

**TRADE—**

retail, mortgagor retaining possession of stock of goods, e 3727.

**TRAILER—**

to street car, contributory negligence, person injured after alighting, 2074.

**TRAIN—**

care due in operation, stock killed, 1971.  
contributory negligence, plaintiff not discovering, 1953.  
driver of vehicle presumed to remain at safe distance, 1925.  
discovery of, in time to avoid going on track, 1923.  
has preference at highway crossing, 1868.  
holding up, robbery, intent, 2894.  
noise affecting value of land, e 3548.  
not on schedule time, stock, 1982.  
rate of speed of, negligence, 1848.  
reasonable rules for management, 1943.  
running at greater speed than allowed by ordinance, negligence per se, 1880.  
should give warning on approaching crossing, 1870.

**TRANSACTIONS—**

between relatives viewed with suspicion, 1087.  
of life, graver, reasonable doubt same as doubt interposed in, e 4443.

**TRANSCRIPT—**

and brief must be filed within time prescribed, 307.

**TRANSFER—**

entering car without, negligence, fault of first conductor, 2061.  
giving wrong one on street car, 2060.  
of property of insolvent debtor, if in payment of debt due motive immaterial, e 3632.  
real property, by deed only, e 3619.  
married woman, positive fraud, e 3627.  
regulations in reference to, on street cars, 2059.

**TRANSIT—**

forest products in, taxation, 2431.

**TRANSPORT OF PASSION—**

murder in second degree, without adequate cause, deadly weapon, leather belt, 3016.

**TRANSPORTING—**

men and arms, military expedition, 3291.

**TRAVELLERS—**

care required of, railroads, 1902.  
negligence of, per se, 1928.  
not excused from using ordinary care because no gate-keeper provided by railroad, 1904.  
by railroad's failure to give signals, 1905.  
rights and liabilities of, 1867.

**TREASURER—**

pledging bonds in security for his note, intent, 2932.

**TREATING PERSONAL INJURIES—**

measure of damages, contributory negligence, e 3583.  
prevented by pregnancy, measure of damages, e 3589.

**TREES—**

cutting, 3299.  
trespass, for telephone system, 2311.  
injured by fire negligently set, 2129.



[References are to sections; e refers to Erroneous Instructions.]

**TRESPASS**—Chapter LXXX, 2298-2325, e Chapter CLXII, 4270-4276, 4811-4814.

- action for false imprisonment, 791.
- accidental injury does not justify award of damages, e 4275.
- by animals, 2320-2325.
  - corporation, exemplary or punitive damages may be allowed, 823.
  - deceased, self defense, 3168.
- cattle, adjacent lands, no division fence, 2320.
  - failure to furnish attendant, 2324.
  - grazing on government land, 2322.
  - on highway with attendant, not "at large," 2323.
  - party taking up must care for, 2325.
  - defects in division fence, 2321.
- conversion of part of realty not necessary, e 4813.
- damages for herding cattle on plaintiff's land, 825.
  - what jury may consider in assessing, 791.
- exemplary damages, "evident disregard of plaintiff's rights," e 4272.
  - may be allowed, measure of, 821.
- identification of property taken not necessary, value of property taken, e 4812.
- joint and several offense, possession of stolen goods, e 4811.
- justified by valid claim of right honestly relied upon in good faith, e 4814.
- killing to prevent, e 4763.
- landlord and tenant cannot sue in to recover crops, 1233.
- measure of damages, 821-826, e 3541-3542.
  - for destroying sign, 826.
- on growing crops, measure of damages, 824.
  - land of another, false imprisonment, 1288.
- pasturing cattle on unclosed lands, e 4274.
- personal property, 2298-2302.
  - justification, burden of proof on defendant, 2299.
  - no levy without officer taking possession, 2302.
  - one rightfully in possession may sue for, 2298.
  - ratification of wrongful distress, 2301.
    - levy, refusing to release property taken, 2300.
- possession alone sufficient to maintain action, e 4270.
  - of land defined, e 4271.
- punitive damages may be allowed where wanton and wilful, 199.
- quare clausum fregit, when maintainable against owner, e 3702.
- real estate*, 2303-2319.
  - both parties having title, 2306.
  - claim of title, warning from owner, 2318.
  - cutting trees for telephone system, 2311.
  - damages, no effort to prevent, 2316.
  - definitions, break and enter, force and arms, 2304.
  - disputed fence line, arbitration, 2319.
  - entry upon land obtained by fraud, 2312.
  - purchaser at tax sale cutting timber, 2310.
  - right to repel by force, 2313.
  - sub-let premises, against lessor, 2317.
  - title, and possession of part, gives right to bring action, 2305.
    - in third person, no defense, for one without title, 2307.
  - trespassers are jointly and severally liable, 2303.
  - unlawful cutting of timber, 2309.
  - upon possession under rightful title, 2308.
  - when defendant liable for act of independent contractor, 2314.
  - writ of sequestration, burden of proof, 2315.
- to person or property, when exemplary damages may be allowed, 821.
  - when exemplary damages may not be allowed, 821.
- two persons acting independently inflicting injury, e 4276.
- upon land, when smart money or exemplary damages may be allowed, 822.

**TRESPASSERS**—

- accidentally injured not assault, 523.
- assaulting, self defense, instructions ignoring part of the evidence, e 4543.

[References are to sections; e refers to Erroneous Instructions.]

# **TRESPASSERS—Continued.**

- assuming plaintiff a, e 4017.
- boarding moving train, duty toward, e 3972.
- carriers of passengers forcibly ejecting from train, 1752.
- degree of care due by railroads, 1752, 1753, e 3971, 3972.
  - required by passenger carriers, 1754.
  - from railroads by persons riding on platform, 1752.
- ejection of, assault and battery, 2842.
  - from moving train, e 4020.
  - railroads, e 3971.
- expelling disorderly person not an assault, 538.
- getting on moving railroad train, 1858.
- infant, care due from street car company, 2080.
- injury to, while getting off moving train, e 4021.
- instruction omitting to state whether trespasser or passenger, e 3970.
- liability of railroads as to, 1856, e 4018.
- misconduct towards, 1857.
- on street car, degree of care, e 4158.
  - slowing down before putting off, 2089.
- personal injury to consignee, 1941.
- person crossing track, 1859.
  - may defend himself when wantonly assailed by another, 5341.
  - on platform to meet incoming trains, 1753.
  - riding on platform to avoid payment of fare, 1752.
  - willfully on the premises of another man who assaults owner, cannot complain of assault by the owner, in self defense, 5341.
- shooting, defense of property, e 4765.
  - of, by watchman, liability of master for, 1374.
- wanton and wilful injury to, by brakeman, e 4019.

# **TRIALS—**

- in general, Chapter I, 1-15.
- absence of the judge, effect of, 83.
  - improper, whether civil or criminal, 84.
  - in felony case cannot be consented to, 83.
  - when reversible error, 83.
- abstract instructions should not be given, 179.
  - principle of law in criminal case not error, 179.
- adjournment from day to day does not permit jurors to disperse, 99.
- in actions for personal injuries, court cannot limit number of witnesses, 224.
  - crippled plaintiff as witness, 122.
- admissions in pleadings need not be proven, 387.
  - of spectators, 63.
- admonishing jury as to conduct during separation, 98.
- affirmative and positive instruction not cured by others, 173.
- allowing additional time for argument, 226.
- ancient common law trial lasted but a day, 99.
- appeals and writs of error, 281-326.
- appeals to prejudice or passion, 234.
- appearance and conduct of witnesses, 122.
- argument of counsel to the jury, 220-246.
  - should be confined to the evidence, 228.
- argumentative instructions not ground for reversal, 189.
- assumption by court of material facts error, 182.
- bailliff remaining with jury over-night, 95.
- being signed by foreman and read in court constitutes valid verdict, 272.
- bills of exception, time for settling, 304.
- by jury, cases to which it does not extend, 12.
  - constitutional right of, 10.
  - does not extend to equity cases, 12.
  - in Federal Courts, 11.
  - may be waived in civil cases, 266.
- cautioning instructions given by the court, 407.
- certainty as to what the jury intended to award, 276.
- charge to the jury should be taken together, 173.
- comments of counsel on withholding evidence, 238.

[References are to sections; e refers to Erroneous Instructions.]

**TRIALS—Continued.**

of court discrediting witness held error, 97.

on conduct of witnesses proper, 231.

communications between court and jury, 96.

between one party out of others' presence improper, 207.

conceded facts may be assumed in instructions, 164.

conduct of attorneys, court or parties, 121.

of parties and witnesses may be commented on, 231.

trial judge should not be too closely scrutinized, 92.

conducting cross-examination, 138.

cost of should not be considered by jury, 404.

court and counsel should be considerate in conduct to each other, 89.

controls order of admission of evidence, 103.

may adjourn from day to day, 99.

amend a verdict in a mere matter of form, 277.

in its discretion, permit further evidence after jury has retired, 218.

instruct jury not to compromise between liability and amount of damages, 205.

to disregard improper evidence, 187, 188.

without being asked, 154.

limit needless examination, 102.

number of attorneys on each side, 86.

of witnesses on single point, 69, 224.

time consumed in argument, 225.

for giving instructions, 160.

modify instructions, 208.

order party to testify before producing his witnesses, 87.

protect witness from uncalled for abuse, 102.

recall all instructions and direct verdict, 260.

regulate or prevent publication of proceedings, 63.

need not caution parties while testifying, 86.

give instructions in form requested, 208.

instruct jury unless so requested, 155.

should be careful of its manner towards an attorney, 89.

direct the jury what the law is on the facts, 180.

give clear, concise and comprehensive instruction, 154.

instruct jury as to issues joined in the pleadings, 155.

on the principles of law governing the case, 157.

whether requested or not, 155.

prevent improper questions being put to young child, 102.

interruptions of argument, 227.

prohibit argument through instructions, 177.

matters tending to excite the prejudice of the jury in opening statement, 75.

protect witness from abuse of counsel, 102.

rebuke improper remark of counsel, 241.

refer to issues in instructions, 170.

restrain use of profane and obscene language, 240.

not answer questions as to clemency, 91.

answer questions of jury in absence of parties, 91.

comment on credibility of witness or weight of testimony, 88.

evidence to jury, 182.

endorse respectability of witness by remarks, 88.

express opinion on the facts, 88.

indulge in facetious remarks about consumption of time, 224.

instruct jury to determine legal propositions, 180.

make remarks to the defendant in criminal cases, 89.

order arrest of witness for perjury in presence of jury, 89.

permit case to be argued through instructions, 177.

question witness in a suspicious way, 88.

refuse proper instructions, 209.

submit questions of law to jury, 180.

tell jury case has already been tried twice, 176.

use incorrect instructions, 173.



[References are to sections; e refers to Erroneous Instructions.]

**TRIALS—Continued.**

- criticising practice as to instructing jurors not ground for reversal, 92.
- cross examination, latitude, 134.
  - manner of examining within discretion of court, 138.
  - of character witness, 139.
- defendant may make opening statement, when, 71.
- definition of, 1.
- depositions should not be taken to jury room, 216.
- directing verdict equivalent to demurrer to the evidence, 249.
- discretion of court in regulating attendance, 63.
- display of anger and ridicule by judge, 97.
- duty of court to give instructions when requested, 157.
  - to direct verdict when it will have to be set aside, 256.
- effect of disregarding admonition not to talk, 98.
- error in admitting evidence, 185.
  - to instruct jury that evidence must appear to the satisfaction of the jury, 198.
  - that plaintiff must prove the material facts, 198.
- when erroneous evidence not obviated by instruction, 185
- every slight mistake or lack of judgment will not constitute judgment on the part of judge, 92.
- evidence, court controls order of, 103.
  - should not be introduced haphazard, 105.
  - offered piecemeal, 107.
  - withdrawal of, 104.
- examination of witness, Chapter VIII.
- exceptions in record must show error complained of was passed upon, 296.
  - should be taken to ruling of court excluding evidence, 130.
  - taken to improper remarks in opening statement, 79.
  - to offering all evidence on direct, 106.
- excluding evidence same as instructing for opposite party, 252.
- exclusion of witnesses not matter of right, 66.
- exhibition of body against party's will, 147-148.
- experiments and photographs as evidence, 123.
- expressing opinion by judge not cured by instruction, 91.
- facts not contraverted may be assumed in instructions, 165.
- failure of court to instruct jury not necessarily erroneous, 156.
  - of jury to agree court may give additional instruction, 210.
  - to report special findings, 271.
  - to instruct held erroneous, 155.
  - not error, 156.
- faulty instruction may be cured by others, 173.
- fining attorney for contempt not reversible error, 97.
- form of cautionary instruction, 200.
- former testimony, how proven, 117.
- formerly jurors forbidden to separate, 99.
- forms and requisites of instruction, 153-184.
- freedom of speech allowed in argument, 231.
- further testimony after close of case, 109.
- giving abstract principle correctly stated not erroneous, 179.
- how jurors should arrive at verdict, 407.
- if question of fact fairly presented, it should be submitted to the jury, 250.
- impeachment as to character, 140.
  - in general, 141.
- importance of opening statement, 73.
- improper remarks by attorney about witness, 87.
  - remarks cured by instruction, 242.
  - how cured, 80.
  - not cured by withdrawal, 242.
  - to allow other than licensed attorney to argue case, 222.
  - single out evidence for comment in instructions, 188.
- in courts of France, 94.
  - criminal cases court may appoint counsel, 86.

[References are to sections; e refers to Erroneous Instructions.]

**TRIALS**—Continued.

- verdict should be returned in open court in presence of parties, 273.
- directing verdict question of credibility not considered, 254.
- questions of preponderance not considered, 254.
- motion for new trial, points not included waived, 262.
- the absence of statute giving of instructions discretionary with court, 157.
- informal verdicts may be amended, 277.
- insanity at time of, jury not to determine, 2600.
- inspection and admissibility of documents, 112.
- instructions*,
  - in general, 153-184.
  - indicating weight of evidence improper, 194.
  - may be taken by jury upon retiring, 213.
  - must be accurate and pertinent, 172.
  - construed with evidence, 191.
  - marked given, refused or modified, 161.
  - presented before argument to jury, 156.
  - must not prejudice or favor, 197.
  - should be clear, accurate and concise, 201.
  - confined to issue, 171.
  - considered as a single series, 173.
  - together, 173.
  - correct in law, 172.
  - given if any pertinent testimony, 193.
  - where evidence tends to prove, 193-194.
  - harmonious, 174.
  - in writing and numbered, 162.
  - should not be argumentative, 195.
  - ignore facts proven, 196.
  - indicate opinion as to weight of evidence, 166.
  - refer to pleading, 169.
- interruptions of argument by opponent, 87, 227.
- producing further evidence after retiring of jury, 218.
- after verdict, 218.
- irritability and loss of temper by judge, 97.
- judge conversing with witness, 94.
- falling asleep during trial, 85.
- may ask leading questions of witnesses, 87.
- questions of counsel during examination of witness, 94.
- should keep counsel within due bounds in argument, 232.
- should not invade province of jury by intimidating his opinion, 91.
- judicial functions cannot be delegated, 84.
- juries—powers and duties, 338.
- jury, bound to follow instructions, 206.
- judges of law and facts in criminal cases, 181.
- may be allowed to correct a verdict in open court, 278.
- cautioned as to expense of mistrial, 407.
- instructed they are the exclusive judges of the facts, 200.
- permitted to view premises in discretion of court, 146.
- may come in for further instructions, 222.
- consider senses of hearing, sight and smell, 110.
- find one or more guilty, others not guilty, 2777.
- take rest and refreshment, 99.
- must believe from evidence alone, 198.
- determine issue upon the evidence, 110.
- should be brought into court for additional instructions, 96.
- be guided by the evidence, 404.
- consider all instructions together, 173.
- view premises in a body, 125.
- should not be influenced by prejudice or passion, 403.
- be influenced by the result of their verdict, 403c.
- consider any evidence or matter that has been excluded, 403d.
- make memoranda of evidence, 217.
- seek evidence outside, 125.

[References are to sections; e refers to Erroneous Instructions.]

**TRIALS—Continued.**

- to take law from the court, 183.
- law authorizing majority verdict unconstitutional, 265.
- books should not be taken by jury, 215.
- licensed attorney alone entitled to argue, 122.
- limiting time consumed in, 224.
- of argument subject to sound discretion of court, 225.
- to five minutes abuse of discretion, 225.
- thirty minutes error, 225.
- list of witnesses and copy of indictment, 113.
- machinery installed on, purchaser buys at his own risk in absence of special contract, 2277.
- matters competent in opening statement, 74.
- of common knowledge may be referred to in argument, 228.
- mere conjecture cannot be resorted to in verdict, 276.
- memoranda attached to depositions may be taken to jury room, 216.
- methods of, 2.
- misconduct of judge during trial should be excepted to, 97.
- motion to direct verdict, Chapter XIII, 247-263.
- must be made at close of plaintiff's evidence, 259.
- nature of, 249.
- should be separate, 255.
- not be one of a series, 255.
- must be public, 63.
- necessity for making exceptions, 300.
- new, correcting error, twice putting in jeopardy, e 4504.
- no cross examination without direct, 138.
- number of expert witnesses may be limited, 69.
- impeaching witnesses may be limited, 69.
- instructions may be limited by court, 210.
- objections to argument of counsel to be passed on at once, 244.
- to improper remarks should be made immediately, 244.
- majority verdict, 266.
- unanimous verdict, 266.
- obtaining evidence of court, 124.
- of accomplice, name of principal should be given, e 4482.
- purchased machine, provision of returning, 2276.
- offer provisional evidence not to be commended, 108.
- on cross-examination counsel need not state object, 108.
- one correct instruction will not always cure an erroneous one, 174.
- having burden of proof is entitled to open, 70-71.
- instruction may be limited by others, 175.
- opening statements, Chapter VI, 70-82.
- anticipating defense of opponent, 81.
- in criminal cases, 72.
- refusal to make waiver, 82.
- right of parties to make, 70.
- order of introducing evidence within court's discretion, 105.
- papers admitted in evidence may be taken to jury room, 216.
- parties and witnesses showing wounds, 122.
- may agree on majority verdict when authorized by statute, 265.
- assume facts in instructions, 168.
- must be identical to admit former testimony, 118.
- not precluded from questioning correctness of replies in special findings, 271.
- party cannot complain of instructions given at his own request, 314.
- cannot complain of opponent's instruction if he requests a similar one, 314.
- having opening should offer all evidence on direct, 106.
- must ask court to direct verdict, 248.
- not confined to facts in opening statement, 74-75.
- permitting jurors to make memoranda of evidence, 217.
- personal opinion of counsel to be avoided, 230.
- place of holding, 4.
- plaintiff entitled to recover when material allegations are proved, 178.
- plaintiff may waive opening argument, 223.
- must present entire case on direct, 106.



[References are to sections; e refers to Erroneous Instructions.]

**TRIALS—Continued.**

- powers and duties of the court during, Chapter VII, 83-101.
  - and duties of presiding judge, 86.
  - of court to amend a verdict, 277.
  - jury to amend or correct a verdict, 278.
- preponderance of the evidence, explained, 351.
  - sufficient, 352.
- presence of parties when verdict is returned, 273.
  - of the judge required at, 83.
  - witnesses in civil cases may be dispensed with, 114.
- presiding judge, 86-89.
- presumption of innocence continues throughout, 2646, e 4429.
- previous disclosure of evidence, 111.
- privilege of attorney on account of words used in argument, 233.
- protraction of same over night, 219.
- provisional evidence, 108.
- publicity of, Chapter V, 63-69.
- punishment for violating rule of exclusion of witnesses, 68.
- questions by court subject to legal objections, 87.
- reading of law in opening statement, not proper, 78.
  - of law in opening statement, when proper, 78.
  - papers supposed to be introduced, 77.
- the pleadings to the jury in opening statement, 76.
- rebuttal evidence confined to what, 106.
- reference by state's attorney to failure of defendant to testify, re-  
versible error, 238.
  - in argument to reason for excusing juror error, 238.
  - to amount of damages in previous trial, 245.
    - corporate capacity of opponent, 239.
    - damages allowed in previous trial, 245.
  - inability to secure witness on account of expense, 237.
  - other crimes of accused, 235.
  - issues error, 171.
- poverty and wealth, 236.
  - withdrawal does not cure error, 236.
- prior trials in instructions, 176.
- result in appellate court, 245.
- verdict in other cases, 245.
- reflection by court on ability of counsel, 87.
- refusal of correct instructions without prejudice will not reverse, 190.
  - of court to hear counsel explaining motions, 87.
  - to listen to argument, 221.
  - to exclude witnesses error, 66.
- remarks by court in presence of the jury, 88.
  - by court indicating bias, error, 92, 97.
    - indicating opinion of facts, 91.
    - on expense of trial and necessity of agreeing, 93.
    - that case was not important, 89.
    - too much time was being consumed error, 89.
  - by trial judge indicating disfavor toward the accused, ground for  
reversal, 97.
  - that client unable to call physician in argument error, 237.
- repeating same statement in instructions error, 186.
- right of accused to meet witnesses face to face, 114.
  - to argue case absolute, 220.
  - guaranteed by constitution, 221.
  - to see opponents instructions, 207.
- sealed verdicts, 278-279.
  - equivalent to a rendition in open court, 278.
- separation of jurors during trial constitutes error, 99.
  - in some instances may be sufficient grounds for new trial, 99.
  - of itself not sufficient ground for new trial except in capital cases,  
99.
  - when matter of discretion, 100.
- should not assume facts not admitted, 163.
- showing required for not producing witness, 117.
  - to admit former testimony, 117.

[References are to sections; e refers to Erroneous Instructions.]

# **TRIALS—Continued.**

- special findings and verdicts in general, 264-280.
  - not conclusive, 271.
  - when should be asked, 268.
- special interrogatories may be leading, 269.
  - when should be asked, 268-269.
- special verdicts and answers to special interrogatories, 268.
  - defined, 268.
  - inconsistent with admitted facts, 270.
- statutory provisions in various states as to instructions, 153-184.
- superstitious, 3.
- temporary absence during argument not reversible error, 84.
- testimony on former, all must be considered together, 2516.
- time and order of argument, 223.
  - formerly limited to one day, 224.
- to admit former testimony ground of absence must be shown, 118.
- transitory residence outside of state sufficient for not calling witness, 117.
- unanimous or majority verdicts, 264-280.
- undue interference by court during the trial, 94.
  - prominence to any fact in instructions, 176.
- unless written instructions are presented, cannot complain of failure to instruct, 156.
- use of metaphors and Latin words in instructions, 184.
  - offensive language to counsel error, 87.
  - profane and obscene language improper, 240.
- verdict being signed by foreman and read in court valid, 272.
  - found by casting lots, erroneous, 267.
  - compromise and quotient verdicts, invalid, 267.
  - may be oral or in writing, 280.
  - must be consistent and decisive of the issues, 274.
    - follow instructions, 274.
  - of twelve, more likely to be correct, 266.
  - returned on the Sabbath day may be oral or written, 280.
  - should specify in whose favor or against whom it is rendered, 275.
  - state the amount assessed by the jury, 276.
- wager of battle, 2.
- what evidence jury may consider, 109, 110.
  - improper in opening statement, 75.
- when court may render judgment on special findings, contrary to general verdict, 270.
  - court should direct verdict, 248.
  - cumulative evidence may be excluded, 103.
  - erroneous held not prejudicial, 189.
  - error in instructions will reverse, 191.
  - evidence in chief may be offered on rebuttal, 105.
    - may be given at close of argument, 109.
- jury may take pleadings on retirement, 214.
  - take law other than from court, error is committed, 183.
- mere scintilla of evidence to establish fact court may direct verdict, 256.
- motion to direct may be waived, 259.
- opposite party equally guilty of improper conduct in trial, 246.
- provisional evidence may be stricken out, 108.
- separation ground for new trial, 101.
- verdict and special findings are inconsistent, 270.
- witnesses may be excluded, 64, 65.
- where count has been withdrawn, declaration should not be taken by jury, 215.
  - evidence is conflicting court should refuse to direct verdict, 250.
  - juror becomes ill and unable to take part, verdict a nullity, 265.
  - jury discharged and new trial ordered, members of old jury should not be included in new panel, 265.
  - one party prevents witness from testifying, former testimony may be admitted, 117.
  - plaintiff waives opening and defendant also, case goes to jury without argument, 223.

[References are to sections; e refers to Erroneous Instructions.]

**TRIALS—Continued.**

- waives opening, may later reply to defendant, 223.
- verdict is clearly right from the evidence, error in instruction will not reverse, 190.
- withdrawal of evidence, when not prejudicial, 104.
- when prejudicial, 104.
- witnesses exempted from order of exclusion, 67.
- power of court to exclude, 90.
- written instructions mandatory, 158.
- may be waived, 159.
- need not be sealed by the judge, 158.

**TRICK—**

- by seller, whether fraud, 1113.
- embezzlement, obtaining possession by, 2927.
- playing, with cards, place where liquor is sold, e 4807.
- selling intoxicating liquor, assuming without evidence; e 4772.
- to mislead purchaser, whether fraud, 1104.

**TRIVIAL PROVOCATION—**

- manslaughter, not sufficient, 3040.

**TROVER—Chapter LXXXI, 2336-2345.**

- against vendor who has resold property, 2331.
- burden of proof, 2344.
- conversion, by bailee, 2334.
- by warehouseman, 2337.
- demand and refusal, evidence of conversion, 2339.
- no particular form necessary, 2338.
- property wrongfully taken and consumed, 2335.
- proved, demand not necessary, 2341.
- saw mill machinery, 2345.
- wrongful intent must be proven, 2333.
- defendant rightfully in possession accidentally losing property before demand, 2336.
- landlord cannot sue in trover to recover for value of crops, 1233.
- maintainable by rightful possessor of property, 2327.
- measure of damages for cutting, destroying and carrying away timber, 771.
- for wrongful conversion of property, 769.
- wrongfully taking property, 768.
- not maintainable by servant or agent, 2329.
- plaintiff must prove conversion, what constitutes, 2332.
- general or special ownership, 2326.
- right to immediate possession, possession evidence of title, 2328.
- seller may bring trover against fraudulent purchaser, 1116.
- tender, as good as payment, not good if conditional, 2342.
- waiver of production of money, 2343.
- when maintainable by buyer against seller, 2330.

**TRUE—**

- testimony not to be taken as, because not denied, rape, e 4528.

**TRUMPED-UP CHARGE—**

- of conspiracy, as a defense, 2761.

**TRUNK—**

- opening, larceny, left in defendant's custody, 3239.

**TRUST PROPERTY—**

- sale by assignee, guaranty, agreement to buy back, 2266.

**TRUSTEE—**

- of cemetery cutting trees unlawfully, 3299.

**TRUSTS—**

- necessary words, repudiation, limitations, 2428.

**TRUTH—**

- no presumption that witness is telling, conduct on stand, e 3312.
- of contents of certificate of notary public, deeds presumption, e 3621.
- evidence question for jury, not justice, e 3388.
- statements, no reasonable grounds for believing, swearing falsely, 3257.



[References are to sections; e refers to Erroneous Instructions.]

- TRUTH**—Continued.  
 premonition of death no guaranty of, credibility of dying declaration for jury, e 4687.  
 slander and libel, defense, 2297.  
 stating matters to be, without knowledge, must be false to constitute fraud, e 3640.
- TUBERCULOSIS**—  
 suffering from, at time of taking out insurance, 1194.
- TURBULENT DISPOSITION**—  
 of deceased, homicide, 2976.
- TURF**—  
 damages to, negligence, railroads, grass burned, 2001.
- TURNING LOOSE**—  
 stolen mare, no defense to charge of larceny, 3234.
- TURNTABLE**—  
 attraction for children, negligence, 1847.
- TURPENTINE**—  
 pouring on person and igniting, commenting on evidence, e 4483.  
 soaking person with, consent to criminal act, principals and accessories, e 4480.
- TWICE PUTTING IN JEOPARDY**—  
 correcting error by new trial, e 4504.
- UMBRELLA**—  
 passenger raising, while alighting, negligence, street railroads, 2050.
- UNANIMITY**—  
 of verdict, 264, 265.
- UNAVOIDABLE**—  
 killing must be, self defense, where defendant seeks meeting to provoke difficulty, 3129.
- UNCOMMUNICATED THREATS**—  
 self defense, admissible when, 3152.
- UNCONTROLLABLE IMPULSE**—  
 insanity, 2581.
- UNCONTROLLABLE PASSION**—  
 homicide, 3038.
- UNCULTIVATED LANDS**—  
 prescriptive right of, 1151.
- "UNDER THE INSTRUCTIONS OF THE COURT"**—  
 omitting, e 3567.
- UNDERSCORING**—  
 instructions, erroneous, 177.  
 words in instructions, e 3709.
- UNDERSTAND**—  
 deceased must be given to, that defendant has abandoned conflict when aggressor, e 4725.
- UNDUE INFLUENCE**—2393-2416, e 4301-4309.  
 affectionate attention is not, e 4303.  
 burden of proof, 2394, e 4301, 4302.  
 by mistress of testator, e 4306.  
 circumstances showing, 2398.  
 common law marriage, e 4307.  
 declarations and previously expressed purposes of testator, 2413.  
 defined, 2415.  
 destruction of free agency of testator, 2396.  
 existence of confidential relationship, e 4303.  
 husband and wife, 2408, e 4305.  
 influence in bringing about marriage, e 4306.  
 instilling false beliefs in testator's mind, 2406.  
 issue to be tried, 2393.  
 jury may consider inequality of distribution, 2402.  
 legitimate advice or persuasion, 2405.  
 influence, 2404.

[References are to sections; e refers to Erroneous Instructions.]

**UNDUE INFLUENCE—Continued.**

may be inferred from circumstances, 2397.  
 must affect will, 2403.  
     be coercion of will of testatrix, e 4303.  
     proved, not to be assumed, e 4301.  
 no presumption of, from unreasonableness of will, e 4302.  
 not considered when testamentary incapacity proved, 2390.  
 of attorney, 2411.  
     one beneficiary under will affects all, 2414.  
 parent and child, 2407, e 4304.  
 physical condition of testator, 2412.  
 previous declarations of testator, e 4308.  
 shown by means employed rather than by effect produced, 2399.  
 unlawful cohabitation, 2410.  
 what constitutes, e 4303.  
     jury may consider in determining, e 4308.  
     may be considered in determining reasonableness of will, e 4305.  
     must appear, 2395, 2416.  
 when must be exercised, 2400.  
 who brought about marriage not considered, 2409.  
 will written by person largely benefited by, e 4302.

**UNDUE PROMINENCE—**

giving, to evidence, self defense, threats of deceased, e 4732.

**UNEXPLAINED POSSESSION OF RECENTLY STOLEN GOODS—**

burglary, of what weight as evidence, e 4563.  
 whether sufficient to convict of larceny, 3244, e 4787.

**UNINCLOSED LAND—**

pasturing cattle on, trespass, e 4274.

**UNION MINERS—**

conspiracy of, right of officers to arrest, e 4323.

**UNITED STATES CONSTITUTION—**

does not require unanimous verdict, 264.

**UNITED STATES COURTS—**

manslaughter defined, 3024.  
 reasonable doubt defined, 2674.  
 rule as to weighing defendant's testimony, 2551.

**UNJUSTIFIABLE—**

assault, officer making arrest, e 3442.  
 motive, homicide, included in malice, 3062.

**UNKNOWN—**

defects, accepting work containing no labor, 715.  
 ownership in owner, larceny, 3225.

**UNLAWFUL—**

deliberate, and intentional burning, arson, malice presumed, e 4798.  
 expulsion, from another's house, resisting, self defense, 3159.  
 homicide, jury to consider only, 2978.  
 motive, homicide, included in malice, 3062.  
 occupation, no justification of killing, self defense, 3140.  
 purpose, assuming existence of, self defense, when evidence does not show it, e 4750.  
     conspiracy, meeting need not be for, 2912.

**UNLOADING CINDERS—**

railroads frightening horses, 1876.

**UNMARRIED—**

seduction, woman must be to constitute, e 4530.

**UNNECESSARY COMMENT—**

weight of testimony, proof of loss by fire, e 3671.

**UNREASONABLE—**

and vexatious delay—in payment of money—interest may be allowed, 737.  
 force, school teacher using, assault, e 4539.

**UNSAFE TO CONVICT—**

on testimony of accomplice, erroneous charge, e 4490.

[References are to sections; e refers to Erroneous Instructions.]

**UNSOUND MIND—**

wills, must exist when, 2377, e 4295.

**UNSWORN STATEMENT OF DEFENDANT—**

Georgia statute, 2552.

weighing, Georgia, e 4389.

**UNWARRANTED MANNER—**

of eviction, landlord, punitive damages, e 3704.

**URGENT—**

danger must seem, self defense, 3112.

**USAGE AND CUSTOM—**

as entering into contract, 637.

effect of, in stopping trains, 1775.

governs board of trade transactions, 606, e 3472.

principal consents to an agent's market, 472.

**USE—**

of deadly weapon, homicide, presumption that death intended, 3070.

defendant's house conjointly with others, larceny, goods found in possession, 3248.

highways—See HIGHWAYS.

highway crossing, determines amount of caution required, 1864.

homestead for business purposes, e 4235.

money loaned to limited partnership by individual, e 4230.

premises, tenant not estopped to deny, by voluntary payment of rent, e 3697.

**USURPING POWERS OF JURY—**

motives of witnesses to be considered, e 4499.

**USURY—**

comment on weight of evidence, e 4204.

promissory notes, mortgage avoided, 2136.

**UTAH—**

statute relating to instructions, 153, p 142.

**UTILITY—**

public, damages, eminent domain, e 3553.

**UTTER—**

attempt to, forgery, intent must be proved beyond reasonable doubt, presumption, 2943.

**UTTERING—**

forged instrument, venue, 2947.

note, for personal gain, must be proved, 2945.

**VAGRANCY—**

arrest for, malicious prosecution, validity of ordinance, consistent with statute, e 3720.

**VAGUE—**

doubt must not be to be reasonable, 2683.

**VALENTINE—**

assault and battery, purpose and intent may be shown by, 2860.

**VALID CLAIM—**

motive in making, immaterial, fraud, e 3658.

of right, justifying trespass, honestly relied upon in good faith, e 4814.

**VALIDITY—**

of ordinance, arrest for vagrancy, consistent with statute, e 3720.

wills, burden of proof, e 4286.

**VALUE—**

enhanced, property taken for public use, e 3552.

larceny, must be proved, 3218.

rule for determining, 3219.

market, defined, sales, 2263.

timber cut, eminent domain, damages, e 3560.

of property, arson, must be proved, e 4797.

property, misrepresentation as to, 1103.

necessary element of burglary, e 4561.



[References are to sections; e refers to Erroneous Instructions.]

**VALUE**—Continued.

taken by trespasser, identification not necessary, e 4812.  
time, measure of damages, personal injury, e 3570.

**VALUABLE CONSIDERATION**—

conveyance of real estate, 2222.

**VALUATION**—

fixing, real estate, taxation, 2232.

**VARIANCE**—

from statutory definition, murder in second degree, Florida, e 4640.  
indictment in instruction, killing by poison, murder in first degree, e 4634.

**VARYING**—

written contract by parol, negotiable instruments, must ratify all agent's transactions or none, e 4197.

**VEHICLE**—

care due from driver of, crossing street car track, 2107.  
persons in, from street car company, 2079.  
collision with street car, negligence, car has right of way over other vehicles, 2092.  
contributory negligence of driver of, street railroads, 2110.  
crossing railroad tracks, contributory negligence, 1932.  
street car track at crossings, negligence, 2094.  
driver of, presumed to remain at safe distance from approaching train, 1925.  
failure of driver to heed signal of train, 1922.  
fire department, negligence, street railroads, injury from collision, 2028.  
negligence in equipment, management, or operation of, street railroads, personal injury, 2024.  
oil tank not a part of wagon, 3296.  
reasonable care of driver, near street car track, 2106.

**VENDEE**—

failure of, to notice defect, no bar to recovery for fraud, e 3650.  
real estate, ground for non-performance, e 4232.

**VENDOR**—

warranty of title by, 2271.

**VENDOR'S LIEN**—

arises when, 1329, e 3733.

**VENUE**—

of conversion, embezzlement, 2929.  
of possession and uttering forged instrument, 2947.

**VERBAL ADMISSIONS**—

to be received with great caution, 384.

**VERBAL CONFESSIONS**—

how considered by jury, 2531.  
instructing that they ought to be received with great caution, e 4364.

**VERBAL CONTRACT**—

controlled by written, 636.  
may change prior written contract, 707.

**VERBAL DEMAND**—

trover and conversion, sufficient, 2338.

**VERDICTS**—

in general, 264-280.  
according to law and evidence, admonishing jury to render, polluting stream with coal refuse, 2198.  
based on single fact, note paid by check, statute of limitations, e 4200.  
by lot or chance is error, 407.  
cannot be amended in substantial manner, 277.  
cautioning instructions to the jury, 407.  
certainty as to what the jury intended to award, 276.  
certainty as to whom it is found in favor of, 275.  
coroner's, life insurance, suicide, e 3683.  
court may direct verdict for defendant, 249.

[References are to sections; e refers to Erroneous Instructions.]

# VERDICTS—Continued.

- should direct, when Appellate court will set aside, 256.
- directing, method of arriving at, e 3393.
- where evidence is without conflict, 251.
- disputed question must be left to jury, 248.
- effect of refusal of jury to direct, 247.
- elements to be considered in arriving at, perjury, 3267.
- error to direct, manslaughter, e 4651.
- excessive may be cured by remittitur on appeal, 315.
- exclusion of evidence same as directing, 252.
- form of*, 413.
  - assault with intent to murder, 2871.
  - measure of damages, personal injury damages must be based on evidence, e 3600.
  - murder in first degree, 3003.
    - in first degree, repeating, e 4630.
    - in second degree, 3022.
    - manslaughter, 3046.
  - furnishing forms of, homicide, 2981.
  - if evidence tends to sustain its right must be submitted to jury, 248.
  - in lesser degree than murder, error to prevent, e 4625.
  - instruction to find, all the elements of case, e 3655.
  - judge may inquire upon what grounds verdict was found, 96.
  - juror should give consideration to views of his fellow jury-men while deliberating upon, 408.
  - jury may seal under certain conditions, 279.
    - not justified in finding contrary to the law laid down in instructions, 401.
    - restrained in reaching, e 3391.
    - should find from the evidence under the instructions of the court, 401.
  - retire and correct informal verdict, 277.
  - made up from individual opinions of all, 408.
  - majority discussed, 266.
  - manslaughter, where reasonable doubt whether murder or manslaughter, 2707.
  - may be oral or written unless otherwise provided by statute, 280.
    - returned on the Sabbath day, 280.
  - measure of damages in arriving at, personal injury, anticipating future payments, e 3571.
  - motion to direct, Chapter XIII, 247-263.
    - is in effect peremptory instruction, 249.
    - must be made at close of each party's case, 259.
    - nature of, 249.
  - motion to vacate not appealable, 297.
  - must follow instructions or be set aside, 274.
  - negligence, not justified by simple fact that plaintiff was killed by railroad car, 1935.
  - of coroner's inquest is evidence of cause of death, 1213.
    - not evidence of negligence, 1349.
  - of guilty as to some, not guilty as to others, joint trial, 2777.
    - manslaughter, indictment for murder, 3034.
  - only proper one is that rendered in open court, 272.
  - party must ask court to direct, or waive his right, 248.
  - power of court to amend verdict, 277.
  - jury to amend or correct, 278.
  - should be consistent and decisive of the issues, 274.
    - given by evidence and law alone and not by statements of counsel, 405a.
    - in accordance with weight of evidence, 315.
  - should not contradict admissions contained in the pleadings, 274.
  - make immaterial findings, 274.
  - signed state the amount assessed by jury, 276.
  - signed by less than twelve jurors, e 3389.
  - special findings and verdict in general, Chapter XIV.
  - unanimous or majority, Chapter XIV, 264-280.
  - under what circumstances court will direct, 248.

[References are to sections; e refers to Erroneous Instructions.]

**VERDICTS—Continued.**

- validity of does not depend on its being in writing, 280.
- when court should direct, 248.
  - court should not direct, 248.
  - motion to direct comes too late, 260.
  - should not be allowed, 258.
  - no conflict of evidence, court may direct, 251.
  - will not be reversed though instructions inaccurate, 313.
- where evidence insufficient to sustain verdict, court may direct, 249.
- evidence is conflicting court may refuse to direct verdict, 250.
- only a scintilla of evidence, court may direct verdict for defendant, 250.
- reasonable minds might come to different conclusions jury must decide, 250.
- the evidence is without conflict, 251.

**VEEXATIOUS—**

- acts of servants, liability of master for, 1372.

**VICE PRESIDENT—**

- corporations, salary of, period of contract, 2421.

**VICE PRINCIPALS—**

- liability of master for negligence of, e 3810.
- of molder to laborer, 1443.
- orders of, injury to servant, 1545.
- responsibility of master for negligence of, 1439-1440.
- superior authority does not always destroy relationship of fellow servants, e 3811.
- who are, 1439, 1440, e 3809.

**VICIOUS ANIMALS—Chapter LXXXII, 2346-2350, e Chapter CLXIII, 4277-4278.**

- dog's reputation not competent, 2348.
- injuries by, must prove animal is vicious, e 4277.
- knowledge of disposition, means to prevent injury, cows, 2350.
- disposition, dogs, 2347.
- party injured, master and servant, e 4278.
- measure of damages—for injuries, 827.
- necessary essentials to recover, dogs, 2346.
- plaintiff must prove due care, knowledge of vicious disposition, steers, 2349.
- what may be considered in assessing damages, 827.
- must be proven to allow exemplary damages, dogs, 827.

**VICTIM—**

- of fraud, need not prove intent to defraud, e 3643.

**VIEW—**

- and inspection by the jury, 146-152.
- by jury of scene of accident as evidence of negligence, 1350.
- disregarding other testimony, e 3379.
- taking from, robbery, taking from immediate presence, 2895.

**VILE EPITHETS—**

- on public street, breach of the peace, 3294.

**VILLAGES—**

- speed of railroad trains through, negligence, limited by ordinance, 1987.

**VINDICTIVE DAMAGES—**

- See also DAMAGES and EXEMPLARY DAMAGES.
- for alienating affections of wife, e 3502.
- may be allowed in action for malicious prosecution, 787.
- pecuniary circumstances of defendant in action of slander may be considered, 816.
- reiteration of slander, element of damage, 817.
- slander, when may be given, 816.
- when may be allowed for suing out garnishment, 743.
- allowed for trespass on land, 822.
- given in action of assault, 532d.

**VIOLENCE—**

- assuming when controverted, assault, e 3440.



[References are to sections; e refers to Erroneous Instructions.]

**VIOLENCE—Continued.**

death by, malice presumed from fact of killing, 3060.  
reputation of deceased for, immaterial when killing unlawful and premediated, 2489.  
robbery, must not be subsequent to taking, 2892.  
taking from person or in his presence, 2899.  
unnecessary, in making arrest, 2450.

**VIOLENT MAN—**

reputation as, self defense, purporting to draw weapon, prior threats, 3151.

**VIOLENT PASSION—**

homicide, provocation, grade of homicide may be reduced, 3089.  
offensive language used, murder in second degree, 3013.

**VIRGINIA—**

reasonable doubt defined, 2671.

**VIRTUE—**

discovery made after marriage promise, that woman is not virtuous, e 3495.  
proving good character for, e 4337.

**VISITING DEFENDANT—**

prosecutrix, assault and battery, 2846.

**VISITS—**

away from state, statute of limitations, not deducted, e 3707.

**VOID CONSIDERATION—**

negotiable instruments, liquor sold and note given on Sunday, 2158.

**VOID WARRANT—**

of arrest, retaining plaintiff under, malicious prosecution, e 3719.

**VOIDABLE NOTE—**

ratification of, duress, 2153.

**VOLUNTARY—**

admission of guilt must be, 2518.  
confession, among best evidence known to law, e 4365.  
corroborated, arson, 2532.  
entitled to great weight, 2520.  
must be, admissibility for court, e 4368.  
consent, seduction, defense, 2834.  
dismissal of case, malicious prosecution, prima facie evidence of want of probable cause, e 3710.  
drunkenness, irresistible impulse from, no defense, 2609.  
no excuse for crime, 2606.  
considered with reference to intent, e 4553.  
not when procured by artifice of deceased, 2608.  
will not excuse any grade of homicide except murder in first degree, 2617.  
with view of committing crime, 2607.  
manslaughter, distinguished from murder, 3032.  
what constitutes, 3027.  
payment of rent, does not estop tenant from denying use of premises, e 3697.  
surrender for trial, flight as evidence of guilt, e 4327.  
no proof of innocence, 2463.

**VOTE—**

refusal of election judges to receive, e 4817.

**WAGON—**

covered, crossing railroad track in, negligence, 1916.  
oil tank not a part of, 3296.

**WAITING—**

no duty of, self defense, defendant may act promptly, 3170.

**WAITING ROOM—**

failure to heat, e 3977.

**WAIVER—**

as to condition of other insurance, knowledge of the company, 1175.

[References are to sections; e refers to Erroneous Instructions.]

**WAIVER—Continued.**

- misrepresentation of occupation insurance application, 1189.
- by public in reference to highway, 1153.
- denying liability by insurance company is waiver of further proof of loss, 1161.
- eminent domain, damages, right of property owner, proceeding under the statute, e 3565.
- of claim for damages for false imprisonment, not caused by defendant's obtaining release, e 3717.
- conditions as to other insurance, 1174.
- in application for insurance, 1172.
- errors in application for reinstatement insurance, 1191.
- forfeiture, as to delay in payment of premium, 1212.
- fraud by retention of insurance policy, 1201.
- negotiable instruments, 2149.
- ratification, e 4212.
- implied warranty, sale of machine, acceptance, 2273.
- insurance company by uniform course of business, 1169.
- legal right arising from sickness at the time of delivery of certificate, 1197.
- personal privilege, defendant cannot be compelled to testify against himself, perjury, e 4795.
- policy, mere silence not enough to infer, 1162.
- production of money, tender, conversion, 2343.
- prompt payment of insurance premium, 1168.
- proofs of loss, 1158.
- not in exact conformity with terms of policy, 1158.
- provisions in lease by landlord, 1232.
- railroad company of rule against coupling cars in motion, 1551, e 3871.
- test, of goods sold, 2264.
- prompt compliance in furnishing proofs of loss, 1159.
- urging one ground of invalidity by insurance company waives all other known forfeitures, 1160.
- waiving validity of restoring to membership in fraternal life insurance society, e 3681.

**WANT OF CONSIDERATION—**

- knowledge of, negotiable instruments, e 4214.

**WANTON—**

- acts of servants, liability of master for, 1372.
- and unwarrantable manner of eviction, punitive damages, e 3704.
- defined, railroads frightening horses, 1874.
- misconduct, contributory negligence, railroads, law regulating speed, 1960.
- of railroads toward trespassers, 1857.
- negligence, defined, 1360.
- trespass, punitive damages may be allowed, 199.

**WARD—**

- suing guardian, burden on guardian of showing good faith, e 3626.

**WAREHOUSE—**

- damage to goods, inherent qualities, 838.
- inherent quality of goods defined, 838.
- measure of damages for loss or injury to goods stored, 837.
- receipts*,
- assignable, 564.
- constructive possession, 564.
- tender of equivalent to delivery, 564.

**WAREHOUSEMEN—559-566.**

- burden of proof of negligence, 561.
- care required of, 1744.
- conversion by, 2337.
- defined, 559.
- duty to remove goods when flood threatens, 563.
- have equal duty towards all patrons, 560.
- liability of railroad for baggage after reasonable time, after arriving at destination, 1836.

[References are to sections; e refers to Erroneous Instructions.]

# WAREHOUSEMEN—Continued.

- lien of, 1325, e 3731.
- must exercise ordinary care of goods, 562.
  - protect goods stored, 563.
- negligence must be proved by preponderance of the evidence, 561.
  - not presumed from mere loss of goods, 561.
- ordinary care of goods defined, 562.
- should protect the property of all patrons alike, 560.
- storage, greater than value of goods sold, 566.
- when goods stored without reward, 562c.
- where storage due is greater than the value of the goods, 566.

# WARNING—

- burden of proof, as to ringing of bell, e 4035.
- comparing affirmative and negative testimony in regard to giving warning, e 4043.
- danger, servant assuming that master will give, e 3902.
- duty of master to warn servant of danger, e 3824.
  - of railroad to give, crossing made public by use, 1890.
    - to give, crossing, 1882, e 4030.
    - to ring bell and blow whistle, e 4052.
  - ring bell at railway crossing, 1882, e 4038.
    - sound bell or blow whistle at railway crossing, e 4025.
- failure of, to passenger, of danger, passenger jumping from moving train, 1812.
  - to give warning at railway crossings, liability of railroads, e 4042.
    - heed of foreman to get away from falling timber, 1485.
  - ring bell, e 4063.
    - gong on street car, e 4166.
    - bell or sound whistle, e 4010, 4049.
  - sound whistle causing injury to live stock, e 4090-4091.
    - or ring bell not negligence per se, 1885.
- giving of as required by law at crossing, e 4035.
  - by blowing whistle at insufficient distance, 1887.
- lulling plaintiff into a feeling of security by failure to give, e 4042, 4044.
- may assume that that bell will be rung, 1883.
- moving car without, injury to servant, railroad, 961.
- need not blow whistle and ring bell at same time, e 4040.
  - or ring bell continuously, 1886, e 4041.
- noise of approaching train as substitute for blowing whistle or ringing bell, e 4060.
- of approach of engine, failure to give, ordinary hearing, 1534.
- posted in cars for passengers, e 4141.
  - street cars, negligence, 2057.
- self defense, should be given before killing, if practicable, 3171.
- servant being struck by car propelled upon track at dangerous rate of speed without warning, 1542.
- should be given by trains approaching crossing, 1870.
- street car running into wagon, failure to give warning e 4163.
- watchman standing at crossing whether sufficient, e 4047.
- when failure to ring bell at railway crossing is excused, 1884, e 4039.
  - suit based on omission to give signals, recovery must be had for such failure, 1888.
- whether negligence not to have flagman at railway crossing, e 4046.

# WARRANT—

- arresting without, when it may be done, 1286.
- carrying concealed weapons, arrest without, 3274.
- distress, see DISTRESS WARRANT.
- of arrest, retaining under void, malicious prosecution, e 3719.
- officer arresting without, private individual, 2449.
- right of officer to arrest without, whether crime committed in presence of officer, e 4324.
  - to procure, wrongful eviction, 1247.
- wrongful arrest without, an assault, 531.

# WARRANTY—2270-2278, e 4251-4256.

- application as to insurance, 1171.



[References are to sections; e refers to Erroneous Instructions.]

**WARRANTY—Continued.**

- assuming facts in issue, instruction must be based on evidence, e 4256.
- by agent, sale of machinery, ratification, 2272.
- conditions in application and policy amounting to, 1188.
- expression of opinion may amount to, purchaser guilty of contributory negligence, e 4253.
- grantor who adopts plat as described in deed, 589.
- implied, fit for special purpose, samples, e 4251.
- sale of machine, waived by acceptance, 2273.
- manufactured article, 2275.
- in absence of special contract, purchaser buys at his own risk, machinery installed on trial, 2277.
- application of insurance as to amount of incumbrance, 1172.
- of live stock, option to return stock or sue for damages, e 4255.
- skill, knowledge and care implied, by physicians and surgeons, 1289.
- title, by vendor, 2271.
- damages for breach, e 3514.
- physician does not warrant cure, 1303.
- purchaser of machine to give trial and notice, provision of returning, 2276.
- recovery on express or implied, e 4254.
- sales, 2270-2278.
- burden of proof, 2278.
- must be relied on, 2274.
- special, suit on, not on written guaranty, e 4252.
- what constitutes, 2270.

**WASHINGTON—**

- court may order examination of person as evidence, 151.
- statute relating to instructions, 153, p 142.
- weighing defendant's testimony, 2548.

**WATCHING—**

- while another killed, principal and accessory, 2744.

**WATCHMAN—**

- authority of, shooting trespassers, liability of master, 1374.
- railroad crossing, care to be exercised toward, 1897.
- signal of, failure to heed, 1924.

**WATER—**

- preventing natural flow of, diverting watercourse, omitting element of ordinary care, e 4280.
- reservation of in deed, 995.
- right to use what passes over land, must restore to original bed, 2354.
- surface, watercourses, dominant heritage, e 4284.

**WATERCOURSES—Chapter LXXXIII, 2351-2363, e Chapter CLXIV, e 4279-4284.**

- ancient, no right to divert, 2352.
- changing of, flooding land, 2361.
- dams, dedication, 2363.
- defined, 2351.
- diversion of surface water, measure of damages, elements of injury, 2353.
- diverting, preventing natural flow of water, omitting element of ordinary care, e 4280.
- dominant heritage, surface water, e 4284.
- embankments, obstructions, party acquiring interest after erection, right of action, 2358.
- flooding lands, railroad building bridge, e 4282.
- freshet, absence of negligence, act of God, 2362.
- mill race, obstructions, 2357.
- navigable stream, building docks, 2360.
- overflowing land, injury to roadway, measure of damages, e 4283.
- owner of soil, owner of surface and subterranean water, 2355.
- placing obstructions and diverting water, damages, 2356.
- polluting, nominal and special damages, e 4281.

[References are to sections; e refers to Erroneous Instructions.]

**WATERCOURSES—Continued.**

- right to dam water, flooding land, liability, what constitutes a stream, e 4279.
- to use water passing over land, must restore to original bed, 2354.
- riparian right of adjacent owners, 586.
- rule as to boundaries, 582.
- use of banks of streams, floatage of logs down navigable stream, 2359.

**WAY OF ESCAPE—**

- self defense, duty to utilize any reasonable, 3161.

**WEAPONS—**

- carrying, mutual threats to kill, 2968.
- concealed, see CONCEALED WEAPONS.
- deadly, see DEADLY WEAPON.
- homicide, to be considered in judging intent, 3052.
- intent a question for jury, homicide, 3049.
- right to carry, homicide, e 4624.
- self defense, purporting to draw, threats, reputation as dangerous and violent man, 3151.

**WEAKNESS—**

- of confessions, illustrating, e 4363.
- mind, whether ever amounting to insanity, 2584.

**WEALTH—**

- reference to in argument improper, 236.

**WEEDS—**

- and grass, negligence, railroads, injury by fire, 2000.
- obstructing view of railroad track, negligence, 1877.

**WEIGHING DEFENDANT'S TESTIMONY—**

- conviction of former offense, admitted to affect credibility, e 4391.
- rule in various states, 2335-2552, e 4376-4390.

**WEIGHING TESTIMONY—**

- of child, 369.
- defendant and wife, Missouri, 2554.
- employees, 367.
- husband, 368.
- police officers and detectives, 2768.
- rape, that of prosecutrix the same as any other, "implicated," e 4527.

**WEIGHT—**

- confessions entitled to great, when spontaneous, voluntary and corroborated, 2520.
- credibility, to be given the more intelligent and better informed witnesses, e 3309.
- of circumstantial evidence, as conclusive as direct, 2507.
- how to be considered by jury, 2506.
- of confessions of guilt, jury judges of, 2513.
- depositions, e 3397.
- dying declarations compared with other statements of deceased, e 4689.
- for jury, 3097, 3098.
- not of highest order, to be received with caution, e 4686.
- instructions, same for state and defendant, adoption by court of instructions, criminal trial, 2621.

**WEIGHT OF EVIDENCE—**

- all the evidence should be considered together in determining, 411.
- character and former life of witness may be considered, 337.
- comment on, burglary, reasonable and credible account for possession of stolen goods, e 4570.
- embezzlement, proof of other embezzlements as showing intent, e 4593.
- usury, e 4204.
- commenting on, e 3318, 3338.
- robbery, considering condition of prosecuting witness, e 4575.
- credibility of witnesses, e 3300.
- does not necessarily depend on the greater number of witnesses, 335.
- elements that may be considered in determining, 334, 337, 411.
- for jury alone, 338.

[References are to sections; e refers to Erroneous Instructions.]

**WEIGHT OF EVIDENCE—Continued.**

- expert testimony, e 3372.
- former life of witness may be considered, 337.
- good character, whether depending on strength of other evidence, e 4335.
- how determined, 335.
  - jury should determine, 328.
  - predomance is determined, 352.
- interest of witnesses may be considered, 338.
- invasion of province of jury, e 3363.
- jury exclusive judges of, 327, 330, 333, 335.
- not alone determined by the number of witnesses, 355, 411.
- of interested witness swearing falsely, 342b.
  - witness giving testimony by deposition, 412.
  - testifying falsely, 342c.
- plaintiff must maintain his case by the preponderance of the evidence, 351.
- positive evidence entitled to more weight than negative, 336a.
- preponderance of, 351.
- verdict should be in accordance with, 315.
- what may be considered in determining, 353, 411.
  - may be considered where witness has willfully testified falsely, 347.
  - the jury should consider in determining, 335.
- when equally balanced, 356.
- where witness has willfully sworn falsely to a material fact, 346.
- witness willfully and knowingly swearing falsely may be disregarded, 342.

**WEIGHT OF TESTIMONY—**

- as to alibi, singling out defense, e 4322.
- is for the jury, 327a.
- lessened by ill will, e 4500.
- of accomplice, no greater because corroborated, e 4487.
- opportunities of the witness may be considered, 338.
- question of fact for jury, 327.
- relatives of accused, e 4497.
- what the jury should consider in determining, 338.

**WELL—**

- construction of contract for sinking, 633.

**WELL FOUNDED DOUBT—**

- of defendant's guilt of any offense will not prevent conviction, e 4452.

**WEST VIRGINIA—**

- reasonable doubt defined, 2672.
- weighing defendant's testimony, 2549.

**WHIMSICAL—**

- reasonable doubt must not be, 2683.

**WHISTLE—**

- see also WARNING.
- blown at insufficient distance from crossing, 1887.
- failure of driver of vehicle to heed, 1922.
  - to sound, not negligence per se, railroads, 1885.
- need not be blown continuously, railroads, 1886.

**WHOLE CONFESSION—**

- must be considered, with other evidence, 2515, 2516.

**WHOLE EVIDENCE—**

- reasonable doubt must be on, sale or gift of intoxicating liquor, e 4774.

**WIDOW—**

- action by, for death of husband from intoxication, damages, 778.
- domicile of, 1031.
- measure of damages for causing death of husband, 972.
- title to real estate, separation of spouses during life, 2225.

**WIFE—**

- See also HUSBAND AND WIFE.
- agent of husband to buy necessities, 1013.



[References are to sections; e refers to Erroneous Instructions.]

**WIFE—Continued.**

- alienation of affection of, 496.
- consent of husband, e 3427.
- and children, pecuniary loss of in actions causing death, 974.
- caught in adultery, killing of, 2958.
- criminal conversation, condonation no defense, e 3430.
- deceased having had illicit intercourse with, murder in first degree, 2996.
- discovery of, in adultery, not sufficient provocation for homicide, e 4678.
- domicile that of husband, 1031.
- getting property from husband, fraud against creditors, e 3635.
- husband striking in defense of, self defense, e 4759.
- insulting words to, provocation for homicide, 3087.
- living apart from husband, what necessary to charge latter, 1016.
- without cause, not entitled to support, 1015.
- fault, 1014.
- must allow husband to select residence, 1030.
- of accomplice, testimony of, e 4492.
- or husband, admissions as affecting the other, 386.
- must instigate prosecution for adultery, 2790.
- personal injury to, measure of damages, action by husband and wife, by wife, e 3588.
- measure of damages, society of, action by husband, e 3587.
- rape, instruction not showing prosecutrix not the wife of defendant, 2826.
- release by, illegal sale of liquor to husband, e 3686.
- suing husband's parents for alienation of his affection, e 3429.
- wills, undue influence, 2408.

**WILL—**

- must consent to constitute seduction, 2830.
- tenancy at, implied agreement, e 3701.

**WILLFUL—**

- deliberate and premeditated homicide must be a crime, e 4675.
- false swearing, testimony disregarded, e 3323.
- killing in homicide, facts showing, 3051.
- misconduct of railroads towards trespassers, 1857.
- negligence, defined, 1360.
- overstatement, in affidavit, malicious prosecution as evidence of malice, e 3714.
- purpose, element of murder in first degree, e 4630.

**WILFULLNESS—**

- necessary to discredit testimony, as totally false, e 3327-3328.

**WILLFULLY—**

- and knowingly swearing falsely to material facts, 342.
- definition of, homicide, 3058.
- embezzlement used in conjunction with "intentionally," e 4595.
- placing obstruction in navigable stream, 3290.
- swearing falsely to material issue, 346.
- sworn falsely, defendant, 2561.
- singling out witness, e 3331.

**WILL POWER—**

- want of, by reason of insane impulse, 2578.

**WILLS—Chapter LXXXIV, 2364-2416, e Chapter CLXV, 4285-4310.**

**IN GENERAL,**

- change of domicile, 2366.
- effect of spoliation, e 4310.
- incompleteness of, e 4286.
- nature of wills and general requisites for exercising testamentary power, 2364-2366, e 4285-4288.
- power of testator to exclude relatives from share in his estate, 2364, e 4285.
- spoliation of, e 4310.
- what is sufficient proof of due execution, e 4288.
- witnessing, 2365, e 4287.

[References are to sections; e refers to Erroneous Instructions.]

# **WILLS—Continued.**

## **CAPACITY TO MAKE, 2367-2392, e 4289-4300.**

- appeal from probate court, 2391.
- burden of proof in case of insanity, on contestant where due execution proved, e 4291.
- rule in Illinois, e 4292.
- contest in chancery, 2392.
- delusion regarding property of wife or child, 2384.
- expert testimony, e 4300.
- failure of memory, e 4297.
- insane delusions, groundless suspicion not necessarily insane delusion, 2383, e 4298.
- insanity, e 4289-4300.
  - burden of proof, due execution, 2369-2370-2371.
  - Illinois, 2371.
  - expert testimony, 2389.
  - in general, e 4289.
  - issue to be tried, 2367.
- instrument as evidence of insanity, 2387.
- intoxication, 2379, 2380.
  - producing insanity, 2381.
- jury must determine question of soundness of mind and memory from whole evidence, 2388.
- letters as evidence of testamentary capacity, 2375.
- mental incapacity, fraud not considered, 2390.
- old age does not necessarily incapacitate, 2382.
- partial insanity, monomania, 2376, e 4294.
- right of testator to dispose of property as he pleases, 2385. e 4299.
- sanity is presumed, 2368, e 4290.
  - previously expressed purpose, 2386.
- settled insanity presumed to continue, 2378, e 4296.
- sound and disposing mind and memory, 2372, e 4293.
- test of testamentary capacity, 2373, 2374.
- time when unsoundness of mind must exist to defeat will, 2377, e 4295.

## **UNDUE INFLUENCE, 2393-2416, e 4301-4309.**

- admissions of legatee as to suppression of another will, e 4309.
- affectionate attention is not error, 4303.
- burden of proof, 2394, e 4301, 4302.
- by mistress of testator, e 4306.
- circumstances showing undue influence, 2398.
- common law marriage, e 4307.
- conduct of beneficiaries, undue influence of one affects all, 2414.
- declarations and previously expressed purposes of testator, 2413.
- defined, 2415.
- destruction of free agency of testator, 2396.
- existence of confidential relationship, e 4303.
- husband and wife, 2408, e 4305.
- inferred from circumstances, 2397.
- influence in bringing about marriage, e 4306.
- instilling false beliefs in testator's mind, 2406.
- issue to be tried, 2393.
- jury may consider inequality of testator's distribution of property, 2402.
- knowledge of contents, by testatrix, burden of proof, e 4307.
- legitimate advice or persuasion, 2405.
  - influence, 2404.
- mental capacity, previous declarations of testator, e 4308.
  - what jury may consider in determining, e 4308.
- must affect will, 2403.
  - be coercion of will of testatrix, e 4303.
- not to be assumed, e 4301.
- of attorney, 2411.
- parent and child, 2407, e 4304.
- physical condition of testator, 2412.
- previous declarations of testator, e 4308.
- satisfies minds of jury, too high a degree of proof, e 4303.

[References are to sections; e refers to Erroneous Instructions.]

**WILLS—UNDUE INFLUENCE—Continued.**

- shown by means employed rather than by effect produced, 2399.
- testator may dispose of property as he pleases, 2401.
- unlawful cohabitation, 2410.
- what constitutes, e 4303.
- jury may consider in determining, e 4308.
- may be considered in determining, justness of will, e 4305.
- must appear, 2395, 2416.
- be proved, e 4301.
- when must be exercised, 2400.
- who brought about marriage not considered, 2409.
- will written by person largely benefited by, e 4302.

**WINDOW-SILL—**

- boards on, insecurely fastened, 1395.

**WISCONSIN—**

- reasonable doubt defined, 2673.
- rule in, imputable negligence, street railroads, 2112.
- statute as to abstract of record, 316.
- relating to instructions, 153, p 143.
- weighing defendant's testimony, 2550, e 4388.

**WITHDRAWAL—**

- from conspiracy, liability before and after, 2908.
- of offer, sale of real estate, 2221.

**WITHDRAWING—**

- part of ordinance from consideration of jury, negligence, street railroads, personal injury, 2019.
- plea of the general issue, slander and libel, facts admitted by, justification, e 4268.

**WITNESSES—**

- accused seated twenty-four feet from witnesses, 114
- agreement to testify for consideration, void, 640.
- are presumed to speak the truth, 333.
- as to land value may be limited, 86.
- attendance of, limit of process, taking testimony by commission, 2775.
- attorney may testify when, 143.
- parties, judges as, 142-145.
- bastardy proceedings, credibility, 2794.
- candor and fairness of may be considered in determining credibility, 331, 332.
- character, cross examination of, 139.
- or impeachment may be limited, 86.
- character of, not matter of inference, e 3360.
- competent, defendant and his wife, weighing their testimony, 2554.
- conduct and appearance subject of comment, 232.
- contradictory statements out of court, e 3359.
- control of court over examination, 102.
- conversing with judge, 94.
- court may limit number on single point, 86.
- may supervise conduct of, 86.
- should prevent improper questions being put to young child, 102.
- should protect from abuse of counsel, 102.
- Credibility of*, see also CREDIBILITY.
- for the jury, 1509.
- genuineness of signature, what must be proved, 2144.
- how determined, 334.
- impeached and uncorroborated, e 3355.
- number may be limited, 86.
- vouched for by party calling, e 3358.
- what to consider, weight of evidence, e 3300.
- credible, one against many, knowingly false testimony, as to material facts, e 3301.
- defendant competent, 2553.
- denunciation of, by counsel, credibility, e 3320.
- discretion of court should not be arbitrary, 90.



[References are to sections; e refers to Erroneous Instructions.]

**WITNESSES—Continued.**

- disinterested witnesses, 339.
- elements to be considered by jury in considering credibility, 334.
- equal number on each side, 331.
- evidence should not be disregarded through mere caprice, 333.
- examination of, 102-108.
- exclusion not granted as a matter of right, 65, 66.
- excused from answering incriminating question, 2764.
- expert testimony, 393-394.
  - may be limited, 86.
  - not to be discredited, e 3374.
  - to be judged as any other, e 3373.
- false, corroboration required, e 3325.
  - must be corroborated, e 3324.
  - testimony must be wilfull, e 3327-3328.
- for prosecution, particularizing, e 4496.
- former life and character may be considered in determining credibility, 337.
  - affecting credibility, 337.
- former testimony, when admissible, 116.
- giving full faith and credit to impeached and uncorroborated, e 3354.
- greater number of does not necessarily mean preponderance, 355, 1347, e 3976.
- how their testimony should be considered by the jury, 335.
- impeaching, contradictory statements, 2766.
  - must be as to a material matter, e 3356.
- intelligence of may be considered in determining credibility, 331, 332.
- interest of may be considered in determining credibility, 331, 338.
  - swearing falsely, 342.
- interested, hired detectives different from others, e 4498.
- judge has sole discretion in excluding, 90.
- jury have no right to disregard testimony without cause, 333c.
  - need not disregard entire testimony of impeached witness, 378.
- larceny, person having possession must be produced, 3227.
- limiting of number in discretion of court, 69.
  - number of impeaching, 69.
- list of must be furnished accused, 113.
- material, failure to produce, presumption, 144.
- may be excluded, when, 64, 65.
  - impeached by proof of bad reputation, 373.
  - by proof of contradictory statements, 374.
  - punished for violating rule of exclusion of witnesses, 68.
- may testify lying on cot, 122.
- means of information of disinterested, 339.
- mere numbers do not mean greater weight of evidence, 69.
- motives of, may be considered by jury, 2476, e 4499.
- need not be produced, state may rely on dying declaration, e 4690.
- newly discovered in criminal cases should be furnished accused before trial, 113.
- number cannot be limited in personal injury cases, 224.
  - does not necessarily determine weight of evidence, 411c.
  - experts may be limited, 69.
  - preponderance of evidence, e 3340.
  - proper to be considered in determining preponderance, 354.
  - oath of not conclusive, 370.
- parties testifying subject to criticism, 145.
- party cannot impeach his own, 379.
- payment of expenses of, credibility, e 3311.
- penalty for not obeying order excluding, 90.
- perjured, rejecting evidence of, credibility, 2767.
- perjury, more than one required, 3258.
  - when one sufficient, 3259.
- persons exempted from order of exclusion, 67.
- positive testimony more weight than negative, 336.
- power of court to exclude, 90.
- presence of, necessary in criminal cases, 114.
  - not required in civil cases, 114.

[References are to sections; e refers to Erroneous Instructions.]

# WITNESSES—Continued.

- presiding judge may be witness, 142.
- proof of negligence may be made by defendants, 1348.
- prosecuting, witness on cross examination, 138.
- prosecutrix only witness, bastardy proceedings, jury may disregard testimony, 2795.
- reasons for excluding witnesses, 90.
- refusal to exclude error, 66.
- right to be confronted with, receiving stolen property, record of former trial not sufficient, e 4792.
- rule as to newly discovered as to criminal cases, 113.
- should not be disregarded because of employment, 333.
- signing names to get fees, forgery, verbal agreement to give defendant the fees, e 4604.
- singling out, believing theory of either side, e 3316.
- credibility, e 3349.
- sworn falsely, e 3331.
- subsequently discovered in criminal cases, 113.
- swearing falsely, interest of, 342.
- Missouri Rule, 341.
- to material matter, e 3329.
- talking to attorney, 380.
- telling truth, no presumption of, conduct on stand, e 3312.
- testifying falsely on material fact need not be believed, 344.
- to reputation of drunkard, credibility, e 4342.
- testimony falsus in uno, falsus in omnibus, 344.
- uncontroverted testimony of, 340.
- violating rule of exclusion of witnesses does not exclude testimony, in absence of collusion, connivance, or fraud, 68.
- what jury should consider in determining, 334.
- when jurors may be, 7.
- must be corroborated by other credible evidence, 349.
- party not bound by, 390.
- where witnesses testify opposite each other, 331.
- who intentionally, corruptly, willfully and knowingly swear to material facts, 348.
- knowingly testify falsely, 342.
- testified in commitment court dead, what evidence considered, 2770.
- testify falsely may be distrusted as to all testimony, 347.
- falsely to material fact, 347b.
- willfully testified falsely need not be believed unless corroborated, 345, 346.
- willfully exaggerating, e 3330.
- swearing falsely, e 3323.

# WITNESSING WILL—

- what is sufficient, 2365, e 4287.

# WOMAN—

- attacking another in protection of, may plead self defense, e 4761.

# WOMEN, MARRIED—See MARRIED WOMEN.

# WORDS—

- actionable, slander and libel, all the words need not be proved, 2280.
- malice and damage presumed from speaking, 2283.
- aiding by, may constitute principal and accessory, 2735.
- alone not sufficient provocation for homicide, e 4681.
- exact, must be proved slander and libel, e 4264.
- imputing dishonesty in business, libel, e 4262.
- insulting, causing violent passion, may reduce grade of homicide, 3089.
- no bar to plea of self defense, 3139.
- not necessarily guilty of murder, invading province of jury, e 4620.
- provocation for homicide, to wife of defendant, other relatives, 3087.
- must be proved as charged, slander and libel, 2279.
- necessary to create trust, repudiation, limitations, 2428.
- not necessary to constitute sale, intoxicating liquor, prohibition limits, 3202.
- sufficient provocation for homicide, 3086.

[References are to sections; e refers to Erroneous Instructions.]

**WORDS**—Continued.

- of statute, instructions in, not always correct, self defense, e 4751.
- "proven," "fully and conclusively" or "satisfactorily proven" equivalent, 1671.
- slander and libel, not spoken maliciously, 2284.
- presumed to be used in their ordinary meaning, 2282.
- truth of, defense, 2297.
- underscoring, is giving undue weight to them, e 3709.
- "well known" equivalent of "fully known," 1671.

**WORK**—

- duty of examining, architect, e 3435.

**WORK AND LABOR**—

- claim for extra services must be made when work is done, 711.
- contract entered into, but not reduced to writing, 706.
- damages for wrongful discharge, 721.
- discharged employe must be diligent in seeking new employment, 721.
- done and performed for the benefit of another, with his knowledge and consent, law presumes the promise to pay, 710.
- effect of written contract, 708.
- employe cannot recover until completion of contract, 720.
- quitting during term without cause, 722.
- who leaves employer on account of sickness may recover for part performed, 723.
- ground for discharge, improper conduct, 724.
- implied promise to pay at rate fixed by previous agreement, 712.
- to pay for labor done in boring a well, 710.
- for services rendered, what they are reasonably worth, 710.
- therefor, 710.
- ordinary skill defined, 726.
- quantum meruit may be recovered, when, 719.
- rate of compensation presumed to change with change of work, 714.
- wages presumed to continue at rate fixed in contract, 713.
- reasonable diligence in seeking new employment, defined, 721a.
- right to discharge employe for want of skill or diligence, 725.
- sickness as cause for employe's leaving, 723.
- statute of limitations does not commence running until the labor ends, 1253.
- violating agreement as to associating with women ground for discharge, 724.
- want of skill or diligence ground for discharge, 725.
- without knowledge or request of person for whom done creates no liability, 709.

**WORK, REASONABLY SAFE PLACE FOR**—See NEGLIGENCE.

**WORKMANLIKE MANNER**—

- bridges, duty of county commissioners to construct, 1664.

**WORTHLESS**—

- negotiable instruments, 2155.

**WOUND**—

- homicide, not necessarily fatal, death from neglect, 2973.
- negligence in treatment of, 932.

**WOUNDED**—

- fatally, by striking with billiard cues, 3000.

**WRECK**—

- of train on defective bridge, 1527.

**WRIT OF CERTIORARI**—

- in various states, 286-288.

**WRITS OF ERROR**—Chapter XV, 281-326.

- and certiorari distinguished, 289.
- a supersedeas at common law, 324.
- court will dismiss when controversy ceases, 326.
- dismissal of equivalent to non-suit, 326.
- either party may prosecute, 295.
- is a prohibition to the execution of a writ, 324.



[References are to sections; e refers to Erroneous Instructions.]

**WRITS OF ERROR—Continued.**

- may be sued after appeal has been dismissed, 326.
- taken when appeal dismissed, 326.
- synonymous with stay of proceedings, 324.
- when may be resorted to, 292.

**WRIT OF MANDAMUS—282.**

**WRIT OF PROHIBITION—**

- when may be issued, 290.

**WRIT OF REVIEW—282.**

**WRITING—**

- assisting forgery without doing, 2942.
- construction of, memorandum notes, e 4203.
- contract in, oral evidence, e 3483.

**WRITTEN CONTRACT—**

- controls verbal, 636.
- on same subject matter to be construed together, 708.
- varying by parol, negotiable instruments, must ratify all agent's transactions or none, e 4197.
- when contractor refuses to sign after award, 689.

**WRITTEN GUARANTY—**

- suit on special warranty instead of, e 4252.

**WRITTEN INSTRUMENTS—**

- alteration of, Chapter XXVIII, 504-510, e Chapter CXVI, 3433-3434.
  - adding name, e 3433.
  - leaving blanks, e 3434.
  - rate and time of paying interest material, 504.
- changing words, material, 504.
- directing verdict must be presented with motion, 261.

**WRITTEN ORDER—**

- intoxicating liquor, burden of proof, 3197.

**WRONG—**

- distinguishing from right, but no power to choose, insanity, e 4404.
- test of insanity, 2573, e 4397.

**WRONG AND RIGHT—**

- knowledge of, test of insanity, 2574.
- obliterating sense of, insanity, 2575.

**WRONGFUL—**

- act of servant, liability of master for, 1373.
- arrest without warrant, constitutes an assault, 531.
- attachment, elements of damages, 739.
- levy, interest, 2425.
- taking, replevin, demand not necessary, otherwise if taking not wrongful, e 4237.
- submitting question to jury what constitutes, e 4240.

**WYOMING—**

- murder in second degree, need not be previously planned and deliberated upon, malicious, 3011.
- statute relating to instructions, 153, p 143.
- weighing defendant's testimony, 2550.

**X-RAY—**

- plaintiff cannot be compelled to submit to, 149.









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